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NOTABLE CASE LAW

Constitutional Law

1. Can the members of legislatures created for Union Territories be treated as members of legislative assemblies of States for the purpose of electing the President of India under Article 54 (b) of the Constitution? (No)

AIR 1970 SC 2097 (Pt. M.)

Co-operative Societies

2. Whether powers of receiving reference given to Registrar, Co-operative Societies under Section 71 can be exercised by persons appointed to assist him, and can the Government confer on them such powers? (Yes)

AIR 1970 Orissa 227

Criminal Procedure Code

3. Can an Assistant to the Deputy Commissioner try an offence under Section 147 Penal Code occurring within the limits of United Khasi-Jaintia Hills Autonomous District? (Yes)

AIR 1970 Assam & Nagaland 130

Income-tax

4. The premium received from the lessee by the owner of a forest leasing out the right to cut and remove trunks of forest trees leaving the roots and stumps intact capable of regeneration is income in the nature of revenue receipt and not a capital receipt. See Head Note

AIR 1970 SC 2051

5. Where a partner of a registered firm earning agricultural as well as other income receives salary from the firm, can the whole of the salary be included in his total income under Section 16 (1) (b) Income-tax Act? (No. Only 40 per cent of such salary can be so included by application of Rule 24 of the Income-tax Rules.) See Head Note

AIR 1970 Mad 497 (Pt. A) (FB)

Land Acquisition

6. Whether the Land Acquisition proceedings commenced either under the Travancore Land Acquisition Act (1039) or the Cochin Land Acquisition Act or the Central Land Acquisition Act (as amended by Mad. Acts 21 of 1948 and 22 of 1953) in force in Malabar area can be

Land Acquisition (contd.)

continued under the Kerala Land Acquisition Act 1961 (21 of 1962)? (Yes)

AIR 1970 Ker 301 (Pt. A) (FB)

Limitation

7. Where a sale of tarwad property by the Karnavan of the tarwad to a mortgagee in possession is found to be invalid, does the mortgagee's possession become adverse to the tarwad so as to bar its suit for redemption after 12 years from the date of sale? (Yes)

AIR 1970 Ker 305 (FB)

Partnership

8. Whether a salary drawn by a partner for his services rendered to the firm partake of the same character as his share of profits of the firm? (Yes)

AIR 1970 Mad 497 (Pt. B) (FB)

Penal Code

9. Does threat to electors of serious consequences if they do not change their decision to nominate a certain person as their candidate in an election amount to an offence of interference with their right to vote at the election under Sec. 171-A, Penal Code. (No)

AIR 1970 SC 2097 (Pt. A)

10. Is the offence of undue influence at an election under Section 171-C, Penal Code committed where the members of the Legislative Assembly of a State are threatened with President's Rule if they elected a certain candidate to the office of the President? (No)

AIR 1970 SC 2097 (Pt. B)

11. Does mere carrying or wearing of deadly weapon amount to "using" deadly weapon within the meaning of Section 397, Penal Code? (No)

AIR 1970 Punj 532 (FB)

Wages

12. Does Section 5 (1) of the Minimum Wages Act confer unguided and uncontrolled discretion on the Government to follow either of the alternative procedures prescribed in Clauses (a) and (b) of that sub-section and violate Article 14 of the Constitution? (No)

AIR 1970 SC 2042 (Pt. A)

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Ker 312 (C N 52)
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—S. 13 — 'Control' contemplated by Section 8 (2) — Control may be exercised by issuing general instruction or direction — It cannot authorise State Government to issue specific instructions about disposal of particular application — See Bengal Excise Act (5 of 1909), Section 8 (1) (as amended in 1965)
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—Ss. 85, 86 — Rules under Section 85, Section 86, Rule 87 (3) — Renewal of brewing licence — Applicant is entitled to have application dealt with in accordance with law if conditions are similar to conditions when original grant was made, in material respects. (Obiter)
Cal 548 E (C N 110)

—Ss. 85 (2) (e), 86 (3) — Rules under Sections 85, 86, Rules 58, 87, 207, 208, 209 — Brewing licence is of more permanent nature than vending licence
Cal 548 D (C N 110)

—S. 86 — 'Control' contemplated by Section 8 (2) — Control may be exercised by issuing general instruction or direction — It cannot authorise State Government to issue specific instructions about disposal of particular application — See Bengal Excise Act (5 of 1909), Sec. 8 (1) (as amended in 1965)
Cal 548 B (C N 110)

—S. 86 — Renewal of brewing licence — Applicant is entitled to have application dealt with in accordance with law if conditions are similar to conditions when original grant was made, in material respects. (Obiter) — See Bengal Excise Act (5 of 1909), S. 85
Cal 548 E (C N 110)

Bengal Excise Act (contd.)

—S. 86 — Rule 87 (as amended on 23-2-1967) — Amendments made to Rule 87 do not affect application for renewal for the year 1966-67
Cal 548 F (C N 110)

—S. 86 (3) — Brewing licence is of more permanent nature than vending licence — See Bengal Excise Act (5 of 1909), Section 85 (2) (e)
Cal 548 D (C N 110)

—Rules under Rule 58 — Brewing licence is of more permanent nature than vending licence — See Bengal Excise Act (5 of 1909), S. 85 (2) (e)
Cal 548 D (C N 110)

—Rules under Rule 58 (d) — 'Control' contemplated by Section 8 (2) — Control may be exercised by issuing general instruction or direction: It cannot authorise State Government to issue specific instruction about disposal of particular application — See Bengal Excise Act (5 of 1909), S. 8 (1) (as amended in 1965)
Cal 548 B (C N 110)

—Rules under Rule 87 — 'Control' contemplated by S. 8 (2) — Control may be exercised by issuing general instruction or direction — It cannot authorise State Government to issue specific instruction about disposal of particular application — See Bengal Excise Act (5 of 1909), Sec. 8 (1) (as amended in 1965)
Cal 548 B (C N 110)

—Rules under Rule 87 — Brewing licence is of more permanent nature than vending licence — See Bengal Excise Act (5 of 1909), S. 85 (2) (e)
Cal 548 D (C N 110)

—Rules under Rule 87 — Amendments made to R. 87 do not affect application for renewal for the year 1966-67 — See Bengal Excise Act (5 of 1909), Section 86
Cal 548 F (C N 110)

—Rules under Rule 87 (3) — Renewal of brewing licence — Applicant is entitled to have applications dealt with in accordance with law if conditions are similar to conditions when original grant was made, in material respects. (Obiter) — See Bengal Excise Act (5 of 1909), Section 85
Cal 548 E (C N 110)

—Rules under Rule 207 — Brewing licence is of more permanent nature than vending licence — See Bengal Excise Act (5 of 1909), Section 85 (2) (e)
Cal 548 D (C N 110)

—Rules under Rule 208 — Brewing licence is of more permanent nature than vending licence — See Bengal Excise Act (5 of 1909), S. 85 (2) (e)
Cal 548 D (C N 110)

—Rules under R. 209 — Brewing licence is of more permanent nature than vending licence — See Bengal Excise Act (5 of 1909), S. 85 (2) (e)
Cal 548 D (C N 110)

Bihar Superior Judicial Service Rules (1946)
See under Civil Services.

Bombay Agricultural Debtor's Relief Act (28 of 1947)

See under Debt Laws.

Bombay Industrial Relations Act (11 of 1947)

—Ss. 27-A, 32, 33 — Union representing a workman filing application to Labour Court and further filing appeal — Withdrawal of appeal — Individual cannot reagitate grievance
Guj 277 C (C N 42)

—S. 32 — Union representing a workman and filing application to Labour Court — Further filing appeal to Industrial Court — Union withdrawing appeal — The individual concerned has no locus standi to reagitate the grievance — High Court cannot grant relief even under Order 41, Rule 33, Civil P. C. as this provision is not made applicable — See Bombay Industrial Relations Act (11 of 1947), Section 27-A
Guj 277 C (C N 42)

—S. 33 — Union representing a workman and filing application to Labour Court — Further filing appeal to Industrial Court — Union withdrawing appeal — The individual concerned has no locus standi to reagitate the grievance — High Court cannot grant relief even under Order 41, Rule 33, Civil P. C. as this provision is not made applicable — See Bombay Industrial Relations Act (11 of 1947), S. 27-A
Guj 277 C (C N 42)

Calcutta Municipal Act (33 of 1951)

See under Municipalities.

C. P. and Berar Money-lenders Act (13 of 1934)

See under Debt Laws.

Central Services (Temporary Service) Rules (1934)

See under Civil Services.

Civil Procedure Code (5 of 1908)

—Pre — Interpretation of Statutes.
See also Interpretation of Statutes.

—Preamble — Interpretation of Statutes
—Fiscal statutes — Retrospective operation of amendment will not readily be inferred, so as to impose or enhance liability of citizen ex post facto — Rule applies even where statute is expressly retrospective in which case no greater retrospectivity than expressly given by statute will be given — This principle applies with greater force where transaction has been completed prior to amendment
Cal 527 C (C N 105)

—Preamble — Interpretation of Statutes
—Penal statute — Amendment — Not to be construed retrospectively in absence of express words — Act legal at time when done — Cannot be made unlawful by construing subsequent amendment retrospectively — Such retrospective construction would be wider than immunity conferred by Art. 20 (1) of Constitution
Cal 527 D (C N 105)

Civil P. C.-(contd.)

—Preamble — Interpretation of Statutes
—Rules under the Act — Harmonious construction should be striven for — See Bengal Excise Act (5 of 1909), S. 8 (1) (as amended in 1965)
Cal 548 B (C N 110)

—Preamble — Interpretation of Statutes
—Harmonious construction — Legislative entries are to be harmoniously construed
Punj 528 F (C N 87)

—Preamble — Interpretation of Statutes
—Legislative entries — Words used therein must receive widest interpretation
Punj 528 I (C N 87)

—Preamble — Judicial precedents — Principle of stare decisis stated — See Precedents
SC 2007 B (C N 430)

—Pre — Precedents — See also Precedents.

—Pre. — Precedents — Two consistent rulings of one High Court were preferred to one contrary F. B. ruling of another High Court
Orissa 237 C (C N 78)

—S. 2 (2) — Decree — Nullity — Since plaintiff did not institute lis, in proper sense and there was no defendant on record, decree is a nullity and has to be set aside
Mad 503 B (C N 146)

—S. 2 (17) (h) — Commissioner of Corporation of Calcutta is not Government servant — See Civil P. C. (1908), Section 80
Cal 539 B (C N 107)

—Ss. 9, 47 — Andhra Pradesh (Andhra Area) Co-operative Societies Act (6 of 1932), Sections 51 and 151 — Andhra Pradesh (Andhra Area) Co-operative Societies Rules (1932), Rule 22 (12) — Registered Society purchasing debtor's immovable property in enforcement of award — Debtor's failure to deliver possession — Suit for recovery of possession is maintainable — Section 47, Civil P. C. is no bar — Rule 22 (12) has no relevancy
Andh Pra 446 (C N 74)

—S. 9 — Suit for eviction of tenant — Suit need not be filed in Mamlatdar's court only, under Goa Daman and Diu Mamlatdar's Court Act but in civil court also — See Goa, Daman and Diu Mamlatdar's Courts Act (1960), S. 4
Goa 142 B (C N 26)

—S. 9 — Jurisdiction — Articles 59 and 69 of Procedure Code of Pondicherry — Fraud during liquidation proceedings on Foreign Court having jurisdiction — Fraud part of affairs of firm before its liquidation — Proper forum for seeking redress is Foreign Court or its successor court — Court of domicile will not exercise jurisdiction over matters which earlier were the subject of proper decision by a Foreign Court
Mad 510 (C N 150)

—S. 11 — Res judicata — Previous Rent suit under Section 228 (1), Orissa Tenancy Act — Decision does not bar fresh suit for contribution when defendants in fresh suit had not participated in Rent suit and had no

Civil P. C. (contd.)

opportunity of being heard and issue of fraud was not involved in the former.

Orissa 237 A (C N 78)

—S. 11 — Res judicata — Principles of — Suit for pre-emption decreed with direction to deposit balance of pre-emption money by particular date — Delay of two days in depositing money — No objection taken either in trial Court or in lower appellate Court or even in second appeal — Objection to late deposit is deemed to have been waived and objection to framing of decree *contrary to the directions in the judgment* is res judicata. Punj 559 (C N 95)

—S. 11 — Res judicata — Issue of law. Tripura 86 C (C N 23)

—S. 35 — Defamation — Damages — Costs of the litigation cannot be included in damages — See Torts.

Bom 424 G (C N 73)

—S. 35 — Costs — Appeal on two grounds — On one ground arguments going on for 22 days and appellant failing — Appellant succeeding partially on the other ground — Held if appellant had confined his arguments only to second ground appeal would have been disposed of in not more than five or six days — Hence appellant should pay four-fifth of the costs of appeal to respondent and bear his own costs. Bom 424 J (C N 73)

—S. 47 — Registered Society purchasing debtor's immovable property in enforcement of award — Debtor's failure to deliver possession — Suit for recovery of possession is maintainable — Section 47 Civil P. C. is no bar — See Civil P. C. (1908), Section 9. Andh Pra 446 (C N 74)

—S. 47 — Questions to be considered by executing Court — Validity of decree — Question as to, can be raised only on the ground that Court passing decree lacked inherent jurisdiction as to subject-matter or over parties arrayed before it —

Manipur 86 A (C N 27)

—S. 47 — Execution proceedings — Objection as to defect in plaint or application cannot be raised.

Manipur 86 C (C N 27)

—S. 66 — Benami. See Benami.

—S. 73 (2) — Rateable distribution — One decree-holder attaching property not realising dues for want of bidders at execution sale — Other decree-holder attaching property belonging to same judgment-debtor, succeeding in realization of dues — Former decree-holder having knowledge of execution by the latter — Former decree-holder is entitled to share rateably the realization by the latter. Mad 504 (C N 147)

—S. 80, 2 (17) (h) — Notice under Section 80 — Commissioner of Corporation of Calcutta is not Government servant — Notice to him is not necessary. Cal 539 B (C N 107)

—S. 80 — Notice — Is condition precedent for maintainability of suit even for injunction. Orissa 239 A (C N 79)

Civil P. C. (contd.)

—S. 80 — Expression "any act purporting to be done by such public officer" — Expression refers to past as well as future acts of public officer — AIR 1961 Guj 85 and AIR 1960 Pat 530, Dissented from.

Manipur 90 (C N 90)

—S. 100 — Plea as to pecuniary jurisdiction of trial Court — Appellate Court refusing permission under Order 41, Rule 2 to raise question of jurisdiction — High Court refused to allow it to be raised again in second appeal. Orissa 215 B (C N 71)

—Section 100 — Second appeal — Intention behind executing document — It is question of fact. Punj 516 B (C N 83)

—Section 100 — Suit for ejectment — Second appeal lies. Raj 272 A (C N 65)

—S. 107 — Evidence — Appreciation — See Evidence — Appreciation.

—Section 115 — Order passed by Single Judge in exercise of his revisional jurisdiction is not appealable under Cl. 12, Letters Patent (J. & K.) — See Letters Patent (Jammu and Kashmir), Cl. 12.

J. & K. 190 A (C N 47)

—Section 115 — Revisional jurisdiction — Suit for bare declaration — No lis — Only one party (plaintiff) — Decree as prayed for obtained — Appeal not maintainable, there being no unsuccessful party — Exercise of revisional jurisdiction was justified. Mad 503 A (C N 146)

—Section 115 — Trial Court holding that appointment of Commissioner under O. 26, Rule 9 would amount to abdication or delegation of powers of Court to Commissioner — By such erroneous view Court held declined to exercise jurisdiction to appoint Commissioner — Failure justified interference in revision — See Civil P. C. (1908), Order 26, Rule 9. Mys 314 B (C N 75)

—Section 115 — Application under O. 41, Rule 33 filed before appellate Court — Dismissal of — Appeal not maintainable — Relief is by way of revision petition — See Civil P. C. (1908), Order 41, Rule 33.

Punj 519 B (C N 81)

—Section 115 — Jurisdiction — Question of limitation — Decision though it relates to question of jurisdiction of Court, order of Court based on wrong decision on limitation or absence of decision not an order without jurisdiction. Punj 354 D (C N 92)

—Order 1, Rule 9 — Non-joinder of parties — Persons interested in suit impleaded — Persons not interested not impleaded — Suit cannot be dismissed — See Constitution of India, Article 226. Punj 539 A (C N 89)

—Order 2, Rule 2 — Suit for partition by co-sharer — No objection taken by defendant for partial partition — Subsequent suit for partition of certain property left out in earlier suit on ground that existence of this property was not known to plaintiff was not

Civil P. C. (contd.)

barred by Order 2, Rule 2

Orissa 231 (C N 76)

— Order 2, Rule 6 — Consolidation of suits — Essentials

Tripura 89 A (C N 24)

— Order 3, Rule 1 — Pleader can move application on behalf of client

Tripura 82 B (C N 21)

— Order 6, Rule 2 — Plea that suit properties were private properties and that there was no trust private or public — Case argued before Supreme Court that properties were partly of private trust and partly private property — Defendant cannot be allowed to set up a case wholly inconsistent with that pleaded

SC 2025 B (C N 432)

— Order 6, Rule 2 — Suit claiming exemption under Sec. 16 (1) Provident Funds Act — Allegations of material facts in plaint without proof not sufficient to claim exemption as pleadings are not evidence — See Employees' Provident Funds Act (1952), Section 16 (1)

Bom 418 (C N 72)

— Order 6, Rule 2 — Claim on entirely new grounds — Not sustainable — Claim implicitly founded in pleadings, is however, maintainable

Guj 284 C (C N 43)

— Order 6, Rule 4 read with Order 7, Rule 6 — Particulars to be given where necessary — Fraud — Plea of, as a ground for exemption from limitation as required by Order 7, Rule 6 — Plaintiff must set forth particulars of fraud alleged — Mere general words such as fraud or collusion are quite ineffective to give legal basis for plea in absence of particular statements of fact

Andh Pra 440 A (C N 73)

— Order 6, Rule 17 — Amendment of plaint — Suit for eviction of trespasser from land belonging to Association — Amendment application to incorporate in plaint history of Association and details of acquisition of land by it from Government — By proposed amendments neither new case nor new cause of action would be introduced — Rejection of amendment on ground that it would change basic structure of suit held not proper

Manipur 81 (C N 25)

— Order 7, Rule 7 — Events happening during pendency of suit — See Civil Services — Fundamental (6th Amendment) Rules (1965), Para 3, Clause (c)

Guj 257 G (C N 40)

— Order 17, Rules 2 and 3 — Case adjourned because Presiding Officer was on leave — Date adjourned is not for hearing of case — Decree passed on such date will fall under Rule 2 and not under Rule 3

Tripura 82 A (C N 21)

— Order 17, Rule 3 — After filing of plaintiff's evidence on commission case adjourned because Presiding Officer was on leave — Defendant absent on adjourned date — Decree passed is not one on contest — See Civil P. C. (1908), Order 17, Rule 2

Tripura 82 A (C N 21)

— Order 18, Rule 9 — Compliance with — Option to be exercised before other party

Civil P. C. (contd.)

enters evidence — AIR 1956 Sau 52, Dissented from

Raj 278 B (C N 67)

— Order 21, Rule 35 — Suit for possession of vacant land — Buildings put up pendente lite — Removal in execution — Building put up prior to institution of suit — Remedy suggested

All 648 B (C N 92)

— Order 21, Rule 92 — Sale subject to confirmation — Property does not vest in Auction-purchaser unless sale is confirmed — See Companies (Court) Rules (1959), R. 273

SC 2037 A (C N 433)

— Order 22, Rule 4 — Procedure in case of death of one of the respondents — Application for bringing L. Rs. of deceased long after limitation — Prayer for condonation of delay on the ground that appellants did not know of his death — Held that appeal had abated as ignorance of death of a party was no sufficient cause for condonation of delay

Punj 556 A (C N 93)

— Order 22, Rule 4 — Death of one of the respondents — Second appeal against judgment and decree in suit for possession by plaintiffs as appellants — Abatement of appeal against one respondent — Appeal became incompetent as a whole and could not be proceeded with as against surviving respondents

Punj 556 B (C N 93)

— Order 23, Rule 1 (2) (b) — Withdrawal of suit — Want of notice under Section 80, Civil P. C. is a technical defect, and plaintiff ought to be allowed to withdraw suit with permission for a fresh suit

Orissa 239 B (C N 79)

— Order 26, Rule 5 — Commission to examine witness not resident in India — No reciprocal arrangement recognised by High Court existing between country in which witness resides and India — Party has no right to issue of Commission

Tripura 93 (C N 26)

— Order 26, Rule 8 — Evidence on commission when may be read as evidence in suit — Party must satisfy Court that its case falls within ambit of Rule 8 (a) or must secure specific order from Court under Clause (b) — Where this is not done, suit cannot be decreed on basis of evidence recorded on commission.

Tripura 82 C (C N 21)

— Order 26, Rule 9 — Object of local investigation under — Investigation is merely to assist Court

Mys 314 A (C N 75)

— Order 26, Rule 9, Section 115 — Trial Court holding that appointment of Commissioner under Order 26, Rule 9 would amount to abdication or delegation of powers of court to Commissioner — By such erroneous view Court held declined to exercise jurisdiction to appoint Commissioner — Failure justified interference in revision

Mys 314 B (C N 75)

— Order 26, Rule 9 — Suit for partition and possession — Defendant's claim for improvements — Issue of commission — Directions to defendant and plaintiff

Mys 314 C (C N 75)

Civil P. C. (contd.)

—Order 26, Rule 9 — Suit for partition and possession — Defendants' claim for improvements on the suit properties — Claim can be decided by taking evidence by Court and matter is not to be ascertained by Commissioner — Local investigation by Commissioner however will be useful in decision of the question Mys 314 (C N 75)

—Order 29, Rule 1 — Reference of dispute to Registrar under Assam Co-operative Societies Act (1950) — Form of — See Co-operative Societies — Assam Co-operative Societies Act (1 of 1950) (as extended to Manipur), Section 85 Manipur 86 D (C N 27)

—Order 33, Rule 5 (d-1) (as amended in Madras and adopted in Andhra Pradesh) — Rejection of application on ground of limitation — Enquiry should be confined only to allegations in plaint — (Deletion of Rule 5 (d-1) and amendment in Rule 5(d) so far as Andhra Pradesh is concerned, suggested.) AIR 1948 Mad 433 and AIR 1949 Mad 591 and AIR 1956 Mad 271 and AIR 1956 Mad 677, Dissented from

Andh Pra 411 A (C N 67)

—Order 33, Rule 6 (as amended in Madras and adopted in Andhra Pradesh) — Enquiring into pauperism — Enquiry is confined only to prohibition contained in R. 5 which has reference only to allegations in pauper petition and not de hors the said allegations — Enquiry on basis of pleas raised by defendant is not permitted — (To avoid confusion and uncertainty it is suggested that Rule 6 as amended in Madras should be deleted so far as Andhra Pradesh is concerned) — AIR 1956 Mad 271 & AIR 1956 Mad 677, Dissented from Andhra Pra 411 B (C N 67)

—Order 41, Rule 2 — Point not raised in trial Court either in pleading or in argument — Not considered in appeal

Cal 539 (C N 107)

—Order 41, Rules 4 and 33 — Defamation — Damages — One decree against all defendants — Variation in appeal must be even against defendant not appealing

Bom 424 I (C N 73)

—Order 41, Rule 22 — Provision of Order 41, Rule 22 applies to appeals under Letters Patent (Cal.) Cl. 15 — See Letters Patent (Calcutta), Cl. 15 Cal 518 A (C N 110)

—Order 41, Rule 33 — Defamation — Damages — One decree against all defendants — Variation in appeal must be even against defendant not appealing — See Civil P. C. (1905), Order 41, Rule 4

Bom 424 I (C N 73)

—Order 41, Rule 33 — Power of Court of appeal — Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objection — Two suits for pre-emption filed by two persons — Both suits consolidated by trial Court — Dismissal of both suits — Appeal against, preferred by one — Other impleaded as respondent who filed application under Order 41, Rule 33 —

Civil P. C. (contd.)

Application is liable to be rejected — The rights and interests of both were quite different and distinct Punj 519 C (C N 84)

—Order 41, Rule 33 — Union representing a workman and filing application to labour Court — Further filing appeal to Industrial Court — Union withdrawing appeal — The individual concerned has no locus standi to reargue the grievance — High Court cannot grant relief even under O. 41, Rule 33, Civil P. C., as this provision is not made applicable — See Bombay Industrial Relations Act (II of 1947), Section 27-A

Guj 277 C (C N 42)

—Order 41, Rule 33, Section 115 — Application under Order 41, Rule 33 filed before appellate Court — Dismissal of — Appeal not maintainable — Relief is by way of revision petition Punj 519 B (C N 84)

CIVIL SERVICES

—Bihar Superior Judicial Service Rules (1946)

—Rule 3 (2) — Amendment of Schedule appended to Rules — Upgradation of post amounts to amending Schedule — Can be done retrospectively — Publication in Gazette is not necessary Pat 432 C (C N 78) (FB)

—Rule 16 (e) — Seniority — Determination of — Officer working on special post — Upgradation of post — Officer deemed to have officiated in promoted post from date of upgradation — Recourse to upgradation of post is valid if done without violating any law or principle Pat 432 B (C N 78) (FB)

—Rule 16 (e) — Expression "may have been allowed to officiate continuously" means actual and continuous officiation and not fictional or notional one — Seniority cannot be given on basis of notional or fictional officiation Pat 432 A (C N 78) (FB)

—Central Services (Temporary Services) Rules (1965)

—Rule 5 (1) (a) — Temporary Government Servant — Notice of termination of service under Rule 5 (1) (a) without any adverse remark — Servants junior to him retained in service — Notice challenged on grounds that it is only a cloak for actual punishment of dismissal without giving opportunity and that it violates his rights under Article 16 — Held, such a notice could not be regarded as amounting to any type of punishment or even a stigma — Nor did it offend Article 16

Mys 302 (C N 72)

—Fundamental (6th Amendment) Rules (1965)

—F. R. 56 (b) (i) amended by substitution of new Rule 56 (a) — Amendment Rules made by President under Article 309, Proviso and Clause 5 of Article 143 — Amended rule only clarifies scope of original rules increasing age of retirement as amended by office memorandum which memorandum had come into force *ex proprio vigore* on their issuance

Civil Services — Fundamental (6th Amendment) Rules (contd.)

— The new rule does not bring them into force for first time and does not bring about any new change in the matter of age of superannuation or premature compulsory retirement
Guj 257 F (C N 40)

— Para 3, Clause (c) — Pre-April 1938 ministerial Central Government servant falling within purview of Rule 56 (b) (i) of unamended F. R. as it stood on relevant date held entitled to benefit of 6th Amendment and is entitled to be retained in service till his attainment of 60 years of age—The civil servant held could invoke the new rule, which had come into force during pendency of proceeding in which he had claimed to continue in service upto 60 years of age under original F. R. 56 (b) (i) — Civil P. C. (1908), Order 7, Rule 7
Guj 257 G (C N 40)

—Fundamental Rules

—Rule 56 (b) (i) — Pre-April 1938 appointment of Ministerial Central Government Servant — Age of compulsory retirement raised from 55 to 58 years pre-condition being efficiency and physical fitness — By subsequent memorandum dated 31-12-1963 superannuation age raised to 58 years without annual orders and made applicable to pre-April 1938 servants — Government's right to retire servant after reaching 55 years age, upon three months' notice, not abolished — Pre-April 1938 servants put on par with other Government servants — Memorandum of 31-12-1963 created substantive rights and liabilities irrespective of the fact that the changes were not incorporated in F. R. 56 (b) (i) and were not gazetted and were not in usual form — Memorandums not being contrary to any provisions of Constitution, were rules under Article 309 made by the President
Guj 257 A (C N 40)

—Rule 56 (b) (i) — Retirement age extended to 58 years by Presidential Memorandum — Pre-April 1938 servant on leave preparatory to retirement on age of 55 years as per original rule when memorandum came into force is entitled to its benefit — He could not be said to have retired before expiry of leave.
Guj 257 B (C N 40)

—Rule 56 (b) (i) — Absolute right of Government to retire Government servant on 3 months' notice after he has attained age of 55 years is restriction on normal right of Government servant to continue in service till he attains age of 58 years — Order of retirement served on 28-12-1963 giving option to retire on 14-3-1964 date on which the Government servant attained age of 55 years or proceed on leave admissible preparatory to retirement — Government servant going on leave of 22 months as admissible — Notice held not in pursuance of Government's absolute right, not being 3 months'

Civil Services — Fundamental Rules (contd.) notice — No instruction for procedure for review issued — Order cannot be said to be one of compulsory retirement in exercise of Government's absolute power — Order is illegal and unconstitutional

Guj 257 C (C N 40)
—Rule 56 (j) (as amended by Fundamental (6th Amendment) Rules (1965)) — Compulsory retirement — Notice — Impugned order passed on 18-12-1963 — Amended rule cannot be relied upon to canvass the view that notice was given under Clause (J)
Guj 257 H (C N 40)

—Rule 56 (j) (as amended by Fundamental 6th Amendment) Rules (1965) — Power to compulsorily retire Government servant after attainment of 55 years is exercisable only if the authority is of opinion that it is in public interest to do so

Guj 257 I (C N 40)

—Indian Audit and Accounts Department (Accountant General Posts and Telegraphs) Transfer of Officers and other Staff Rules, 1968

—Rule 2 — Rules relate to conditions of services — Rules do not confer unfettered discretion in their implementation
Delhi 250 A (C N 54)

—Rule 6 — Validation of invalid promotion made under previous Rules — Validation is legal and so not mala fide
Delhi 250 C (C N 54)

—Jammu and Kashmir Civil Services (Temporary Service) Rules (1961)

—Rule 3 — Status of quasi permanent Government servant — Essentials
J and K 184 D (C N 46)

—Orissa Administrative Services Class II (Recruitment) Rules (1959)

—Rule 6 and Regulations framed under Rule 6 — Reg. 10 — Reservation for Scheduled Castes — Competitive examination by State Public Service Commission — Public Service Commission recommending 33 candidates for 'A' Class posts and 53 for B class posts — Scheduled Caste candidate standing 105th in order of merit recommended for 'B' class post — Candidate appointed to 'B' class post cannot claim appointment to 'A' class post on the basis of reservation in 'A' class posts
Orissa 224 A (C N 74)

—Orissa Civil Services (Classification, Control and Appeal) Rules (1930)

—R. 15 — 'Reasonable opportunity' — Opportunity contemplated is same as contemplated in Article 311 (2) of Constitution — Compliance with each of requirement laid down in rule must normally be insisted upon
Orissa 220 A (C N 73)

—Rule 15 — Reasonable opportunity — Right of cross-examination — Delinquent not given opportunity of knowing contents of

Civil Services — Orissa Civil Services (Classification, Control and Appeal) Rules (contd.)
documents which were going to be utilized against him in enquiry — Realising this infirmity delinquent called upon after enquiry was over to offer another explanation against charges — But enquiry not reopened — Held enquiry proceedings were liable to be quashed as delinquent was denied right of cross-examining witnesses in support of charges — (Constitution of India, Article 311 (2))
Orissa 220 B (C N 73)

—Punjab Civil Services (Judicial Branch) Rules (1951)

—Rule 7 — Who can dismiss — See Constitution of India, Article 311(1)

Punjab 544 A (C N 89)

—Punjab Civil Services (Punishment and Appeal) Rules (1952)

—Rule 9 — Termination of probationer's services for unsuitability — Regular enquiry not essential
Punjab 544 C (C N 90)

—Railway Establishment Code

—Vol. I R 1713 — Disciplinary authority
— Duty of
Cal 545 C (C N 109)

—Vol. I, Rule 1713 (2) — Right of delinquent employee to get assistance of defence helper is statutory — Examination of defence-helper as prosecution witness — No substitute given neither employee made aware that he can nominate another person — Punishment order is invalid for non-compliance with Rule 1713 (2)
Cal 545 D (C N 109)

—Vol. I, Rule 1731 — Order removing employee from service — Punishing authority not filling date of giving effect to removal order — Date filled in by other officer — Propriety
Cal 545 B (C N 109)

—Vol. I, Rule 1731 (ii) (a) — Appeal against order of punishment to General Manager — Complaint about procedure followed — Appellate order not dealing with question whether procedure under this Rule was followed or such non-compliance resulted in failure of justice — Appellate order is invalid
Cal 545 A (C N 109)

—Rajasthan Service Rules (1951)

—Rule 17 (b) — Power of Government to suspend lien of servant on his substantive post — Provisional transfer of Government servant to State Electricity Board — Failure to suspend lien does not result in termination of services under the State
Raj 261 C (C N 61)

—Rule 18 — Government servant's lien on his post — Government employee provisionally transferred to State Electricity Board — Loss of service cannot be inferred simply because Government failed to mention specific permanent post on which his lien could be retained — 1969 Lab IC 513 (Raj) Reversed
Raj 261 A (C N 61)

Civil Services — Rajasthan Service Rules (contd.)

—Rule 141 (as in force in 1958) — Bar on transfer of Government Servant to foreign service without his consent — In absence of express or implied orders of Government transfer without consent does not result in termination of services. 1969 Lab IC 513 (Raj). Reversed
Raj 261 B (C N 61)

Companies Act (1 of 1956)

—Sections 2 (7), 6 — A co-operative society is specifically excluded from definition under Section 2 (7) — Companies Act, under Section 6, not being applicable to co-operative societies, co-operative society cannot be classified as a corporation
Cal 557 B (C N 111)

—Section 6 — A co-operative society is specifically excluded from definition under Section 2 (7) — Companies Act, under Section 6, not being applicable to co-operative societies, co-operative society cannot be classified as a corporation — See Companies Act (1956), Section 2 (7) Cal 557 B (C N 111)

Companies (Court) Rules (1959)

—Rule 273 — Sale subject to confirmation — Property does not vest in auction purchaser unless sale is confirmed — Before confirmation Court must satisfy itself that price fetched is reasonable — Sale confirmed without being so satisfied — Confirmation is not proper exercise of jurisdiction — (Civil P. C. (1905), Order 21, Rule 92)
SC 2037 A (C N 433)

—Rule 273 — Sale held not by public auction and without due publicity — Confirmation of such sale — Prejudice is inherent — Court in appeal will set aside confirmation
SC 2037 B (C N 433)

Constitution of India

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—Art 226 — Quo Warranto — Order of appointment though violating Article 16 constitutes sufficient answer to motion for writ — Reason is possession of public office under Government order is not usurpation of office for which alone Quo Warranto lies — Hence ground under Art. 16, though it may be heard in motion for certiorari or prohibition cannot be heard in Quo Warranto Ker 312 D (C N 52)

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—R. 22 (12) — Registered Society purchasing debtor's immovable property in enforcement of award — Debtor's failure to deliver possession — Suit for recovery of possession is maintainable — Rule 22 (12) has no relevancy — See Civil P. C. (1908), S. 9

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—S. 63 — Jurisdiction of Registrar to entertain disputes — Registrar can entertain disputes concerning such properties if it touches business of society

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—Ss. 85 and 100 (as extended to Manipur) — Manipur Co-operative Societies Rules (1959), Rule 61, Form No. 5 — Reference of dispute by society to Registrar — Signing of, by Chairman and Secretary of Society by adopting Form 5 is not in contravention of S. 85 or O. 29, R. 1 — Civil P. C. (1908), O. 29, R. 1

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—S. 19 — Secretary of a Co-operative Society is not a public servant either under Cl. (10) or under Cl. (12) or Cl. (11) — See Penal Code (1860), S. 21

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—Ss. 8, 71 — Government empowered to confer all powers of Registrar on persons appointed to assist him under subsection (1) of Section 8 — Powers exercisable under Section 71 by Registrar can also be exercised by officers appointed to assist him, when such power is conferred on them by Notification under S. 8 (2) — O. J. C. No. 104 of 1967 (Orissa), Overruled

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—S 13 — Original work — Tests — Originality in text books on arithmetic lies in skill and labour of author — See Copyright Act (1914), S 1 Sch I

Madh Pra 261 B (C N 46)

—S 13 — Copyright — Infringement — Tests — See Copyright Act (1914) Sch I, Section 1

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—S 18 — Assignment of copyright — Duty of Court — See Copyright Act (1914), Sch I, S 5

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—S. 18 — Agreement between author and publisher — Duty of Court — See Copyright Act (1914), Sch. I, S. 5

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—S. 45 — Acquiring copyright in a book — Difference between Act of 1957 and Act of 1914 — Under 1957 Act registration is a condition — See Copyright Act (1914), Sch. I, S 1

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—S. 51 — Copyright — Infringement — Tests — See Copyright Act (1914), Sch. I, S 1

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—S. 55 — Publishing agreement between assignee of author and publisher — Held, rendition of accounts of royalties and payment thereof by publisher were fundamental obligations of contract, upon breach of which contract stands as discharged by breach — After discharge assignee's remedy was in damages for alleged infringement of his copyright for the subsequent period and not for royalty — Quantum of damages would be the loss of business profits — See Contract Act (1872), S. 59

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Madh Pra 261 H (C N 46)

—S. 55 — Remedies under — Damages — See Copyright Act (1914), Sch. I, S. 6

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—S. 145 — Affidavit evidence in proceeding under S. 145 — Affidavits must be sworn to before the Magistrate before whom such proceeding is pending — Only if evidence of person is of formal character affidavit may be sworn to before any other Magistrate. AIR 1966 Punj 528 & AIR 1969 Manipur 3, Dissented from

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—S. 488 — Rate of maintenance — Petitioner claiming maintenance at Rs. 150/- per month for herself and her minor children — Respondent husband owning 14 acres of land and doing contract work and was also income-tax payer — Petitioner held should be granted maintenance at Rs. 35/- per month for herself and Rs. 25/- each for her minor children

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—S. 488(4) — Maintenance of wife — Decree against wife for judicial separation — She cannot claim maintenance having no reasonable ground to live apart. 1964 (1) Cri LJ 242 (Mad), Diss. from

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—S. 488 (6) — Procedure laid down is not that prescribed for summons case — When summons was served on respondent but he did not appear or he appeared but did not file his counter, Magistrate is empowered to determine case ex parte and entire procedure of summons case is not applicable — Where maintenance was granted after following procedure under S. 488(6) the proceedings were not vitiated. Ref. No. 101 of 1966 (Goa), Dissented from Goa 140 C (C N 25)

—S. 489(2) — Finality of finding as to relationship of husband and wife — Subsequent Civil Court decision — Effect — Magistrate can cancel or vary order

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—S. 5 — Notification D/- 26-9-1960 of Government has no retrospective effect. AIR 1966 Punj 232, Reversed

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—S. 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order (1964) — Mysore Foodgrains (Retail) Dealers Licensing Order 1964 — The restrictions imposed by Conditions Nos. 3, 4 and 10, of the wholesale and retail licences, are not unreasonable restrictions
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—S. 3, Sub-s. (3C) (as inserted by Act 86 of 1967) — Orders for sale of sugar issued by Central Government under Clause (f) of sub-s. (2) — Producer is entitled to price which stands determined on date an order is made
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—S. 77 — Public document — Register of births maintained by municipality is a public document — Certified copy of extract is admissible to prove contents of such public document — See Evidence Act (1872), S. 74
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—S. 101 — Criminal trial — Accused relying on particular fact to discredit prosecution witness — Fact should be brought out in cross-examination of prosecution witness
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Gift Tax Act (18 of 1958)

— Ss. 13, 16 and 19 (3) — Sections 13 and 16 are applicable to legal representatives — Gifts made by deceased person escaping assessment — Notice to all legal representatives necessary — Assessing Officer must make diligent efforts to find them out — Only then notice on few would represent the estate — Failure to find out legal representative — Notice on one legal representative only is invalid — Andh Pra 434 (C N 71)

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— S. 19 (3) — Sections 13 and 16 applicable to legal representatives — Gifts made by deceased person escaped assessment — Notice to all legal representatives necessary — Assessing officer must make diligent efforts to find them out — Only then notice on few would represent the estate — Failure to find out legal representative — Notice on one legal representative only is

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invalid — See Gift Tax Act (1958), S. 13
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Goa, Daman and Diu (Administration) Act (1 of 1962)

—S. 5 (1) — Under Section 5 (1), Goa Daman and Diu (Administration) Act (1962) laws in force in the territories were saved — However under Section 4 (1), Goa, Daman and Diu (Laws) No. 2 Regulation (1963) corresponding laws stood repealed — Reading of the two provisions show that law relating to pre-emption under Section 1566 was saved as neither Section 44 nor any other section in T. P. Act dealt with right of pre-emption — See Portuguese Civil Code, Section 1566
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Goa, Daman and Diu (Administration) Removal of Difficulties Order (1962)

—Cl. 2 (as amended on 19-12-1963) — President of Portugal or Overseas Minister or Governor General of State of India could have had no power to pass Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order 1965 — Lt. Governor of Goa, Daman and Diu therefore has no power to pass that order by virtue of Clause 2 — Order of 1965 is, therefore, ultra vires and invalid — See Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order, 1965
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Goa, Daman and Diu (Laws) No. 2, Regulation 1963

—S. 4 (1) — Under Section 5 (1), Goa, Daman and Diu (Administration) Act (1962) laws in force in the territories were saved — However under Section 4 (1) Goa, Daman and Diu (Laws) No. 2 Regulation (1963) corresponding laws stood repealed — Reading of the two provisions show that law relating to pre-emption under Section 1566 was saved as neither Section 44 nor any other section in T. P. Act dealt with right of pre-emption — See Portuguese Civil Code, Section 1566
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Goa, Daman and Diu Mamlatdar's Court Act (9 of 1966)

—S. 4 — Suit for eviction of tenant — Suit need not be filed in Mamlatdar's court only but in civil court also — Defendants seeking protection under Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order, 1965 — Court can consider validity of the Order of 1965 when found essential for just disposal of suit
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HIGH COURT RULES AND ORDERS**—Mysore High Court Rules (1959)**

—Chapter III, Rule 6 — Power conferred on Chief Justice is only in regard to judicial work and not administrative matters
Mys 309 B (C N 74)

High Court Rules & Orders (contd.)**—Tripura (Courts) Order, 1950**

—Para 34 (3) and Para 34 (1) (b) — Revision petition against order directing consolidation of two suits is maintainable under Section 115, Civil P. C. — Although Section 115 is not applicable to Tripura by virtue of Para 34 (3) in fit case court can interfere in revision under Para 34 (1) (b)
Tripura 89 (C N 24)

Hindu Law

—Debts — Father — "Pious obligation" of son — Income-tax arrears in respect of father's separate business prior to partition between father and son — Son is bound to pay under doctrine of pious obligation
Andh Pra 426 A (C N 69)

—Debts — Father — Pious obligation of son — Tax debts — Income-tax arrears — Debt binding on son
Andh Pra 426 C (C N 69)

—Joint family — Onus — See Evidence Act (1872), S. 101
Raj 278 A (C N 67)

—Minority and guardianship — De facto guardian has in certain circumstances competence to transfer ward's estate — Alienation is only voidable in same manner as alienation made by de jure guardian
Andh Pra 440 E (C N 73)

—Pious obligation — Trade debts — Karta member of firm — Members of his family are liable to discharge liability of firm to the extent of their interest in coparcenary property
Guj 269 B (C N 41)

—Religious endowment — Public trusts — Tests — Temple belonging to Vallabha Sampradayeys — Common feature of such temple is that the ground floor is used as the place of worship and the first floor as the residence of Goswami Maharaj — Fact that a temple had the appearance of a residential house does not militate against the contention that the temple is a public temple
SC 2025 C (C N 432)

—Religious endowment — Public trust — Tests — Custom that public are asked to enter temple only after Goswami has finished worship — This is no circumstance to show that temple is private one — Power to manage temple includes power to maintain discipline within its precincts
SC 2025 D (C N 432)

—Religious endowment — Public trust — Public temple — Tests to see whether temple is public — Criteria indicated
SC 2025 E (C N 432)

—Religious endowment — Public trust — Haveli (Temple) at Nadiad of Shree Gokulnathji and the properties attached thereto are properties of public religious trust created by followers of Vallabh cult residing in Nadiad — The Goswami Maharaj is not a mere manager, but has an important place — He is the Maha Prabhu — Vallabh devotees

Hindu Law (contd.)

worship their deity through him — Income from temple properties has to be primarily used for the expenses of the *sevas* and *utsavas* in the temple, the upkeep, renovation and improvements of the temple premises but subject to these demands, the Maharaj has a right to utilise the temple income in maintaining himself and his family in a reasonably comfortable manner

SC 2025 F (C N 432)

—Self-acquired property — Blending — Question whether self-acquired property was thrown into the joint stock and treated as a joint family property is a question of fact and must be proved

J and K 181 B (C N 45)

—Texts — Interpretation of "Smritis" — Unsafe to apply dictionary meaning to words in text of "smritis"

Andh Pra 426 B (C N 69)

—Will — Construction — Nature of interest given

J and K 181 A (C N 45)

Hindu Succession Act (30 of 1956)

—S. 14 (2) — Property of female Hindu — Hindu widow, having no title in joint family properties, allotted properties under agreement for residence during her lifetime — Case falls under Section 14 (2) and widow will not become full owner of property after coming into force of the Act. AIR 1965 Andh Pra 66, Dissented from

Raj 285 (C N 69)

—S. 25 — His conviction for the offence of murder or abetment of murder under Section 302, I. P. C. not necessary for disqualification — Conviction under Sec. 324, I. P. C. is enough to disqualify

Andh Pra 407 B (C N 66)

HOUSES AND RENTS

—Madhya Pradesh Accommodation Control Act (41 of 1961)

—S. 12 — Striking out of the defence under Section 13 (6) — Section 12 does not become inapplicable — See Houses and Rents — M. P. Accommodation Control Act (41 of 1961), Section 13 (6)

Madh Pra 280 (C N 47)

—Ss. 13 (6), 12 — Suit for eviction — Striking out of the defence — Effect — S. A. No. 910 of 1965, D/- 3-3-1969 (M. P.), Overruled

Madh Pra 280 (C N 47)

—Mysore Rent Control Act (22 of 1961)

—S. 21 (1) (d) — Ground for eviction — Nuisance to neighbouring occupiers — Sound of sewing machine does not by itself constitute a nuisance

Mys 297 B (C N 70)

Income-tax Act (11 of 1922)

—S. 2 (1-A), Cl. (ii) — Capital assets — Personal effects — Test — Use of article must be of personal nature — Mere placing of treasure before Goddess while performing

Income-tax Act (1922) (contd.)

puja does not make treasure item of personal use

Raj 270 (C N 64)

—S. 4 — Revenue receipt — Sale of tree trunks — Trees capable of regeneration — Receipt from sale is in the nature of income and subject to special exemption under Section 4 (3) (viii) is liable to tax — By sale of trunks assessee does not realise part of his capital

SC 2051 (C N 436)

—S. 10 (2) (xv) — Amount set apart to provide pension on retirement of or death of Director — Amount becomes expended only on retirement or death of Director and not before that event — For applicability of Section 10 (2) (xv) other requirements of the section and of Section 10 (4A) must be complied with

SC 2067 B (C N 440)

—S. 10 (2) (xv) — Expenditure not in nature of capital expenditure — Assessee Company manufacturer of sugar as well as owner of farms growing sugar-cane — Assessee paying commission to Managing Agents, fees and travelling expenses to Directors — Expenses not apportionable between agricultural and business activities of assessee — Held expenses were admissible as deductions in their entirety in computing income of assessee

Madh Pra 286 (C N 49)

—Ss. 10 (4) (b) and 16 (1) (b) — Read with Income-tax Rules (1922), R. 24 — Assessee, partner of firm — Firm deriving agricultural as well as business income — Salary received by partner for services continue to bear same character as part of total income of firm — Forty per cent of such salary can only be taken in computation of total income of partner under Section 16 (1) (b) by virtue of Rule 24 — (1964) 51 ITR 467 (Mad), Overruled

Mad 497 A (C N 145) (FB)

—S. 16 (1) (b) — Read with Income Tax Rules (1922), Rule 24 — Assessee, partner of firm — Firm deriving agricultural as well as business income — Salary received by partner for services continue to bear same character as part of total income of firm — Forty per cent of such salary can only be taken in computation of total income of partner under Section 16 (1) (b) by virtue of Rule 24 — See Income Tax Act (1922), Section 10 (4) (b)

Mad 497 A (C N 145) (FB)

—S. 52 — Proceedings contemplated by Article 20 must be criminal — Penalty proceedings under Section 297 (2) (g) of Income-tax Act (1961) — Article 20 is not applicable — See Constitution of India, Article 20

All 620 B (C N 59) (FB)

—S. 66 — Extra-ordinary jurisdiction — Exercise of — Writ petition challenging penalty proceedings — Validity of assessment order cannot be challenged — Statutory remedy cannot be allowed to be by-passed — See Constitution of India, Article 226

All 620 A (C N 89) (FB)

—S. 66 (1) — "Question of law arising out of such order" — Question raised before Tribunal — Aspect of it not raised can be

Income-tax Act (1922) (contd.)

urged before High Court — Decision of High Court at Calcutta, Reversed

SC 2067 A (C N 440)

—S. 66 (2) — Power of High Court to direct Tribunal to state case — Exercise of Punj 558 (C N 94)

—S. 66 (4), (5) — Supreme Court directing Tribunal to submit supplementary statement — Tribunal is restricted to evidence on record and is not entitled to take additional evidence — Not taking such evidence may result in injustice — Tribunal left to dispose of case under Section 66 (5) in the light of observations of Supreme Court

SC 2067 C (C N 440)

Income Tax Act (43 of 1961)

—S. 10 — Capital or revenue receipt — See Kerala Agricultural Income Tax Act (22 of 1950), Section 2 (a)

—Ss. 271, 297 (2) (g) — Institution of penalty proceedings on basis of assessment under Income-tax Act (1922) — Case falling under Clause (g) of Section 297 (2) — Section 271 is, however, inapplicable — Section 297 (2) (g) is not charging section — Expression “any proceeding under this Act” in Section 271 — Interpretation — (1968) 70 ITR 293 (All), Overruled; (1967) 64 ITR 285 (Madh Pra) and AIR 1969 Madh Pra 72 and C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi), Dissented from

All 620 E (C N 89) (FB)

—S. 297 (2) (a), (b) — Classification between Clauses (a) and (b) — Being based on date of filing return, it is well defined — No violation of Article 14 — See Constitution of India, Article 14

All 620 C (C N 89) (FB)

—S. 297 (2) (f) and (g) — Classification between Clauses (f) and (g) is based on date of completion of assessment — No nexus with object to be achieved — Clause (g) of Section 297 (2) is ultra vires — 70 ITR 293 (All), Overruled; 64 ITR 285 (Madh Pra) and 72 ITR 417 and C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi), Dissented from — See Constitution of India, Article 14

All 620 D (C N 89) (FB)

—S. 297 (2) (g) — Penalty proceedings under Section 297 (2) (g) of Income-tax Act (1961) — Article 20 is not applicable — See Constitution of India, Article 20

All 620 B (C N 89) (FB)

—S. 297 (2) (g) — Institution of penalty proceedings on basis of assessment under Income-tax Act (1922) — Case falling under Clause (g) of Section 297 (2) — Section 271 is, however, inapplicable — Section 297 (2) (g) is not charging section — 70 ITR 293 (All), Overruled; 64 ITR 285 (Madh Pra) and 72 ITR 417 and C. M. W. No. 1247 of 1969, D/- 24-2-1969 (Delhi), Dissented from — See Income-tax Act (1961), Section 271

All 620 E (C N 89) (FB)

—S. 297 (2) (g) — Institution of penalty proceedings under Section 297 (2) (g) —

Income-tax Act (1961) (contd.)

Proceedings must be quashed, Clause (g) being ultra vires — Plea that penalty imposed is less than minimum prescribed under law is not tenable — See Constitution of India, Article 226

All 620 F (C N 89) (FB)

—Chapter 22 — Proceedings contemplated by Article 20 must be criminal — Chapter 22 provides such proceedings — See Constitution of India, Article 20

All 620 B (C N 89) (FB)

Income Tax Rules (1922)

—R. 24 — Assessee, partner of firm — Firm deriving agricultural as well as business income — Salary received by partner for services continues to bear same character as part of total income of firm — Forty per cent of such salary can only be taken in computation of total income of partner under Section 16 (1) (b), I. T. Act by virtue of Rule 24 — See Income Tax Act (1922), Section 10 (4) (b) Mad 497 A (C N 145) (FB)

Indian Audit and Accounts Department
(Accountant General Posts and Telegraphs)
Transfer of Officers and other Staff Rules (1968)

See under Civil Services.

Industrial Disputes Act (14 of 1947)

—S. 2 (oo) — Retrenchment — Meaning of — Termination of service in accordance with service rule is not retrenchment for purposes of Section 25-F

Assam 131 F (C N 33)

—S. 2 (p) — Settlement — Procedure to be followed — Parties arriving at settlement and reporting same to Tribunal — Act prescribes no procedure to be followed in such case

Andh Pra 432 B (C N 70)

—S. 19 (3) — Period of operation of settlement — Award cannot be award for one purpose and settlement for another purpose — Settlement merging into award ceases to be settlement and operates as award — It will be in operation for period provided by statute — Expression “subject to the provisions of this section” refers to provisions applicable to award and not to settlements

Andh Pra 432 A (C N 70)

—S. 25-F — Retrenchment — See Industrial Disputes Act (1947), Section 2 (oo)

Assam 131 F (C N 33)

—Sch. 2, Item 3 — Dismissal — Fair trial — Allegation against disciplinary authority by delinquent servant — Inquiry held by Labour Officer — Final order of dismissal by disciplinary authority — He being interested party, order is illegal

Guj 277 A (C N 42)

Insurance Act (4 of 1938)

—S. 2 (11) — Life insurance — Definition — Proposal to effect life insurance — Terms of policy providing for payment of single premium and for payment of secured

Insurance Act (contd.)

sum on fixed date — Insurance is not life insurance — Cal 513 A (C N 103)

—S 39 — Nomination of policy — Policy must be of life insurance — Insured purporting to nominate policy other than life insurance — *Legal consequences of nomination under Section 39 do not attach to such nomination* — Cal 513 B (C N 103)

—S 39 — Nominee — Status of — Proceeds of policy though payable to nominee do not vest in him — He cannot assign policy — AIR 1962 All 355, Dissented from — Cal 513 C (C N 103)

Interpretation of Statutes

See also Civil P. C (1908), Preamble

—Expression "without prejudice to the generality of the provisions of sub-sec. (1)" — *Generality of preceding provision not cut down* — See Penal Code (1860), S. 171C (2) — SC 2097 G (C N 440)

—Statute creating special liability — Special definition will supersede ordinary connotation — All 644 A (C N 91) (SB)

Jammu and Kashmir Civil Services (Temporary Service) Rules (1961)

See under Civil Services.

Kerala Agricultural Income Tax Act (22 of 1950)

—S 2 (a) — Receipt from trees cut from roots and removed — Not income but capital, and exempt from taxation. ILR (1969) 1 Ker 329, Reversed

SC 2055 (C N 437)

Kerala Interpretation and General Clauses Act (7 of 1125)

—Ss. 2 (2) and 23 — Word "Act" must mean any Act which Kerala Legislature has power to replace — Definition of "Act" so far as it excludes Central Act would be repugnant to subject and context of S. 23

Ker 301 B (C N 49) (FB)

—S. 4 — Acquisition proceedings commenced under replaced Acts can be continued under the Act — See Kerala Land Acquisition Act, 1961 (21 of 1962), S. 62

Ker 301 A (C N 49) (FB)

—S. 23 — Acquisition proceedings commenced under replaced Acts can be continued under the Act — See Kerala Land Acquisition Act, 1961 (21 of 1962), S. 62

Ker 301 A (C N 49) (FB)

—S. 23 — "Act" meaning of — See Kerala Interpretation and General Clauses Act (7 of 1125), S. 4

Ker 301 B (C N 49) (FB)

—S. 23 — "Repeal" — Includes supersession of one Act by another

Ker 301 C (C N 49) (FB)

—S. 62 — Acquisition proceedings commenced under replaced Acts can be continued under the Act — Kerala Interpretation and General Clauses Act (7 of 1125), Ss. 4, 23

Ker 301 (C N 49) (FB)

Kerala University Act (9 of 1969)

See under Education.

Land Acquisition Act (I of 1894)

—Ss. 3 (c) and 4 (as amended in Mysore) — Notification under Section 4 can be issued by Government or Deputy Commissioner — Notification by Deputy Commissioner appointing Assistant Commissioner to function as Deputy Commissioner under Act — Notification is illegal — Such appointment can be made only by the State Government

Mys 317 (C N 77)

—S 4 (as amended in Mysore) — Notification under, can be issued by Government or Deputy Commissioner — See Land Acquisition Act (1894), Section 3 (c)

Mys 317 (C N 77)

—S 6 — Notification by State Government issued in pursuance of request made by municipal authorities — Municipal authorities requiring the land for the purpose of constructing road to link up some plots with nearby municipal road — Acquisition is for public purpose — Orissa 233 (C N 77)

Letters Patent

—(Bombay) Cl. 15—Defamation—Damages — Exemplary damages awarded by trial court when not due — High Court in appeal has power and duty to interfere with the decree for damages — See Torts

Bom 424 E (C N 73)

—(Calcutta) Cl. 15 — Provision of R. 22 of Order 41 of Civil P. C. is applicable — AIR 1920 Cal 776, held no longer good law in view of AIR 1921 PC 80 — (Civil P. C. (1908), Order 41, Rule 22)

Cal 548 A (C N 110)

—(Jammu and Kashmir) Cl. 12 — Clause excludes appeal from orders passed by single Judge in exercise of his revisional jurisdiction or in exercise of his powers of superintendence — Order under Section 104, Constitution of I. and K., which corresponds to Article 227, Constitution of India is nothing but an order made in exercise of supervisory jurisdiction and hence not appealable

J and K 190 A (C N 17)

Limitation Act (9 of 1908)

—S. 3 — Bar of limitation not pleaded — Court is not bound to speculate upon possible questions of limitation that may arise in the case and apply the section

Guj 281 B (C N 43)

—S. 14 — Exclusion of time — Suit for recovery of possession filed beyond limitation — Proceedings taken by plaintiff in B. A. D. R. Court are beyond scope of Section 14 — (Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), S. 4)

Mys 318 A (C N 78)

—S. 16 — Plea of fraud as a ground of exemption from limitation — It is necessary for plaintiff to give particulars of fraud alleged — General allegations not enough — Particulars should be such as to make out

Limitation Act (1908) (contd.)

that plaintiff was kept in dark about her right to sue — Held on allegations in plaint that there was nothing to sustain plea that there were fraudulent representations so as to prevent plaintiff having knowledge of her right to sue Andh Pra 440 B (C N 73)

—S. 18 — Plea of fraud as a ground from exemption from limitation — Suit to set aside transfer by guardian — Relief of partition claimed only against alienees — Fraud relevant to sustain claim against transferees can only be a fraudulent design of concealment on their part or alternatively that they were accessory to fraud committed by guardian or that they were not transferees in good faith and for valuable consideration — Plaint not disclosing any of these allegations — Held that so far as alienees were concerned plaintiff was not entitled to invoke benefit of Section 18 Andh Pra 440 C (C N 73)

—S. 18 read with Section 8 and Art. 44 — Starting point — Sale by de facto guardian of minor's property in 1938 — Plaintiff attaining majority in 1942 — Suit by plaintiff in 1954 to set aside sale on ground that it was not for necessity or for benefit on allegation that she was kept concealed of her right to sue by fraud of defendant — Plaintiff getting knowledge of right to sue in 1947 when she obtained certified copies of sale deed — Held that in the absence of any specific plea that there was fraudulent representation in 1942 or thereafter, no question of extension of time under Sec. 18 can really arise and suit filed more than three years after attaining majority was barred by time under Article 44 read with Section 8 — At any rate suit should have been filed within three years after 1947 when plaintiff obtained knowledge of his right to sue assuming that plaintiff was kept from his knowledge of right to sue till 1947 due to fraud of defendant

Andh Pra 440 G (C N 73)

—Art. 10 — Suit for pre-emption — Part of property sold included share in Shamlat Deh Patti — Property not capable of physical possession within the meaning of Article — Limitation for filing suit will commence from the date of registration of the sale-deed and not from the date of sale

Punj 519 A (C N 84)

—Art. 44 — Article applies not only to transfers of Hindu minor's property by legal guardian but also to transfers by de facto guardian — Observation in AIR 1949 FC 218 held obiter and dissented from

Andh Pra 440 D (C N 73)

—Art. 44 — Transfer of minor's property by de facto guardian with concurrence of minor's lawful guardians amounts virtually to a transfer by lawful guardians themselves — Suit to set aside transfer is governed by Article 44 Andh Pra 440 F (C N 73)

—Arts. 56 and 115 — Contract for completed work — Work completed on 23-4-

Limitation Act (1908) (contd.)

1955 — Plaintiff protesting against final bill but department not altering it — Payment under final bill accepted on 10-2-1956 — Suit for recovery of money filed on 13-4-1959, after serving notice under Section 80, C. P. C. held was barred by limitation — Article applicable held was 56 and not 115 — Even assuming Article 115 to be applicable the suit was barred by limitation

Raj 268 (C N 63)

—Art. 60 — Loan or deposit — Determination of Guj 269 (C N 41)

—Art. 60 — Partial receipt from deposit of firm — Does not amount to demand

Guj 269 D (C N 41)

—Art. 115 — Contract for completed work — Article applicable held was 56 and not 115 — See Limitation Act (1908), S. 56

Raj 268 (C N 63)

—Art. 120 — Suit for price of goods supplied — No fixed period of credit fixed — Transaction including various items — Transaction though falling under different heads, treated as parts of single transaction — Dealing showing a sort of composite agreement — Defendant not putting up any positive case — No plea of limitation raised — Held that moneys payable due to plaintiff at foot of accounts were payable on demand — Mere giving of debit memos did not amount to making demand — Article 120 applied and not Article 52 or 56

Guj 284 A (C N 43)

—Art. 144 — Suit for possession against redeeming co-mortgagor time-barred — Plaintiffs claiming to be in possession of a house on a portion of suit property — If the plaintiffs succeed in establishing that they were actually in possession of the house as on the date of the institution of the suit, they are entitled to the relief of injunction notwithstanding that their suit for recovery of possession of the remaining portion of the suit property is barred

Ker 289 E (C N 48)

Limitation Act (36 of 1963)

—S. 4 — Section 4 does not extend the time — See Limitation Act (1963), S. 12

All 652 A (C N 94) (FB)

—S. 5 — Condonation of delay — Delay due to conflicting decisions misleading the party in filing appeal is good ground for condoning delay

All 652 B (C N 94) (FB)

—Sections 12, 14, 4 — Mode of computing period — Sections 12 and 14 provide for extension of limitation — Periods provided under Sections 12 and 14 are to be added to the period prescribed — If such periods taken together expire during vacation appeal may be filed on day on which Court reopens — Section 4 does not extend time — Period for filing appeal expiring during vacation — Copy of judgment not obtained before closing of court — Application for copy on date of reopening of Court

Limitation Act (1963) (contd.)

— Appellant is not entitled to exclusion of time taken in obtaining copy. 1962 All LJ 1149 and S. A. No. 420 of 1967, D/- 19-4-1968 (All) and 1956 All WR (HC) 737, Overruled; (1901) ILR 25 Bom 584 and (1901) ILR 25 Bom 586 and (1897) ILR 19 All 342 and AIR 1914 All 303 and AIR 1929 Rang 96 (1) and AIR 1931 Pat 60, held no longer good law in view of AIR 1935 PC 85. AIR 1954 Cal 569 and (1904) ILR 27 Mad 21 and AIR 1922 Oudh 89 and AIR 1937 Oudh 26, Dis-sented from. All 652 A (C N 94) (FB)

—Section 14 — Period under Section 14 is to be added to period prescribed — See Limitation Act (1963), Section 12

All 652 A (C N 94) (FB)

—Article 48 — Suit for contribution — 'A' making deposit in Court for B on behalf of himself and others — 'A' filing suit for contribution against others — Period of 3 years commences to run not from the date of deposit but from the date of the appropriation of the deposit by B

Oussa 237 D (C N 78)

—Article 61 — Invalid transfer by Karnavan of equity of redemption in tarwad property to mortgagee in possession — Possession by mortgagee becomes adverse to tarwad — Suit for redemption barred after 12 years — (Travancore-Ezhava Act (3 of 1100 M. E.) Section 21) — (Travancore Nayar Act (2 of 1100 M. E.), Section 25)

Ker 305 (C N 50)(FB)

—Articles 64 and 65 — Possession of co-owners — Ouster of co-heir by adverse possession — Proof Manipur 93 (C N 29)

—Article 65 — See Limitation Act (1963), Section 64 Manipur 93 (C N 29)

Madhya Pradesh Accommodation Control Act (11 of 1961)

See under Houses and Rents.

Madhya Pradesh Land Revenue Code (2 of 1955)

—S. 145 — Bhumiswami lands — Easement over, by prescription — Period is 20 years and not 60 years — Land does not belong to Government — See Easements Act (1882), S. 15

Madh Pra 283 (C N 48)

Madras City Municipal Act (4 of 1919)

See under Municipalities.

Madras General Sales Tax Act (9 of 1939)

See under Sales Tax.

Madras General Sales Tax Turnover Rules

See under Sales Tax.

Madras Shops and Establishments Act (36 of 1947)

See under Shops and Establishments.

Manipur Co-operative Societies Rules 1959

See under Co-operative Societies.

Married Women's Property Act (3 of 1874)

—S. 6 — Section applies only to life insurance policies and not to policies of any other description

Cal 513 D (C N 103)

Minimum Wages Act (11 of 1948)

—S 3(3) — Fixing of different rates of minimum wages for different industries or in different localities by dividing State into zones is not opposed to S. 3(3) or scheme of the Act — (Zones held made on rational basis) SC 2042 F (C N 435)

—S. 5 — Government can fix different minimum wages for different industries or in different localities — The fixation of minimum wages depends on the prevailing economic conditions, the cost of living in a place, the nature of the work to be performed and the conditions in which the work is performed SC 2042 E (C N 433)

—S 5 — Notification fixing minimum wage saying that if employer supplies free meals to employees, he may deduct the sum mentioned in notification — It is only option given and not duty imposed — Supplying food is amenity — Notification does not fix minimum wages in kind

SC 2042 H (C N 435)

—S 5(1) — Power conferred under, is not arbitrary or unguided — Article 14 of Constitution is not violated

SC 2042 B (C N 435)

—S. 5(1) — Whether power given to fix minimum wages is administrative or quasi judicial, rules of natural justice apply — Reasonable opportunity held had been given before fixing minimum wages to parties concerned — Order was not vitiated by failure to constitute committee under S. 5(1) (a)

SC 2042 D (C N 435)

—S 20 — Claims — Fixation of minimum wages by notification under S 3 — Employer failing to recognise rights of employees accrued to them by virtue of notification — Dispute can be raised before Authority appointed under S 20(1) only within six months from date of notification Raj 265 B (C N 62)

Motor Vehicles Act (4 of 1939)

—S 47 — Temporary permits under S. 62 — Opportunity to existing operator to make representations must be given — See Motor Vehicles Act (1939), S 62

Andh Pra 419 C (C N 68)

—S. 47(1) — Right of representations — Right of persons providing transport facilities near proposed route — Under S. 47(1) representations of persons providing passenger transport facilities not only along the proposed route but also near the proposed route have to be taken into consideration Andhra Pra 419 E (C N 68)

—S. 47(3) — Limiting number of stage carriages — Section 47(3) does not render it obligatory on the part of the authority to limit number of stage carriages though

Motor Vehicles Act (contd.)

if such limit is fixed, grant of permit has to be subject to that limit

Andh Pra 419 D (C N 68)
—S. 60(3) (as inserted in 1956) — Power to recover composition fee instead of cancelling permit — Passing of simultaneous order both under S. 60(3) and (1) not contemplated Raj 276 B (C N 66)

—Ss. 62, 47 — Temporary permits — Grant of — Provisions of S. 47 apply — Opportunity must be given to existing operators to make representations against issue of temporary permits

Andh Pra 419 C (C N 68)
—S. 62(c) — Temporary permits — Particular temporary need — Scheme for nationalisation of bus transport in the particular District pending consideration for a considerable time — Representations from public for increase of buses on existing routes and for plying of buses on new routes — Held there was sufficient temporary need justifying grant of temporary permits

Andh Pra 419 A (C N 68)
—S. 62(c) — Temporary permits — Successive grants of temporary permits — (Constitution of India, Art. 226)

Andh Pra 419 B (C N 68)
—S. 62(c) — Temporary permit — Permanent and temporary needs do not necessarily co-exist Goa 137 A (C N 24)

MUNICIPALITIES

—Assam Municipal Act, 1956 (15 of 1957)

—S. 334(1) and (4) — Constitution of notified area — Conclusion of Government that improved arrangements are required not conclusive — Notification can be challenged on ground of absence of authority or that it was made for collateral purpose — Decision of Assam High Court, Reversed SC 2072 A (C N 441)

—Calcutta Municipal Act (33 of 1951)

—S. 586(1), (4) — Notice — Suit for declaration and permanent injunction against Corporation not to enforce invalid order for demolition of structures — Permanent injunction though claimed as additional relief suit held, in essence one for permanent injunction — Absence of notice not fatal to suit — Specific Relief Act (1877), S. 54 Cal 539 A (C N 107)

—Madras City Municipal Act (4 of 1919)

—S. 105 — Vacancy remission — Allowable only if building is entirely vacant Mad 507 (C N 148)

—Punjab Municipal Act (3 of 1911)

—S. 52(1) (g) — Clause (g) inserted by S. 6 of Punjab Local Authorities (Aided Schools) Act (12 of 1959) is void as contravening Art. 31(2) of Constitution SC 2182 E (C N 448)

Mysore High Court Rules 1959

See under High Court Rules and Orders.

Mysore Rent Control Act (22 of 1961)

See under Houses and Rents.

Natural Justice

—Domestic enquiry — Fair trial — See Industrial Disputes Act (1947), Sch. 2, Item 3 Guj 277 A (C N 42)

Negotiable Instruments Act (26 of 1881)

—S. 4, Illustration (b) — Promissory note — Essentials of — AIR 1938 All 619, Dissented from Punj 516 A (C N 83)

Northern India Canal and Drainage Act (8 of 1873)

—S. 30-A(2) (as in force in Punjab in 1964) — Scheme under — Scheme not complying with all requirements of the section — Is liable to be quashed

Punj 539 C (C N 89)
—S. 30-B(1) (as in force in Punjab in 1964) — Publication of scheme and 30 days' time for filing objection — Provision mandatory — Non-compliance of the provision cannot be cured by hearing given by Divisional Canal Officer

Punj 539 D (C N 89)

Oaths Act (10 of 1873)

—S. 4 — Authority to administer oaths and affirmations — Magistrate's power of delegation of — Power can only be exercised in favour of an officer subordinate to him as distinguished from another Magistrate which is a Court

Orissa 209 B (C N 69)

—S. 4 — Authority to administer oaths and affirmations — Courts and persons referred in the section — They must have connection with the matter to which the affidavits relate and must be discharging their duties or exercising their powers in connection therewith

Orissa 209 C (C N 69)

Official Secrets Act (9 of 1923)

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 —S. 171-C — Undue influence — What
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 sanction though facts of complaint disclose
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 (1962) laws in force in the territories were
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 Daman and Diu (Laws) No 2 Regulation
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 — Reading of the two provisions show
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 with right of pre-emption Goa 143 (C N 27)
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 —S. 5(2) — Nomination paper signed
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 had done so — Candidate subsequently

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presenting nomination paper before Returning Officer — Held by such step candidate indicated his assent to being nominated by the particular proposer and seconder — Nomination not invalid — The Legislature, when enacting the Act, must be presumed to know that this was the law as interpreted in India and, consequently, when the language incorporated in S. 5(2) of the Act was used, it must have been intended that nomination papers would not be invalid by reason of the candidate making his signature before the proposer and the seconder

SC 2097 L (C N 446)

—S. 5(2) — Nomination paper signed by proposer and seconder after candidate had done so — Not invalid

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—S. 5(2) — Validity — Cannot be considered as curtailing rights under Art. 58 of the Constitution — See Constitution of India, Art. 58

SC 2097 N (C N 446)

—S. 17(2) — Election petition — Respondent succeeding — However both sides being responsible for putting into witness box large number of persons deliberately giving evidence which was not true — Held proper course was not to award costs even to successful party

SC 2097 R (C N 446)

—S. 18 — There can be undue influence even at the stage when elector goes through mental process of weighing merits and demerits of Candidates — See Penal Code (1860), S. 171-C

SC 2097 D (C N 446)

—S. 18(1) (a) — Bribery — Proof — A general allegation that bribery was rampant in the elections could not be made the subject-matter of a specific charge of commission of offence of bribery

SC 2097 P (C N 446)

—S. 18(1) (a) — Bribery — Licence granted to a private limited company with specific purpose of obtaining vote of an elector and a Member of Parliament, for a candidate — That would constitute bribery

SC 2097 Q (C N 446)

—S. 18(1) (b) — Undue influence by stranger — Effect — It should materially affect election — Burden of proof is on petitioner

SC 2097 F (C N 446)

—S. 21 — Validity — Not ultra vires on ground that rule making power suffers from vice of excessive delegation of legislative powers — See Constitution of India, Art. 71

SC 2097 H (C N 446)

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Presidential and Vice-Presidential Elections Rules (1952)

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—R. 4(1) — Requirement of certified copy — Every Government servant having custody of document can issue copy

SC 2097 K (C N 446)

—Rr. 4(3) and 6(3) (e) — Validity — Rule 4(3) is validly made under S. 21 of Presidential and Vice-Presidential Elections Act (1952) — Is not in derogation of S. 5(2) of the Act — Rule 6(3) (e) which is consequential is also valid

SC 2097 J (C N 446)

—R. 6(3) (e) — Validity — Rule 6(3) (e) is validly made under S. 21 of Presidential and Vice-Presidential Elections Act (1952) — See Presidential and Vice-Presidential Elections Rules (1952), R. 4(3)

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Prevention of Food Adulteration Act (37 of 1954)

—Preamble — Act does not violate Article 14 of Constitution — See Constitution of India, Art. 14

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—Pre. — Act is not violative of Art. 19 (1) (g) of Constitution — See Constitution of India, Art. 19(1) (g)

Cal 520 E (C N 104)

—S. 2(i) (f) — Section is not violative of Art. 19(1) (g) of Constitution — See Constitution of India, Art. 19(1) (g)

Cal 520 E (C N 104)

—S. 2(v) — 'Food' — Test to determine — Definition wide enough to include Katha (Catechu)

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—S. 2(xiii) — Sale — Supply of food by hotelier to resident guest on consolidated charge — There is no sale

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—Ss. 7, 16 — Store — Meaning of — Means storing for sale — Criminal Appeal No. 100-D of 1964, D/-13-6-1969 (Delhi), Overruled. AIR 1967 Cal 110 & AIR 1966 Cal 51 & AIR 1963 Assam 28, Dissented from

Delhi 244 B (C N 53) (FB)

—S. 12 — Act does not violate Art. 14 of Constitution — See Constitution of India, Art. 14

Cal 520 C (C N 104)

—S. 13 — Report signed by Public Analyst after issue of notification regarding his appointment — Sample of food received in office before issue of notification — Evidentiary value of report

Delhi 244 C (C N 53)

—S. 16 — Store — Meaning of — Means storing for sale — See Prevention of Food Adulteration Act (1954), S. 7

Delhi 244 B (C N 53) (FB)

—S. 19 — Act does not violate Art. 14 of Constitution — See Constitution of India, Art. 14

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Prevention of Food Adulteration Rules (1966)

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Prevention of Food Adulteration Rules (contd.)

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Protection of Rights of Tenants (Cashew-nuts and Arecanuts) Order, 1965

—Validity — President of Portugal or Overseas Minister or Governor General of State of India could have had no power to pass Order of 1965 — Lt Governor of Goa, Daman and Diu, therefore, has no power to pass that Order by virtue of Cl 2 of Goa, Daman and Diu (Administration) Removal of Difficulties Order 1962). Cl. 2 (as amended on 19-12-1963) — Order of 1965 is, therefore, ultra vires and invalid — (Goa, Daman and Diu (Administration) Removal of Difficulties Order (1962). Cl. 2 (as amended on 19-12-1963)

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PUBLIC SAFETY**—West Bengal Criminal Law Amendment (Special Courts Act 21 of 1949)**

—S 4 — Offences triable by Special Courts—Secretary of co-operative society not being a public servant cannot be tried under S. 409, Penal Code by special court

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—West Bengal Security Act (19 of 1950)

—S. 29(3) (b) — Determination of compensation by Arbitrator is subject to Sections 45 and 46 of Arbitration Act (1940) (10 of 1940) — It is open for claimant, therefore, to move appropriate authority for referring matter of compensation payable to him to arbitration — (Arbitration Act (1940), Ss 45 and 46)

Tripura 94 B (C N 27)

—S 29(3) — Section 37 has nothing to do with enforcement of right to compensation by individual whose property has been requisitioned — See West Bengal Security Act (19 of 1950), S 37

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—S. 37 — Section 37 has nothing to do with enforcement of right to compensation by individual whose property has been requisitioned

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Punjab Civil Services (Judicial Branch) Rules (1951)

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Punjab Civil Services (Punishment and Appeal) Rules (1952)

See under Civil Services.

Punjab Co-operative Societies (Amendment) Ordinance (10 of 1963)

See under Co-operative Societies.

Punjab Local Authorities (Aided Schools) Act (22 of 1959)

See under Education.

Punjab Municipal Act (3 of 1911)

See under Municipalities

Railway Establishment Code

See under Civil Services.

Railways Act (9 of 1890)

—S. 73 (New) (as amended in 1951) — Effect of amendment — Liability of railway for loss of goods — When onus of proof shifts on railway

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—S. 77-C (as amended in 1951) — Section does not refer to loss or non-delivery — Railway administration when can be absolved of its liability for short delivery

Delhi 261 B (C N 55)

Rajasthan Service Rules (1951)

See under Civil Services

Registration Act (16 of 1908)

—S 17(1) (b) — Documents of which registration is compulsory — Partition-deed — Effect of non-registration — Though inadmissible in evidence for ascertaining terms of partition and tracing source of title, the factum of partition can be proved by other evidence

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Representation of the People Act (32 of 1951)

—Ss 116-A and 123 — Jurisdiction of Supreme Court under S. 116-A — Charge of commission of corrupt practice — Finding as to, is one of fact — No interference with finding of High Court merely on ground that different view on evidence is reasonable

SC 2075 A (C N 412)

—S 116-A — Election petition, alleging commission of corrupt practice by returned candidate, rejected — Dismissal of appeal to Supreme Court — Court however disallowed cost of returned candidate in appeal in view of the fact that he had raised several false pleas

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—S 123 — Jurisdiction of Supreme Court under S. 116-A — Charge of commission of corrupt practice — Finding as to is one of fact — No interference with finding of High Court merely on ground that different view on evidence is reasonable — See Representation of the People Act (1951), S 116-A SC 2075 A (C N 412)

SALES TAX**—Madras General Sales Tax Act (9 of 1939)**

—Ss. 3(1), 5 — Madras General Sales Tax Turnover Rules, R. 16 — Unlicensed dealer in hides and skins — During 1953-54 such dealer was liable to multiple taxation — No case of discrimination

Mad 494 A (C N 149) (F)

Sales Tax — Madras General Sales Tax Act (contd.)

—S. 5 — Unlicensed dealer in hides and skins — During 1953-54 such dealer was liable to multipoint taxation — No case of discrimination — See Sales Tax — Madras General Sales Tax Act (9 of 1939), Section 3(1) Mad 494 A (C N 144) (FB)

—Madras General Sales Tax Turnover Rules

—R. 16 — Unlicensed dealer in hides and skins — During 1953-54 such dealer was liable to multipoint taxation — No case of discrimination — See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 3(1) Mad 494 A (C N 144) (FB)

—U. P. Sales Tax Act (15 of 1948)

—S. 2(c) — Dealer — Assessee carrying on business in Calcutta dispatching goods on orders from U. P. on railway receipts in name of self which were endorsed by assessee's bankers at Calcutta — Price realised from purchasers on endorsement and delivery of receipts from Banker's branches in U. P. — Assessee not a 'dealer' All 650 (C N 93) (FB)

—Ss. 7(3) and 21 — Failure to furnish return — Proceeding under S. 7(3) not without jurisdiction — Assessment under S. 7(3) cannot be considered as one under S. 21 All 641 (C N 90) (FB)

—S. 21 — Assessment under S. 7(3) cannot be considered as one under S. 21 — See Sales Tax — U. P. Sales Tax Act (1948), S. 7(3)

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Sea Customs Act (8 of 1878)

—S. 137 — Findings arrived at by Customs Authorities in the absence of procedural irregularity cannot be disturbed in writ petition — See Constitution of India, Art. 226, Cal 527 E (C N 105)

—S. 167(8) — Declaration under S. 12 (1), Foreign Exchange Regulation Act 1947, by exporter containing incorrect information on points on which S. 12 (1), Foreign Exchange Regulation Act not requiring declaration — Exporter cannot be penalised under S. 167(8) — Authorities may proceed under other provisions but not under S. 167(8) Cal 527 A (C N 105)

—Ss. 167 (8), 167 (37) — Foreign Exchange Regulation Act (1947), S. 12 (1) — Order of confiscation founded both on Items (8) and (37) of S. 167 — Charge of violation of S. 12, Foreign Exchange Regulation Act failing — Confiscation order cannot be struck down

Cal 527 G (C N 105)

—S. 167(8) — Personal penalty under, can exceed lower alternative of Rs. 1,000 and penalty up to three times of value of goods concerned can be imposed where amount exceeds Rs. 1000 — Since it was held that Customs Authorities had no

Sea Customs Act (contd.)

jurisdiction to proceed under S. 167(8), the order imposing penalty of Rs. 35,000 was quashed — Refund ordered in proceedings under Art. 226

Cal 527 H (C N 105)

—S. 167(37) — Findings arrived at by Customs Authorities in the absence of procedural irregularity cannot be disturbed in writ petition — See Constitution of India, Art. 226

Cal 527 E (C N 105)

—S. 167(37) — Charge under S. 12(1), Foreign Exchange Regulation Act for misstatement in declaration by exporter — Though S. 29 or 137 of the Sea Customs Act was not specifically mentioned held that by understating the value of exported goods accused had committed offence under S. 167(37) — Section 167(37) has to be read with Ss. 29 and 137 of Sea Customs Act — Defence and proceeding for adjudication proceeding on this twofold basis — Held that it was not correct to say that petitioner was charged only with violation of S. 12(1) of Foreign Exchange Regulation Act

Cal 527 F (C N 105)

SHOPS AND ESTABLISHMENTS**—Madras Shops and Establishments Act (36 of 1947)**

—S. 41(1) — Procedure under — Employee reaching superannuation age — Procedure under S. 41(1) need not be followed

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Specific Relief Act (1 of 1877)

—S. 54 — Relief for perpetual injunction sought only as additional relief to relief of declaration that order of Commissioner of Calcutta is illegal, invalid and mala fide — Suit is nevertheless suit for permanent injunction — See Municipalities — Calcutta Municipal Act (33 of 1951), S. 586(1) Cal 539 A (C N 107)

—S. 54 — Injunction — See Limitation Act (1908), Art. 144

Ker 289 E (C N 48)

Stamp Act (2 of 1899)

See under Stamp Duty

STAMP DUTY**—Stamp Act (2 of 1899)**

—S. 2 (17) — Definition of mortgage deed in — Is wider than in Section 58 (a), T. P. Act All 644 B (C N 91) (SB)

—Sch. 1B, Articles 6 (1) and 40 (b) (as amended by U. P. Stamp (Amendment) Act, 1962) — Mortgage deed or agreement relating to deposit of title deeds — Deed held evidenced agreement pledging goods and also agreement purporting to create mortgage by deposit of title deeds

All 644 C (C N 91) (SB)

—Sch. 1B, Art. 40(b) (as amended by U. P. Stamp (Amendment) Act, 1962) —

Stamp Duty — Stamp Act (contd.)

Mortgage deed or agreement relating to deposit of title deeds — Deed held evidenced agreement pledging goods and also agreement purporting to create mortgage by deposit of title deeds — See Stamp Duty — Stamp Act (1899), Sch 1B, Art. 6(1) All 644 C (C N 91) (SB)

Suppression of Immoral Traffic in Women and Girls Act (104 of 1956)

—Ss. 4(1), 8 — Conviction for — Prosecution must prove that accused was knowingly living wholly or in part on earnings of prostitution Mad 491 A (C N 143)

—S. 8 — Earnings referred to in S. 4 are outcome of state of things embodied in Section 8 — See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 4(1) Mad 491 A (C N 143)

—S. 8 — Seducing for purpose of prostitution — In absence of corroboration regarding solicitation it is not safe to convict merely on testimony of person alleged to have been seduced

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Torts

—Defamation — Damages — Damages are compensatory and not punitive

Bom 424 C (C N 73)

—Defamation — Damages — Damage to reputation — Diminution in esteem and extent of mental distress to be considered

Bom 424 D (C N 73)

—Defamation — Damages — Exemplary damages awarded by trial Court when not due — High Court in appeal has power and duty to interfere with the decree for damages — (Letters Patent (Bom), Cl. 15) Bom 424 E (C N 73)

—Defamation — Damages — Power of appellate Court to interfere

Bom 424 E (C N 73)

—Defamation — Damages — Costs of the litigation cannot be included in damages — (Civil P. C. (1908), S. 25)

Bom 424 G (C N 73)

—Defamation — Damages — Plea of justification entirely given up — Evidence relating to justification cannot be reconsidered for purposes of mitigation of damages

Bom 424 H (C N 73)

—Libel — Qualified privilege — Privileged occasion — Fact that subject-matter is of general public importance not sufficient — Party must have duty to communicate to the public

Bom 424 A (C N 73)

—Libel — Qualified privilege — Malice — Burden of proof — Burden is on plaintiff

Bom 424 B (C N 73)

Trade and Merchandise Marks Act (43 of 1955)

—S. 2 (1) (d) — Mark whether deceptively similar to another mark — Test

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Trade and Merchandise Marks Act (contd.)

—S. 9 (1) — Registration of trade mark — Delayed plea that word used in trade mark is deceptive and not invented — Inference that it did not strike even the legal adviser of party etc., that the trade mark is deceptive can be drawn — Finding by High Court also against plea — Plea rejected by Supreme Court

SC 2062 B (C N 439)

Transfer of Property Act (4 of 1882)

—S. 8 — Deed — Construction — See Deed — Construction

—S. 11 — Restriction repugnant to interest created — Settlement deed — Conveyance of absolute interest — Restriction as to joint enjoyment with settlor and as to alienation is void and cannot be given effect to Orissa 215 C (C N 71)

—S. 14 — Settlement — Evasion of rules against perpetuities

Mad 484 (C N 141)

—S. 41 — Benami — See Benami

—S. 44 — Under S. 5(1) Goa, Daman and Diu (Administration) Act (1962) laws in force in the territories were saved — However under S. 4(1) Goa, Daman and Diu (Laws) No. 2 Regulation (1963) corresponding laws stood repealed — Reading of the two provisions shows that law relating to pre-emption under S. 1566 was saved as neither S. 44 nor any other section in T. P. Act dealt with right of pre-emption — See Portuguese Civil Code, S. 1566 Goa 143 (C N 27)

—S. 52 — "Otherwise dealt with" — Includes raising of constructions wrongfully — Suit for possession of vacant land — Defendant putting up superstructure after filing of suit — Cannot claim advantage out of the buildings wrongfully put up All 648 A (C N 92)

—S. 54 — Sales of immovable property — Passing of consideration not condition precedent for transfer of title

Orissa 218 A (C N 72)

—S. 58 — Definition of mortgage deed in Section 2 (17) Stamp Act — Is wider than in Section 58(a), T. P. Act — See Stamp Duty — Stamp Act (1899), S. 2(17)

All 644 B (C N 91) (SB)

—Ss. 58, 100 — Mortgage by deposit of title deeds — Effect — Effectuates transfer of right to properties — Hence creation of charge separately on properties becomes unnecessary

All 644 D (C N 91) (SB)

—S. 60 — Right of redemption — Mortgagee in possession to pay michavaram — Non-payment — Mortgage debt wiped off — Suit by mortgagor is not suit for redemption Ker 289 C (C N 48)

—S. 92 — Equitable doctrine of subrogation — Applicability — Mortgage amount wiped off by adjustment against arrears of michavaram — Plaintiff-mortgagor not required to make any payment

T. P. Act (contd.)

to mortgagee — Doctrine does not apply — Plaintiff-Mortgagor gets no right to be reimbursed by other co-mortgagors

Ker 289 B (C N 48)

—S. 100 — Mortgage by deposit of title deeds — Effect — Effectuates transfer of right to properties — Hence creation of charge separately on properties becomes unnecessary — See Transfer of Property Act (1882), S. 58

All 644 D (C N 91) (SB)

—Ss. 106 and 109 — Date of commencement of tenancy is when tenant has been originally let in — Transfer of the property does not affect it — Tenancy cannot be deemed to have commenced on the date of transfer — Notice terminating tenancy with the expiry of date of transfer invalid — Section 109 supports the view

Raj 272 B (C N 65)

—S. 106 — Tenancy at will, what is — Section 106 does not apply to such tenancy

Raj 272 C (C N 65)

—S. 106 — Power of Custodian of Evacuee Property to eject without notice under Section 106 cannot be availed of by purchaser of property from him — See Administration of Evacuee Property Act (1950), S. 4(2)

Raj 272 D (C N 65)

—S. 108, Cl. (o) — Lease of premises for residential purposes to businessman — Carrying on some business work during spare time in small portion of premises without running a shop — User not inconsistent with purpose of lease

Mys 297 A (C N 70)

—S. 109 — Date of commencement of tenancy — Date when tenant has been originally let in is decisive — Notice terminating tenancy with the expiry of date of transfer invalid — S. 109 supports the above — See Transfer of Property Act (1882), S. 106

Raj 272 B (C N 65)

Travancore-Cochin High Court Act (4 of 1125 ME)

—S. 23 — Finality as regards matter on which Judges of Division Bench are in agreement — Difference as to reasons not material

Ker 289 (C N 48)

Travancore-Ezhava Act (3 of 1100 ME)

—S. 21 — Invalid transfer by Karnavan of equity of redemption in tarwad property to mortgagee in possession — Possession by mortgagee becomes adverse to tarwad — Suit for redemption barred after 12 years — See Limitation Act (1963), Art. 69

Ker 305 (C N 50) (FB)

Travancore Limitation Act (6 of 1100 ME)

—Art. 136 — Mortgage amount wiped off by adjustment against arrears of michavaram — Redeeming co-mortgagor is not subrogated to the position of mortgagee — Suit by some of the co-mortgagors claiming recovery of their share in the suit property in such a case from redeeming co-mortgagor cannot be regarded as suit for redemption — Article 136 does not apply

Ker 289 D (C N 48)

Travancore Nayar Act (2 of 1100 ME)

—S. 25 — Invalid transfer by Karnavan of equity of redemption in tarwad property to mortgagee in possession — Possession by mortgagee becomes adverse to tarwad — Suit for redemption barred after 12 years — See Limitation Act (1963), Art. 69

Ker 305 (C N 50) (FB)

Tripura (Courts) Order 1950

See under High Court Rules and Orders

United Khasi Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953

—Rr. 21 and 22 — Under R. 21 the Subordinate District Council Court is not competent to try an offence under S. 147 Penal Code — Jurisdiction of Assistant to Dy. Commissioner to try such offence is saved by R. 22

Assam 130 (C N 32) (FB)

—R. 22 — Under R. 21 the Subordinate District Council Court is not competent to try an offence under S. 147 Penal Code — Jurisdiction of Assistant to Dy. Commissioner to try such offence is saved by R. 22 — See United Khasi Jaintia Hill Autonomous District (Administration of Justice) Rules, 1953, R. 21

Assam 130 (C N 32) (FB)

U. P. Sales Tax Act (15 of 1948)

See under Sales Tax

West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949)

See under Public Safety

West Bengal Security Act (19 of 1950)

See under Public Safety

Words and Phrases

—"Civil Proceeding" — Proceeding which involves assertion or enforcement of a civil right is a civil proceeding — See Constitution of India, Art. 133(1)

Tripura 86 B (C N 23)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1970 DECEMBER

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
REVERS.=Reversed in

Civil Procedure Code (5 of 1908)

- S 2 (17) (h) — (1960) 64 Cal WN 60 — Not F. in view of AIR 1959 SC 589 as interpreted AIR 1970 Cal 539 B (C N 107)
- S 80 — (1960) 64 Cal WN 60 — Not F. in view of AIR 1959 SC 589 as interpreted AIR 1970 Cal 539 B (C N 107)
- S 80 — AIR 1961 Guij 85 — Diss. AIR 1970 Manipur 90 (C N 28)
- S. 80 — AIR 1960 Pat 530 — Diss. AIR 1970 Manipur 90 (C N 28)
- O 18, R 3 — AIR 1956 Sau 52 — Diss. AIR 1970 Raj 276 B (C N 67)
- O 33 R 5(d-1) — AIR 1948 Mad 433 — Diss. AIR 1970 Andh Pra 411 A (C N 67)
- O 33, R 5(d-1) — AIR 1949 Mad 591 — Diss. AIR 1970 Andh Pra 411 A (C N 67)
- O 33 R 5(d-1) — AIR 1956 Mad 271 — Diss. AIR 1970 Andh Pra 411 A (C N 67)
- O 33, R 5(d-1) — AIR 1956 Mad 677 — Diss. AIR 1970 Andh Pra 411 A (C N 67)
- O 33, R 6 — AIR 1956 Mad 271 — Diss. AIR 1970 Andh Pra 411 B (C N 67)
- O 33, R 6 — AIR 1956 Mad 677 — Diss. AIR 1970 Andh Pra 411 B (C N 67).

CIVIL SERVICES

—Rajasthan Service Rules (1951)

- R. 18 — 1969 Lab IC 513 (Raj) — Revers. AIR 1970 Raj 261 A (C N 61).
- R 141 — 1969 Lab IC 513 (Raj) — Revers. AIR 1970 Punj 261 B (C N 61).

Constitution of India

- Art. 14 — ('68) 70 ITR 293 (All)— Over. AIR 1970 All 620 D (C N 89) (FB).
- Art. 14 — ('69) C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi) — Diss. AIR 1970 All 620 D (C N 89) (FB).
- Art. 14 — ('67) 64 ITR 285 (Madh Pra) — Diss. AIR 1970 All 620 D, E (C N 89) (FB).
- Art. 14 — AIR 1969 Madh Pra 72 — Diss. AIR 1970 All 620 D (C N 89) (FB).
- Art. 31(2) — AIR 1966 Punj 232 — Revers. AIR 1970 SC 2182 F (C N 448).
- Art. 133(1) (a) (c) — ('68) C. W. J. C. Nos. 197 & 234 of 1968 (Pat) — Revers. AIR 1970 SC 2011 (C N 434).
- Art. 311 — AIR 1961 Guij 63 — Diss. AIR 1970 Orissa 213 B (C N 70).

Contract Act (9 of 1872)

- S 69 — AIR 1951 All 774 (FB) — Diss. AIR 1970 Orissa 237 B (C N 78).

CO-OPERATIVE SOCIETIES

- Orissa Co-operative Societies Act 1951 (11 of 1952)
- S 8 — ('67) O. J. C. 104 of 1967 (Orissa) — Over. AIR 1970 Orissa 227 (C N 75) (SB).

Co-operative Societies — Orissa

- Co-operative Societies Act (contd.)
- S 71 — ('67) O. J. C. No. 104 of 1967 (Orissa) — Over. AIR 1970 Orissa 227 (C N 75) (SB).

Criminal Procedure Code (5 of 1898)

- S. 145 — AIR 1969 Manipur 3 — Diss. AIR 1970 Orissa 209 D (C N 69).
- S. 145 — AIR 1966 Punj 528 — Diss. AIR 1970 Orissa 209 D (C N 69).
- S 488 (4) — 1964 (1) Cri LJ 242 (Mad) — Diss. AIR 1970 Punj 515 (C N 82).
- S 488 (6) — ('66) Ref. No 101 of 1966 (Goa) — Diss. AIR 1970 Goa 140 C (C N 25)

Displaced Persons (Compensation and Rehabilitation) Rules (1955)

- R. 102, Cls (a) to (d) and proviso — ('69) C. W. No 2917 of 1965, D/- 23-10-1969 (P & H) — Revers. AIR 1970 Punj 525 A (C N 86)

EDUCATION

—Punjab Local Authorities (Aided Schools) Act (22 of 1959)

- S. 3 — AIR 1966 Punj 232 — Revers. AIR 1970 SC 2182 A (C N 448).
- S. 5 — AIR 1966 Punj 232 — Revers. AIR 1970 SC 2182 C (C N 448).
- S. 6 — AIR 1966 Punj 232 — Revers. AIR 1970 SC 2182 A (C N 448).

Evidence Act (1 of 1872)

- S. 114 — 1966 Ker LT 86 — Held no longer good law as interpreted AIR 1970 Ker 316 (C N 51).
- S. 114 — 1966 Ker LT 93 — Held no longer good law as interpreted AIR 1970 Ker 310 (C N 51).

Hindu Succession Act (30 of 1956)

- S 14(2) — AIR 1965 Andh Pra 66 — Diss. AIR 1970 Raj 283 (C N 69).

HOUSES AND RENTS

—M. P. Accommodation Control Act (41 of 1961)

- S. 12 — ('69) S. A. No. 940 of 1965, D/- 3-3-1969 (Madh Pra) — Over. AIR 1970 Madh Pra 289 (C N 47).
- S 13(6) — ('69) S. A. No 940 of 1965, D/- 3-3-1969 (Madh Pra) — Over. AIR 1970 Madh Pra 289 (C N 47).

Income-tax Act (11 of 1922)

- S. 10(4) (b) — (1964) 51 ITR 467 (Mad) — Over. AIR 1970 Mad 497 A (C N 145) (FB).
- S. 16(1) (b) — (1964) 51 ITR 467 (Mad) — Over. AIR 1970 Mad 497 A (C N 145) (FB).

Income-tax Act (43 of 1961)

- S. 271 — ('68) 70 ITR 293 (All) — Over. AIR 1970 All 620 E (C N 89) (FB).
- S. 271 — ('69) C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi) — Diss. AIR 1970 All 620 E (C N 89) (FB).
- S. 271 — ('67) 64 ITR 285 (Madh Pra) — Diss. AIR 1970 All 620 E (C N 89) (FB).
- S. 271 — AIR 1969 Madh Pra 72 — Diss. AIR 1970 All 620 E (C N 89) (FB).
- S. 297 (2) (g) — ('68) 70 ITR 293 (All) — Over. AIR 1970 All 620 E (C N 89) (FB).
- S. 297 (2) (g) — ('69) C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi) — Diss. AIR 1970 All 620 E (C N 89) (FB).
- S. 297 (2) (g) — ('67) 64 ITR 285 (Madh Pra) — Diss. AIR 1970 All 620 E (C N 89) (FB).
- S. 297 (2) (g) — AIR 1969 Madh Pra 72 — Diss. AIR 1970 All 620 E (C N 89) (FB).

Insurance Act (4 of 1938)

- S. 39 — AIR 1962 All 355 — Diss. AIR 1970 Cal 513 C (C N 103).

Kerala Agricultural Income-tax Act (22 of 1950)

- S. 2 (a) — ILR (1969) 1 Ker 329 — Revers. AIR 1970 SC 2055 (C N 437).

Kerala Land Acquisition Act 1961 (21 of 1962)

- S. 62 — 1968 Ker LJ 1 — Over. AIR 1970 Ker 301 A (C N 49) (FB).
- S. 62 — 1969 Ker LJ 389 — Over. AIR 1970 Ker 301 A (C N 49) (FB).

Limitation Act (9 of 1908)

- Art. 44 — AIR 1949 FC 218 — Diss. AIR 1970 Andh Pra 440 D (C N 73).

Limitation Act (36 of 1963)

- S. 4 — (1897) ILR 19 All 342 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — AIR 1914 All 303 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — AIR 1922 Oudh 39 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — AIR 1937 Oudh 26 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — 1956 All WR (HC) 737 — Over. AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — 1962 All LJ 1149 — Over. AIR 1970 All 652 A (C N 94) (FB).

Limitation Act (1963) (contd.)

- S. 4 — ('68) S. A. No. 420 of 1967, D/- 19-4-1968 (All) — Over. AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — (1901) ILR 25 Bom 584 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — (1901) ILR 25 Bom 586 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — AIR 1954 Cal 569 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — (1904) ILR 27 Mad 21 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — AIR 1931 Pat 60 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 4 — AIR 1929 Rang 96 (1) — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — (1897) ILR 19 All 342 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — AIR 1914 All 303 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — AIR 1922 Oudh 39 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — AIR 1937 Oudh 26 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — 1956 All WR (HC) 737 — Over. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — 1962 All LJ 1149 — Over. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — ('68) S. A. No. 420 of 1967, D/- 19-4-1968 (All) — Over. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — (1901) ILR 25 Bom 584 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — (1901) ILR 25 Bom 586 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — AIR 1954 Cal 569 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — (1904) ILR 27 Mad 21 — Diss. AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — AIR 1931 Pat 60 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 12 — AIR 1929 Rang 96 (1) — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
- S. 14 — (1897) ILR 19 All 342 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

Limitation Act (1963) (contd.)

—S. 14 — AIR 1914 All 303 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — AIR 1922 Oudh 39 — Diss. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — AIR 1937 Oudh 26 — Diss. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — 1956 All WR (HC) 737 — Over. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — 1962 All LJ 1149 — Over. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — ('68) S. A. No. 420 of 1967, D/- 19-4-1968 (All) — Over. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — (1901) ILR 25 Bom 584 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — (1901) ILR 25 Bom 586 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — AIR 1954 Cal 569 — Diss. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — (1904) ILR 27 Mad 21 — Diss. AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — AIR 1931 Pat 60 — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

—S. 14 — AIR 1929 Rang 96 (1) — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

Negotiable Instruments Act (26 of 1881)

—S. 4 Illustration (b) — AIR 1938 All 619 — Diss. AIR 1970 Punj 516 A (C N 83).

Partnership Act (9 of 1932)

—S. 35 — ('63) S. A. No. 725 of 1962, D/- 6-9-1963 (Punj) — Revers. AIR 1970 Punj 522 (C N 85).

—S. 69 (2) — AIR 1952 Nag 57 — Partly Diss. AIR 1970 Mys 299 (C N 71)

Penal Code (45 of 1860)

—S. 397 — AIR 1933 Lah 35 — Diss. AIR 1970 Punj 532 (C N 88) (FB).

Penal Code (contd.)

—S. 397 — AIR 1926 Sind 150 — Diss. AIR 1970 Punj 532 (C N 88) (FB).

—S. 397 — (1912) 13 Cri LJ 267 (Low Bur) — Diss. AIR 1970 Punj 532 (C N 88) (FB).

Prevention of Food Adulteration Act (37 of 1954)

—S. 7 — AIR 1963 Assam 28 — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 7 — AIR 1966 Cal 51 — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 7 — AIR 1967 Cal 110 — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 7 — ('69) Criminal Appeal No. 109D of 1964, D/- 13-6-1969 (Delhi) — Over. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 16 — AIR 1963 Assam 28 — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 16 — AIR 1966 Cal 51 — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 16 — AIR 1967 Cal 110 — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

—S. 16 — ('69) Criminal Appeal No. 109D of 1964, D/- 13-6-1969 (Delhi) — Over. AIR 1970 Delhi 244 B (C N 53) (FB).

SALES TAX

—Madras General Sales Tax Act (9 of 1939)

—S. 3(1) — (1966) 17 STC 284 (Mad) — Over. AIR 1970 Mad 494 A (C N 144) (FB).

—S. 5 — (1966) 17 STC 284 (Mad) — Over. AIR 1970 Mad 494 A (C N 144) (FB).

—U. P. Sales Tax Act (15 of 1918)

—S. 7(3) — ('63) S. T. Ref. No. 397 of 1961, D/- 30-7-1963 (All) — Held overruled by AIR 1968 SC 565 as interpreted AIR 1970 All 641 (C N 90) (FB).

—S. 21 — ('63) S. T. Ref. No. 397 of 1961, D/- 30-7-1963 (All) — Held overruled by AIR 1968 SC 565 as interpreted AIR 1970 All 641 (C N 90) (FB).

Transfer of Property Act (4 of 1882)

—S. 60 — AIR 1943 Bom 191 — Held no longer good law in view of AIR 1973 SC 1041 as interpreted AIR 1970 Ker 287 (C N 48).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC. IN A. I. R. 1970 DECEMBER

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in;
REVERS.=Reversed in

FEDERAL COURT

Observation in AIR 1949 FC 218 = (1950) 1 Mad LJ 586, *Sriramulu v. Pundarikakshayya* — Diss. AIR 1970 Andh Pra 440 D (C N 73).

ALLAHABAD

(1897) ILR 19 All 342 = 1897 All WN 76, *Siyadat-Un-Nissa v. Muhammad Mahmud* — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

AIR 1914 All 303 = 23 Ind Cas 874, *Budhu v. Sultan* — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

AIR 1922 Oudh 39 = 25 Oudh Cas 71, *Abdul Ghafor v. Mt. Rasulunnisa* — Diss. AIR 1970 All 652 A (C N 94) (FB).

AIR 1937 Oudh 26 = ILR 12 Luck 531, *Sukhanandan Prasad Shukla v. Raja Ahmad Ali Khan* — Diss. AIR 1970 All 652 A (C N 94) (FB).

AIR 1938 All 619 = 1938 All LJ 907, *Firm Ratanji Bhagwanji and Co. v. Prem Shanker* — Diss. AIR 1970 Punj 516 A (C N 83).

AIR 1951 All 774 = 1951 All LJ 521 (FB), *Dharni-Dhar v. Chandra Shekhar* — Diss. AIR 1970 Orissa 237 B (C N 78).

1956 All WR (HC) 737, *Udairaj Singh v. Jugal Kishore Mehra* — Over. AIR 1970 All 652 A (C N 94) (FB).

AIR 1962 All 355 = 1962 All LJ 265, *Kesari Devi v. Dharma Devi* — Diss. AIR 1970 Cal 513 C (C N 103).

1962 All LJ 1149 = 1962 All WR (HC) 902, *Ganga Prasad v. Raghubir Prasad* — Over. AIR 1970 All 652 A (C N 94) (FB).

(1963) Observation of Desai, J., Sales Tax Ref. No. 397 of 1961, D/- 30-7-1963 (All), *Kishan Lal Gopi Krishna v. Commr. of Sales Tax* — Held overruled by AIR 1968 SC 565 as interpreted AIR 1970 All 641 (C N 90) (FB).

(1968) 70 ITR 293 (All), *Income-tax Officer v. Firm Madan Mohan Damma Mal* — Over. AIR 1970 All 620 D, E (C N 89) (FB).

(1968) Second Appeal No. 420 of 1967, D/- 19-4-1968 (All), *Dudhnath Dubey v. Prafulla Dube* — Over. AIR 1970 All 652 A (C N 94) (FB).

ANDHRA PRADESH

AIR 1965 Andh Pra 66 = (1964) 2 Andh WR 470, *Gadam Redayya v. Venkataraju* — Diss. AIR 1970 Raj 285 (C N 69).

ASSAM

AIR 1963 Assam 28 = 1963 (1) Cri LJ 120, *Narain Das v. State* — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

BOMBAY

(1901) ILR 25 Bom 584 = 3 Bom LR 143, *Tukaram Gopal v. Pandurang Sadaram* — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

(1901) ILR 25 Bom 586 = 3 Bom LR 244, *Pandharinath Sakharan v. Shankar Narayan* — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).

AIR 1943 Bom 191 = 45 Bom LR 253, *Raghavendra Charya Appa Charya Katti v. Vaman Srinivas Deshpande* — Held no longer good law in view of AIR 1963 SC 1041 as interpreted AIR 1970 Ker 289 C (C N 48).

AIR 1952 Nag 57 = ILR (1952) Nag 764, *Firm Kapurchand Bhagaji v. Laxman Trimbak* — Partly Diss. AIR 1970 Mys 299 (C N 71).

CALCUTTA

AIR 1954 Cal 569 = ILR (1953) 2 Cal 144, *Smt. Kamala Sundari Dasi v. Sridhar Chandra* — Diss. AIR 1970 All 652 A (C N 94) (FB).

(1960) 64 Cal WN 60, *Shivadhar Sukla v. Corporation of Calcutta* — Not F. in view of AIR 1959 SC 589 as interpreted AIR 1970 Cal 539 B (C N 107).

AIR 1966 Cal 51 = 1966 Cri LJ 135, *Gopalpur Tea Co. Ltd. v. Corpn. of Calcutta* — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

AIR 1967 Cal 110 = 1967 Cri LJ 329, *Shipping and Clearing (Agents) Pvt. Ltd. v. Corporation of Calcutta* — Diss. AIR 1970 Delhi 244 B (C N 53) (FB).

DELHI

(1969) Civil Misc. Writ No. 1247 of 1967, D/- 24-2-1969 (Delhi), *M/s. Jain Brothers v. Union of India* — Diss. AIR 1970 All 620 D, E (C N 89) (FB).

(1969) Criminal Appeal No. 100-D of 1964, D/- 13-6-1969 (Delhi), *Municipal Corpn. of Delhi v. Jethanand* — Over. AIR 1970 Delhi 244 B (C N 53) (FB).

GOA

(1966) Reference No. 101 of 1966 (Goa) — Diss. AIR 1970 Goa 140 C (C N 25).

GUJARAT

AIR 1956 Sau 52, *Motibhai v. Umedchand* — Diss. AIR 1970 Raj 278 B (C N 67).
AIR 1961 Guj 63, *Hemraj Singhji v. I. G.*

Gujarat (contd.)

- of Police — Diss. AIR 1970 Orissa 213 B (C N 70)
 AIR 1961 Guj 85, Bai Jilekhabai v. Competent Officer — Diss. AIR 1970 Manipur 90 (C N 28)

KERALA

- (66) 1966 Ker LT 86 = ILR (1966) 1 Ker 689, Pennunamma Vally v. Achuthan Unni — Held no longer good law in view of AIR 1970 Ker 310 (C N 51)
 (66) 1966 Ker LT 93 = 1966 Ker LR 183, Varkey v. Joseph — Held no longer good law in view of AIR 1970 Ker 310 (C N 51)
 (63) 1968 Ker LJ 1 = 1968 Ker LT 205, Gopinatha Pillai v. State of Kerala — Over. AIR 1970 Ker 301 A (C N 49) (FB).
 ILR (1969) 1 Ker 329, Vishnudatta Anthar-anam v. Commr. of Agricultural Income-tax, Trivandrum — Revers. AIR 1970 SC 2055 (C N 437).
 (69) 1969 Ker LJ 389, State of Kerala v. Padmanabhan Asari — Over. AIR 1970 Ker 301 A (C N 49) (FB).

MADHYA PRADESH

- (67) 64 ITR 285 = 1966 MPLJ 1118, Kishanlal v. Commr. of Income-tax — Diss. AIR 1970 All 620 D, E (C N 89) (FB).
 AIR 1969 Madh Pra 72 = (1969) 72 ITR 417, Commr. of Income-tax, M. P. v. Champalal Sukhram — Diss. AIR 1970 All 620 D, E (C N 89) (FB).
 (69) S A No. 940 of 1965, D/-3-3-1969 (Madh Pra), Hajara Begum v. Guljar Khan — Over. AIR 1970 Madh Pra 280 (C N 47)

MADRAS

- (1904) ILR 27 Mad 21 = 13 Mad LJ 300, Somnath Ayyar v. Venkata Subba Ayyar — Diss. AIR 1970 All 652 A (C N 94) (FB).
 AIR 1948 Mad 433 = (1948) 1 Mad LJ 400, Mythili Ammal v. Mahadeva Ayyar Diss. AIR 1970 Andh Pra 411 A (C N 67).
 AIR 1949 Mad 591 = (1949) 1 Mad LJ 61, Ponuswami v. Alamelammal — Diss. AIR 1970 Andh Pra 411 A (C N 67).
 AIR 1956 Mad 271 = ILR (1956) Mad 1035, Anganna v. Angammuthu — Diss. AIR 1970 Andh Pra 411 A, B (C N 67).
 AIR 1956 Mad 677 = 69 Mad 555, In re. K. Annamalai Chettiar — Diss. AIR 1970 Andh Pra 411 A, B (C N 67).
 1964 (1) Cri LJ 242 = (1963) 2 Mad LJ 82, Meliappa Chettiar v. Sivagami Achi — Diss. AIR 1970 Punj 515 (C N 82).

Madras (contd.)

- (1964) 51 ITR 467 = (1963) 2 Mad LJ 33, Mathew Abraham v. Commr. of I. T. — Over. AIR 1970 Mad 497 A (C N 145) (FB).
 (1966) 17 STC 284 (Mad), Hajee Abdul Wahab and Sons v. Govt. of Madras — Over. AIR 1970 Mad 494 A (C N 144) (FB).

MANIPUR

- AIR 1969 Manipur 3 = 1969 Cri LJ 124, Leithanthem Bidhu Singh v. Khangrakpam Ibobi Singh — Diss. AIR 1970 Orissa 209 D (C N 69).

ORISSA

- (67) O J C 104 of 1967 (Orissa) — Over. AIR 1970 Orissa 227 (C N 75) (SB).

PATNA

- AIR 1931 Pat 60 = 14 Pat LT 91, Ramchandra Shukul v. Sri Thakurjee Mandil Dardkadh — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
 AIR 1960 Pat 530 = 1960 BLJR 432, State of Bihar v. Raghunandan Singh — Diss. AIR 1970 Manipur 90 (C N 28).
 (68) C. W. J. C. Nos 197 & 234 of 1968 (Pat) — Revers. AIR 1970 SC 2041 (C N 434).

PUNJAB

- AIR 1933 Lah 35 = 34 Cri LJ 45, Nagar Singh v. Emperor — Diss. AIR 1970 Punj 532 (C N 83) (FB).
 (63) Second Appeal No. 725 of 1962, D/-6-9-1963 (Punj) — Revers. AIR 1970 Punj 522 (C N 85).
 AIR 1966 Punj 232, Municipal Committee, Amritsar v. State of Punjab — Revers. AIR 1970 SC 2182 A, C, F (C N 448).
 AIR 1966 Punj 528 = 1966 Cri LJ 1479, Ahmad Din v. Abdul Salem — Diss. AIR 1970 Orissa 209 D (C N 69).
 (69) C. W. No. 2917 of 1965, D/-23-10-1969 (P & H) — Revers. AIR 1970 Punj 525 A (C N 86).

RAJASTHAN

- 1969 Lab IC 513 (Raj), Shrikishan v. State of Rajasthan — Revers. AIR 1970 Raj 261 A, B (C N 61).

MISCELLANEOUS

- (1912) 13 Cri LJ 267 = 6 Low Bur 41, Nga I v. Emperor — Diss. AIR 1970 Punj 532 (C N 83) (FB).
 AIR 1929 Rang 96 (1) = ILR 6 Rang 743, Ma Dan v. Tan Chong San — Held no longer good law in view of AIR 1935 PC 85 as interpreted AIR 1970 All 652 A (C N 94) (FB).
 AIR 1926 Sind 150 = 27 Cri LJ 334, Nazar Shah v. Emperor — Diss. AIR 1970 Punj 522 (C N 83) (FB).

COMPARATIVE TABLE

(10-11-1970)

A. I. R. 1970 December = Other Journals

AIR 1970 S C		AIR 1970 Allahabad		AIR 1970 Delhi		AIR 1970 Madras	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
2007	...	652FB	1970 All L J 757	244FB	...	434	83 Mad L W 232
2015	1970 Ker L T 588		1970 All W R	250	...	487	(1970) 2 Mad L J 61
	1970 S C D 818		(HC) 485	257	...		(1970) 2 Lab
2025	(1970) 2 S C A 143		1970 All Cri R 343	261	...		L J 211
	(1970) 2 S C R 275			264	...	491	1970 Mad L W
2037	(1970) 2 Com L J 8	AIR 1970 Andh Pra		267	72 Pun L R (D) 196		(Cri) 157
	(1970) 2 S C J 96						(1970) 2 Mad
	(1970) 2 Andh W R			AIR 1970 Goa			L J 380
	(SC) 46	AIR	Other Journals				1970 Mad L J
	(1970) 2 Mad L J	404	(1970) 1 Andh	AIR	Other Journals		(Cri) 688
	(SC) 46		W R 93	137	...	404FB	83 Mad L W 403
	40 Com Cas 936	407	(1970) 1 Andh	140	...		(1970) 2 Mad
2041	1970 S C D 447		W R 403	142	...		L J 234
2042	19 Fac L R 325	411	...	143	...	497FB	77 I T R 494
	39 F J R 1	419	(1970) 2 Andh				(1970) 2 I T J 207
			W R 1	AIR 1970 Gujarat		503	82 Mad L W 642
2051	1969 Ker L T 701	426FB	ILR (1970) Andh				(1970) 1 Mad
	76 I T R 460		Fra 577	AIR	Other Journals		L J 159
	(1970) 1 I T J 803	432	...	257	...	501	82 Mad L W 630
	(1970) 2 S C J 85	434	...	269	...	507	82 Mad L W 724
2055	1970 Ker L T 352	438	...	277	(1970) 11 Guj		(1970) 1 Mad
	1970 Ker L J 379	440	...		L R 517		L J 395
	1970 S C D 786	446	...	284	ILR (1969) Guj 551	509	1969 Mad L W
	78 I T R 59						(Cri) 174
2057	76 I T R 706	AIR 1970 Assam		AIR 1970 J & K			(1970) Mad L J
	Assam L R (1970)						(Cri) 231
	S C 39	AIR	Other Journals	AIR	Other Journals		(1970) 2 Mad L J 30
	(1970) 1 S C R 780	130FB	Assam L R (1970)	179	...	510	(1969) 2 Com L J 25
	(1970) 2 I T J 4		Assam 181	181	...		(1969) 2 Mad
	(1970) 2 S C J 325	131	...	184	...		L J 449
2062	(1970) 2 S C R 213	137	...	190	...	512	1969 Mad L W
2067	...	142	Assam L R (1970)				(Cri) 208
2072	...		Assam 164	AIR 1970 Kerala		AIR 1970 Manipur	
2075	...						
2079	1970 Ker L T 630	AIR 1970 Bombay		AIR	Other Journals	AIR	Other Journals
2088	1970 Ser L R 375			289	ILR (1970) 1 Ker 10		
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Here is another standard work on the law and practice of building contracts, which opens with a description of the nature of a building contract; it examines its relation to the general law of contract, the course of a typical building operation, and contract documents like Agreement, Conditions, Architect's plans, Bills of Quantities, Specifications, and other documents. The present publication is intended to deal in a practical and concise way with the most important of the legal problems which can arise when building works are carried out. It includes four recent decisions of the House of Lords and a statute which affect the law in many ways. Two of the cases explain the ordinary implied duties of the contractor as regards materials and, to a lesser extent, workmanship. These cases form the basis of an enlarged section (Ch. 3), and a detailed discussion of the liability of the contractor for nominated sub-contractors and nominated suppliers (Chs. 10 and 15). The two other cases have led to a reconsideration of damages (Ch. 9), of repudiation (Ch. 7) and of risk, indemnity and exclusion clauses (Ch. 8). The statute referred to is the Misrepresentation Act 1967, which is printed and discussed in Chapter 7.

There are several other alterations and additions in this new edition. There are new passages on design costs, lengthy negotiations, essential terms and the position where no price is fixed. There are references to an interesting recent decision which opens up the possibility of a new way of attacking the architect's final certificate. The relationship of such a certificate to defects clauses is considered and the barring of liability for defects by the Limitation Act, 1939 is discussed. The application to builders of the section of the Act relating to concealment by fraud is also referred to, as is also the difficulty which occurs when there is apparently one loss caused by breaches of several contracts. Some views are put forward on how far the terms of a sub-contract which the contractor is directed to enter into become part of the main contract. The possibility is

examined of the employer having a claim in tort against a sub-contractor or supplier as well as the liability of architects in tort to contractors. The architect may not design everything, but what exactly is his liability in law is clarified in a recent judgment which is reported in the book. Chapters 13 and 14 dealing with arbitration and litigation have been brought up-to-date and include some revised sections. The official referee's Practice Direction of 8th July 1968 is printed in full. The latest (July 1968) revision of the R. I. B. A. Form of Contract has been printed in full with notes, and the author has expressed his views clearly on many points of doubt.

Chapter 13 deals with that part of the law of arbitration which affects building contracts. An arbitration agreement ousting the court's jurisdiction entirely is contrary to public policy and void. Although the arbitrator's decision is final as to facts, the court retains control over arbitration agreements and references and an aggrieved party may invoke its assistance, and an award may be enforced by leave of the High Court or a judge thereof in the same manner as a judgment or order. Three chapters in the book are devoted to the formation of a contract, construction of contracts and rectification, and the right to payment and the time for compensation. Employer's approval and architect's certificates, default of the parties and excuses for non-fulfilment, damages and equitable remedies, assignments, substituted contracts and sub-contracts, are the subject of some other chapters, followed by those on insolvency and death, architects, engineers and quantity surveyors, arbitration and litigation. In the appendices are included Definition of prime cost of day work carried out under a building contract, R. I. B. A. Conditions of Engagement, Code of Procedure for Selective Training, Form of direct contract and R. I. B. A. forms of warranty. There are tables of cases and of statutes, while the table of references to R. I. B. A. Forms in the text and the Index are highly useful. With the addition of recent cases, the intention is to state the law as at the beginning of July 1969. The author's aim has been to provide a book which will be as useful in practice as possible, and its contents have been selected and arranged with this end in view.

R.S.S.

AN INTRODUCTION TO LEGAL SYSTEMS. Edited by J. Duncan M. Derrett, D. C. L. (Oxon.), Bar-at-law. Sweet and Maxwell Ltd., London, 1968. (N. M. Tripathi Private Ltd., Bombay). Pp. xix & 203. Price, Rs. 18.

Coming after Prof. Derrett's 'Law, Religion and the State in India' (a series of studies, reviewed in these columns, on aspects of law and religion in India from early times to the present day, including the impact of European administration) and Prof. Sethna's 'Law and Morality' and 'Essentials of an Ideal Legal System' (University of Bombay 1968) the publication under review completes the picture of what an ideal legal system should be and how the different legal systems have evolved into what they actually are at the present day. The beginner needs to know where his own national system of law fits into the pattern created by the different systems. There is little point, observes the Editor of the volume, in exploring the minutiae of one's own system unless one has grasped that it is itself only one of a group of efforts to effectuate justice among human beings. The different systems of law and morality naturally induce conflicts between the different outlooks. India and England, for example, share the legal remedy known as 'restitution of conjugal rights'. While it is doubtful whether it has a useful function to perform in England, it is still a real remedy among Hindus in India. Hindus in England must understand it as it is understood in that country. A Hindu wife coming to England to enforce her rights against her erring husband, domiciled in that country, will discover, to her chagrin, the fact that a deserted wife, with a decree for restitution in her hand, has no right to her husband's society against his will and may be restrained by injunction from disturbing his peace and quiet. Basic information on such contrasts in outlook and allied matters should be more readily available to practitioners as well as students. The present book has chosen seven systems of jurisprudence for treatment, systems that are coherent, possess a unity and have made their marks on the world.

In the six sections which comprise this book, six specialists explain the leading characteristics of the major historic legal systems, each outline presenting an interesting account of the sources and development of the system concerned, its basic concepts of law and jurisprudence, and its capacity for growth and change in relation to changing social and economic conditions. Prof. J. A. Thomas, for example, shows the virtue of Roman Law and the qualities which survive in modern civilian

jurisprudence. Dr. Z. D. W. Falk explains the nature and history of the Jewish law, which is one of the world's monuments of juridical science and forms the basis of Israeli legal thinking today. N. J. Coulson considers the law of the 400 million Muslims the world over and Prof. Derrett explains the equally important, but older, Hindu law. Chinese law is described by H. McAleavy. African customary law in its confrontation with laws imported from Europe is handled by Prof. A. N. Allott, while the last chapter is devoted to English law, described in considerable detail in the light of the other systems by Prof. A. K. R. Kiralfy.

Emphasis has throughout been on practical matters as well as jurisprudence. Each section deals with the way in which laws are established and enforced, examining the role of legislative bodies, the judiciary and writers on jurisprudence. The relationship between religious and legal systems receives particular attention, and the concept of property is analysed. The laws of contract and succession are examined, instructive comparisons emerging on topics such as fraud, misrepresentation and adverse possession. Family law, including marriage, divorce and adoption, is treated in detail. The details of criminal law and procedure are compared. Central and Local Government, and their finance and staffing are discussed, and movements for law reform are noted and their results evaluated. As to Hindu law, it should be noted that it has always taken religion and superstitious sanctions as the allies of jurisprudence, while recognising that no actual judgment could ignore public opinion or public policy. Principles based upon religion never seemed to deny the force of purely secular needs, and a conflict between religion and State rarely arose, as the organs of Government have always considered it their permanent obligation to enforce every individual's duty to show compassion, responsibility and loyalty. Thus, religion is not a true source of law but a part of the conceptual frame work within which a legal system works; similarly beside the ultimate requirements of morality all such law is dwarfed, and on this every religion is agreed.

At the end of each section is an useful list of books for further study, and the index at the end of the book is quite useful.

R.S.S.

THE PHILOSOPHY OF THE INDIAN CONSTITUTION. By K. Subba Rao, Former Chief Justice of India. The Advocates Association, Bangalore, 1969, Pp. 32. Price Rs. 1.50.

The historical and other circumstances that bring a Constitution into being and the hopes and aspirations of the members of the Constituent Assembly which frames the Constitution go to mould its philosophy. The Constitution is the form in which a State is organised, and its philosophy deals with the principles underlying it. It is the soul of the Constitution, and the provisions thereof, the body. If this philosophy is ignored or misinterpreted in any way the Constitution loses its soul and ceases to be itself. 'The Philosophy of the Indian Constitution' was the subject of the Bangalore Bar Association Endowment Lectures of 1969. The Endowment Lectures Fund was constituted in 1959 to finance a scheme of lectures on topics relating to the legal profession, development of law and legislation, international law and Human Rights and other allied subjects, and the Lecture under notice was the seventh in the series.

The following are the basic principles of the Indian Constitution: (1) Federation with a bias towards the Centre; (2) Constitutional democracy with its division of powers, territorial and functional; (3) Representative Government through adult franchise; (4) Responsible Government through Parliamentary executive; (5) Social control of economic power; (6) Social justice, i.e., the right of the underprivileged to the State's protection against ruthless competition; (7) The doctrine of the tolerance of religious diversity (8) The high concept of the rule of law in which social justice and freedoms are integrated; (9) The conferment of power on the higher judiciary to enforce the fundamental rights, to maintain a just balance between freedoms and social justice, and to function as a balancing wheel of federation.

The learned lecturer begins by analysing the various slogans of economic ideology including democratic socialism, that are being flaunted to gain political ends. Democratic socialism seeks to bring about an egalitarian State through the democratic process. It does not accept nationalisation of property except under extraordinary circumstances and provides for social control of economic power in order to prevent possible imbalances in the economy. The economic ideology of the Indian Constitution is reflected in Articles 14, 19 (1) (f), 19 (1) (g), 19 (4) and (6), 31, 32, 39 (b) & (c), 226, 265, 301 to 307. The Constitution seeks to implement the ideal Gandhian doctrine of Trusteeship through the Rule of Law,

which satisfies the modern tests, both substantive and procedural. The fundamental rights mentioned in Part III of the Constitution and the Directive principles of State policy contained in Part IV bring out the social and economic content of law. The rule of law envisaged by the Constitution is a powerful instrument for bringing about an egalitarian society. It maintains the balance between liberty and authority, ensures equality before the law to everyone, keeps just equilibrium between freedom and social control, is a powerful instrument of socio-economic justice, and enjoins on the executive not to interfere with the rights of the people except in accordance with law. The next doctrine that received constitutional acceptance is that of social justice. While Parts III and IV of the Constitution provide for an integrated scheme of social justice, the doctrine of equality is taken care of in Articles 15 to 18 of the Constitution. As regards religion the constitutional doctrine may be described as that of tolerance of religious diversity, and the learned lecturer proceeds to state the effects of the relevant provisions of the Constitution and the case law on it in nine main propositions.

Since the Constitution came into being, the executive has been making attempts to remove judicial checks. With a few bold and deft strokes of amendment the constitutional philosophy was changed and a totalitarian slant given to it, unrestricted power being conferred on Parliament to make laws infringing some of the fundamental rights of the people. The executive and even the Supreme Court in some of its judgments added to the process of deflating the constitutional philosophy, although the latter has sometimes tried to stem the tide as far as it lay within the scope of its jurisdiction. In the famous Golaknath case the Supreme Court held that the Parliament has no power, by the amendment of the Constitution, to take away or abridge the fundamental rights. To enable one to appreciate the scope of this judgment and its effect on the Philosophy of the Constitution, the lecturer lays special emphasis on six fundamental principles of the Constitution. As it is, in the realm of property and business, constitutional despotism has replaced the rule of law though in other respects the original philosophy holds good. The lecturer finally refers to the proposed amending bill which seeks to amend Article 368 so as to confer a power on the Parliament to amend the Constitution in order to take away or abridge by a special majority the fundamental rights of the people.

R.S.S.

LAW AND MORALITY. By M. J. Sethna, Department of Law, University of Bombay, University Buildings, Fort, Bombay 32. 1st Edition, 1969. Pp. 73. Price, Rs. 7.50.

The object of the present handy work is to show the respective provinces of law and morality and, while explaining how they are inter-dependent, to emphasise clearly how they are not exactly identical. Morality appeals internally to the human conscience while positive law sometimes coerces, or attempts to coerce, the human conscience. Positive law is a powerful instrument for enforcing morality at a reasonably high level, but no man could be made a good citizen through the fear of punishment. There are fields on which law does not encroach; there are values like those of social education, religion and art, which are often more potent in their effect than the value of law, which in its nature cannot be sole or supreme. This is not, however, to deny that law is absolutely necessary, for without it, morality would be thrown overboard. Positive law rules through sanctions, such as those of fine, imprisonment, decrees for specific performance, restitution, damages, processes of execution of decrees and orders of courts of law, and in international law, quasi-legal sanctions like condemnation or censure by the U. N. boycott, reprisals and, in the ultimate resort, by even recourse to arms.

There are seven chapters in the book under review dealing, inter alia, with the concept of law, the nature and purpose of morality, the achievement of morality through legislation, the relation between law and morality, the morality of legal rights and duties and the morality of punishment. The purpose of law, which is an essential social institution, is to promote the security of the citizen, prevent class conflict, procure socio-economic welfare for all classes and protect and enforce the rights and obligations and liberties of the citizen. Morality on the other hand guides principles of ideal behaviour in consonance with what is right and good. Positive morality is what society creates or dictates, it is the conscience of the people and it is enforced through social sanctions. Legislation is only a powerful instrument for attaining peaceful conditions of living so that men may live with due respect to the rights and liberties of others and in the due discharge of their own duties. Good laws bring credit to the Government of the State, which works through the machinery of its laws. Having examined the difference between positive law and morality which could be easily bridged and having examined the extent to which morality should prevail

in a healthy legal society, the author rightly concludes that law has its limitations and is not meant to make men moral by the force of sanctions. Positive law needs the help of ethics, for ethics alone, more than law, can facilitate the leading of the higher life which instinctively sees what is good and right from what is mischievous and wrong. Law has power to impose sanctions, but religions, moral and philosophical ideas should also be borne in mind. To bring about the reconciliation of the conflicting claims of the various classes, it becomes desirable at the outset to observe and study the malady that afflicts a particular section of society, for this is essential before any actual law-making is taken in hand. As to punishment for breaches of the law, its moral justification lies in the very objectives it is meant to secure; they are, the prevention of the offender from committing the crime again; the informing of society at large that crime does not pay; the working of retribution "As you sow so you reap" — and the education or reformation of the criminal.

What is the extent to which morality could efficaciously be enforced through legislation? The present work seeks to show that there is a limit beyond which legislation cannot enforce morality and the forces of good living. Law should help to enforce morality upto a high standard, but it cannot make men intrinsically good-hearted and noble, a conclusion to which few will demur.

There is an useful index to the book, but expressions like "Powerful instrumentality towards enforcing" and "enforcing to obedience and peaceful living" and several others would seem to admit of improvement. R.S.S.

POTTER AND MONROE'S TAX PLANNING (WITH PRECEDENTS). 6th Edition by D. A. Shirley, M. A., Bar-at-Law, and Stephen J. H. Oliver, M. A., Bar-at-Law. Sweet & Maxwell, London, 1970. (N. M. Tripathi Private Ltd., Bombay). Pp. xxxix & 485. Price, Rs. 90.

"Tax Planning" means that a man should make an intelligent appreciation of the incidence of tax and should take it into account as a relevant factor in planning the dispositions of his property as between himself and members of his family. If we are to be taxed according to law, the introduction of pseudo-moral judgments into the administration of fiscal measures should be deprecated, for prejudice cannot be substituted for reason in discussing this topic. If one lawful course involves the payment of more tax and another

less, the choice between them raises no moral issue. What the law permits cannot be reprehensible, especially as this branch of the law knows no equity. Problems of tax planning are normally approached by regarding the family rather than the individual as the tax paying entity, and, as the precedents in the book under review show, a saving of tax and of duty may often be effected. This subject has been dealt with also in "Tax and the Family Business" (Sweet and Maxwell 1970).

The twofold purpose of the present publication is to provide the legal draftsman with a supplementary precedent book for use where considerations arise outside the scope of the standard works on conveyancing precedents, and to assist all those who are called upon to deal with the disposition or management of property and wish to understand the principles concerned and visualise the type of disposition likely to be advantageous. In order to preserve the book's practical nature, the text has been built around the precedents. There are some fifty precedents, grouped in eight chapters. It is not merely a precedent book, however, for at the beginning of each chapter an account of the tax problems arising out of the particular topic is provided. The book also describes the principles involved in 'tax planning' in such a way that a reader without specialised knowledge may comprehend them. Footnotes have been reduced to the minimum, and the text and the precedents have been set one against the other, to balance, as it were, theory and practice.

The most important changes in the tax law since the previous edition (1968) are contained in the Finance Act, 1968 and in the Finance Act, 1969. The former introduces the notion of aggregating with his parent's income the income of an infant where the settlor is not the infant's father or mother. The subject was referred to also in "Elements of the law of Income and Capital Gains Taxation" (Stevens, 1970). The Finance Act, 1969 recasts the estate duty changing provisions of the Finance Act 1954. It is said that the greatest change is the imposition of estate duty on the death of a beneficiary under a discretionary trust. The new legislation has rendered obsolete parts of the previous edition of this book; the total length of the text has been considerably reduced and several precedents of doubtful value omitted.

The table of contents gives the titles of the eleven chapters along with the cross-heads of each chapter as well as a description of the precedents provided in it. The 11 chapters, cover, respectively, deeds of covenant, separation deeds, family settlements, discretionary trusts, marriage settlements, charities, in-

surance policies, variation of existing settlements, partnerships, service agreements and pension schemes, and wills. A table of cases, a table of statutes and index are provided, while in the appendix is included a note published in November 1961 by Inland Revenue on Estate Duty on benefits under superannuation schemes. The present book should, by illustrating the possibilities, be of use to all who deal with matters of taxation.

THE TECHNIQUE OF PERSUASION

By David Napley, Solicitor of the Supreme Court, England. With Foreword by the Hon. Mr. Justice Melford Stevens. Sweet and Maxwell, London. 1970. (N. M. Tripathi Private Ltd, Bombay). Pp. xii & 104. Price, Rs. 27.

Why "The Technique of Persuasion" rather than "The Art of Advocacy"? The author holds, and many will agree, that the art of advocacy is not confined merely to the four walls of the lawyer's chambers and the courtroom but extends all down the line from the time that a lawyer takes on a client's case to the moment it is finally disposed of, and consists essentially in the cultivation of the quality of persuasiveness in every detail, however small, a quality that is to be acquired by diligent observation and study. The lessons which can be easily learnt by any lawyer who reads Mr. Napley's pages, observes Mr. Justice Melford Stevens in the Foreword, "were all too often rubbed in by sharp and ferocious rebukes administered in public by men who were overworked and underpaid..." This goes for several judicial officers in the Indian Law Courts as well.

The present small book represents revised versions of talks given by the author to the Associate and Young Members of the Law Society, London. As a result the Society initiated courses of training in advocacy, which have now become an established part of the facilities offered by it under the control of its Education and Training Committee. The result of over thirty-five years observation and practice of the technique of persuasion has been presented in this book, which analyses and explains the mistakes usually made by lawyers, a valuable part of the book being that devoted to the preparation of cases. In discussing the essential know-how of the lawyer's profession, viz., the most effective way to persuade, the author considers that, in the examinations for lawyers, it should be made compulsory for every candidate to sit for a paper on the elements of

psychology, the science of human behaviour. Some knowledge of it lies at the root of successful cross-examination; it is an integral part of skilled negotiation; and it is indispensable in the field of public relations.

"Preparation for Trial" and "Presentation in Court" are the titles of the two sections into which the book is divided. The former section deals, *inter alia*, with the preparation of the case, discovery of documents, expert witnesses, the preliminary enquiry, the preparation of witnesses, and the preparation for cross-examination. The latter section is devoted to the duties of an advocate, preparation in Court, addressing the Court, presentation of the case, opening address, examination-in-chief, cross-examination, and re-examination. At the outset it is necessary to define the lawyer's objective and what he must establish to achieve it, before proceeding to the serious business of preparation, which forms the most important part of the art of advocacy and the technique of persuasion. While presenting the case for his client to its best advantage, the advocate should also be bound by certain ethical rules, and he should assist the Court in reaching a just decision on the facts and the law. Neatness and tidiness in dress is indispensable as also strict adherence to punctuality. In the matter of delivery the points to be watched are clarity; simplicity; putting the points succinctly; developing them in an interesting way, presenting them with integrity, but without any trace of pomposity. The advocate's task will be to persuade judge to accept the arguments and reasoning he places before him. Although the case is decided on the evidence and not on the personality of the lawyer, unless one advocate is more persuasive than another, the result will be an indeterminate decision. An advocate, in pleading a cause, may not express his own opinions, but it will be his business to present to the Court what his client 'should' say for himself if he had the necessary skill and knowledge, and not what the client 'would have' said.

Apart from the author's own experience in the Courts, he has had the advantage, over many years, of watching others who have pursued the art of advocacy. The present work should provide a measure of guidance and confidence to the beginner and enable him to avoid at least some of the errors of his professional life.

R.S.S.

CONCISE COLLEGE TEXTS ESTATE DUTY IN ENGLAND AND WALES.
By A. Douglas Lawton, LL.B., B. Sc. (Econ.), Bar-at-Law. Sweet and Maxwell Limited, London, 1970. (N. M. Tripathi Ltd., Princess Street, Bombay 2). Pp xxi and 169. Price, Rs. 14.20.

The present work has been designed as a concise statement of the main principles of estate duty in England and Wales, inasmuch as the basic law in respect of persons dying after the 15th April 1969 has been altered by the Finance Act, 1969. It was the Finance Act, 1894 which introduced estate duty and is still the basic code. It provides the scheme of liability to duty and the basis of valuation of property liable, specifies the persons accountable for the duty, and prescribes the machinery of collection. Although extensively altered by amending legislation, the 1969 Act continues to be the framework upon which the whole body of estate duty law is erected. The publication under review which covers England and Wales, owes its origin to the third edition of *An Outline of Estate Duty in Scotland*, which was published in 1967 for the Institute of Chartered Accountants of Scotland. It deals with the Finance Acts of 1968 and 1969, and the author has tried to base the English edition on the accepted formula which has proved popular with Scottish lawyers, accountants and students. Nevertheless a few topics had to be largely re-written because of the differences in the legal structure in the two countries. The arrangement of the book follows the Act in its main divisions, commencing with property liable to duty and certain special categories of such property, and then proceeding to valuation, exemptions and deductions, rates and reliefs, accountability, payment and procedure on appeals. The law is stated as at 1st September, 1969.

Estate duty is a charge leviable upon the principal value of all property, both moveable and immoveable, which passes or is treated as passing on the death of any person. The meaning of the term 'passing' is considered fully in chapters 2 and 3. The property passing on death is not restricted to the deceased's own free estate, which he owned absolutely and could dispose of at will, but also includes settled property in various circumstances, such as the capital of trust funds and gifts made by the deceased within a certain period after his death. The broad principle of liability for estate duty is that the burden of it falls upon the persons who are entitled to it on the death or as donees of property given by the deceased. To secure efficiency in the collection of the duty, persons having an administrative title to the property are required to account for the duty before passing the re-

mainder of the property to the persons beneficially entitled to it; the executor of the deceased is required to pay the duty on the estate passing to him as executor before accounting to the beneficiaries. The duty is imposed upon the basis of the legal rights and liabilities of persons in relation to property as determined by the general law. In a problem relating to liability to duty the first step is to ascertain the legal situation of the persons concerned, and to apply the principles of the relevant branches of law, like the law of domicile, contract, trusts, gifts, property and life assurance.

There are eleven chapters in the book, the first five dealing, *inter alia*, with property liable to duty, gifts, joint and common property, life assurance policies, and interests under trusts or settlements. The valuation of property for estate duty, exemptions and deductions, rates and reliefs, accountability, and payment and appeals are covered in the other chapters. The Appendices relate to the previous rates of estate duty and the current amount of duty, list of Forms of Affidavit and Account and specimen Estate and Model Affidavit and Accounts. The table of cases, the table of Statutes and index, are other useful features.

R S.S.

AEROSPACE LAW. By Nicolas Mateesco Matte, LL.D., Professor of Air & Space Law at the University of Montreal. Sweet and Maxwell Limited, London, 1969. (N. M. Tripathi Ltd., Princess Street, Bombay 2), Pp. 501. Price, Rs. 99.

Man, the State, and the International community cannot live for ever in a legal 'no man's land.' The launching of satellites into space must make one sit up. The first sputnik was placed in orbit on the 4th October 1957. More than 1000 objects now move about in space, among them being about 300 satellites which will remain in space for different lengths of time. It is not surprising, therefore, that international, governmental, regional, continental and State organisations immediately began to work to establish adequate norms and lay the foundations of a new legal code. The uses and exploitation of space,—technical, economic, meteorological, military, sanitary, and for transport and research,—demand a corresponding law and a structural transformation of the existing international organisations, because the United Nations resolutions dealing with space are considered vague and lack binding force, and the present make-up of its specialised agencies, including WHO and UNESCO, are thought to be insufficient and obsolete.

The volume under review considers doing away with the boundaries between the air and the remainder of space, as drawn up by the sovereign States and,—after a presentation of living conditions created by satellites—analyses the new law resulting from the peaceful uses of space. This utilisation is dealt with from its technical and economical angle as well as from the military one. The present analysis takes into account the nuclear dangers, the space laboratories, the present division of atomic power between the United States and the U. S. S. R., and its consequences for peace and the danger of war, the non-proliferation of nuclear arms, as well as the problem of disarmament. The responsibility for damages caused in space or on land and the assistance to be given to astronauts in distress are also covered.

The author considers that the moon and other celestial bodies can in fact be appropriated, and the present resolutions of the U. N. and the Treaty on Peaceful uses of Outer Space cannot stop it, so that the States must draw up and ratify in good faith a world-wide international agreement. The United Nations may be a favourable place for the emergence of certain principles of space law, but, its charter and composition being what they are, any legal space organisation will have to be set up only by State agreements. The present space law is developing in a regime of bipolar competition between the United States and the Soviet Union and so long as this lasts, the world will be far from the possibilities of a more general participation. A special status must be given, says the author, to economical uses of space, such as satellite communications. Here also the old ideas of law should make way for new ones which do not stop at the frontiers of States. The Treaty on the Peaceful uses of Outer Space suffers from weaknesses which reduce its scope and efficiency and it will have to be revised, or replaced by an agreement relating to a code of conduct in good faith in space.

The present volume is divided into five Parts. The first Chapter of Part I, on space and space vehicles, dwells on the movement towards a new functional theory regarding the legal status of space, and the second Chapter deals with space vehicles and their use in scientific research and telecommunications. The four Chapters in Part II are devoted to the activities of non-governmental organisations, Governmental organisations and the development of space law, bilateral co-operation, and State activities. Part III is concerned with the economic utilisation and exploitation of space, while Part IV deals with the treaties, agreements and projects on the peaceful uses of outer space. The problems of

aero-space law are stated as they may arise, but no answers are attempted, because it is recognised that principles of law in this domain must at the moment be premature.

At the end of the volume are twenty annexes giving the text of the U. N. General Assembly resolutions, conventions, Agreements and Treaties; there is a Bibliography, and an Index of authors cited. To have the table of contents at the very end of the publication, rather than at the beginning, will be an innovation to many who may think it is not given its due place. R.S.S.

THE LAW AND PRACTICE RELATING TO COMPANY DIRECTORS.

By Vircent Powell-Smith, LL. M., J. C. B., Dip. Com., Lecturer in Law at the University of Birmingham. Butterworths, London, 1969 (Sole Selling Agents: Eastern Law House Pvt. Ltd., Calcutta), Pp. xxvii & 233, Price £2-16s.

As observed by Sir Richard Powell, Bt., M. C., Director-General of the Institute of Directors, in the Foreword, today's director has to be a man of many parts, not the least of them being the need to have a knowledge of where he stands legally. The object of the present publication is therefore to provide an easily read description of the law relating to company directors. It describes the principal legal implications arising from the office of director and discusses the legal aspects of a company director's work, illustrated by reference to decided cases. Although some details have been omitted, the aim has been to provide a practical handbook for practical men. Where the law is not clear, the most likely solution has been suggested, and the author has also drawn on trans-Atlantic experience where this seemed helpful.

After tracing the evolution of the modern company in the first chapter, the author proceeds to discuss the qualification and appointment of directors, their service, emoluments, taxation and fringe benefits, in the next four chapters. The last of these chapters does not deal with all taxation matters likely to affect directors, but indicates those matters which are most likely to concern them and those provisions in the law where specific reference is made to directors. These are: Remuneration deductible by close companies, expenses and benefits; stock option plans and employees' shares; loans; payment for loss of office; superannuation; life policies; and national insurance. The directors and the Board, relation of directors, meetings, and powers of directors are the subject of the next four chapters, while chapter 10 is devoted to the duties and

obligations of directors. Directors owe to their company duties of good faith, loyalty, skill and diligence. The duties of loyalty arise out of the fiduciary relationship between the director and his company and are virtually identical with those imposed on trustees. The Courts are well qualified to operate in this area, the law being fairly well defined. On the other hand, a director's skill and diligence are somewhat indefinable, because of the difficulty the Courts find in dealing with problems of business economics and administration. An understandable reluctance to move into the business world and to interfere in matters of business judgment is evident. The Courts have been unwilling to condemn directors when loss has been occasioned to the company by a misjudgment of the course of business events, because it is always easy to be wise after the event. The last two chapters examine the liabilities of directors on contracts and for torts of the company and statutory liabilities for fraudulent trading, misfeasance proceedings and offences. Appendix I reproduces the principal sections of the Companies Acts of 1918 and 1987 and Appendix II gives the City Code on take-overs and mergers.

This is not primarily a book for lawyers, says the author, but it is intended for company directors and company executives generally. He gives in fairly non-technical and straightforward language the background to the increasing complexities of company law. The publication is a practical handbook which may be easily understood by company directors and executives as well as lawyers. R.S.S.

ROLE OF DIRECTORS IN COMPANY LAW.

By Ch. S. Rao, M.A., B.L., C.L.B.S. The Madras Law Journal Office, Mylapore, Madras, 4, 1970. Pp. xxxvii and 448. Price, Rs. 25.

The Company Director is the keystone in the arch of the business structure of a Company because, in the final analysis, a company depends for its success on the Director's ability and integrity. Although the interest of the share-holders constitute the ultimate factor involved, the entire responsibility for management rests in practice on the Board of Directors, as the share-holders are in fact widely dispersed and out of touch with the day-to-day affairs of the companies. Progress depends mainly on the character and administrative acumen of the Directors and a correct appreciation of the Director's position and status in law is therefore necessary both for ensuring proper administration and for preventing maladministration, and that is the theme of the work now under review.

2. The present work sets out to demonstrate the norms that derive from the positive laws over and above the provisions of the Companies Act, 1956. Based particularly upon those sections of the Act which deal with the Directors of companies, the subject-matter is discussed against the background of the whole of the Indian Trusts Act and other laws, Indian and foreign. Some judgments of the American Courts, with special notes by the author, have been included. The Seventeenth Report of the Law Commission on the law of trusts is also reproduced in the form of an appendix.

3. As observed by ex-Chief Justice Subba Rao in the Foreword, the author gives the Director a status consistent with the doctrine of constructive trusteeship, and develops the doctrine in the light of the provisions of the Indian Trusts Act and the Indian Partnership Act. Chapter I sets out the status of constructive trustees, and the second chapter deals with the joint responsibility of the Board of Directors. Chapter 3 traces their civil and criminal liability to their status as constructive trustees and their relationship inter se. The last chapter illustrates the application of the doctrine to cases of unjust enrichment and abuse of power. The author concludes that the position of the Directors will continue to be onerous so long as the scheme of the law of companies and of trusts stands as it is at present, but that it carries the quality of a mission whose best reward can only be in its service aspect.

4. There are six appendices; the first two are devoted to the Indian Trusts Act (II of 1882) and Report on Trusts Act, 1882, Appendix V is on American judgments, and Appendix VI contains Notes on non-elected directors, on strict-liability doctrine and directors, and on de facto directors. Appendices III and IV reproduce relevant sections from the Indian Companies Act, 1956, the Constitution of India, Civil Procedure Code, Indian Contract Act, Indian Partnership Act, Code of Criminal Procedure, English Companies Act, 1948, English Trustee Act, 1925, and the Delegation of Functions Act, 1950.

5. The subject-matter of the book is based on lectures delivered by the author to the Incorporated Secretaries of England, Calcutta District, during his tenure as Additional Registrar of Companies at Calcutta. His official experience of the daily administration of the Companies Act and his work at the Bar in the earlier years have eminently fitted him for the present work. The author, it is believed, strikes out his own path where necessary and expresses original views that are at times critical of well-known authors, and there is

no lack of citations in the book. The work should therefore be of help to lawyers and students of law; equally interesting and useful should it be to every Company Director. The subject index at the end furnishes a ready key for a topic-wise approach to the subject-matter of discussion.

R.S.S.

PHIPSON ON EVIDENCE. 11th Edition. By John H. Buzzard, Roy D. Amlot, and Stephen Mitchell. Sweet & Maxwell, London. 1970 (N. M. Tripathi Private Ltd., Bombay) Price, Rs. 175.50.

Evidence, as used in judicial proceedings, has several meanings. The two main senses of the word are: the means, apart from argument and inference, whereby the Court is informed about the issues of fact as ascertained by the pleading; and, the subject-matter of such means. The rules of procedure regulate the general conduct of litigation; the object of pleading is to ascertain for the guidance of the parties and the court the material facts in issue in each particular case; proof is the establishment of such facts by proper legal means to the satisfaction of the court. The province, therefore, of the Law of Evidence is two-fold, viz., to lay down rules as to what matter is or is not admissible for the purpose of establishing facts in dispute and as to the manner in which such matter may be placed before the court.

2. Since the appearance of the last edition of the present authoritative work on evidence in 1963, large areas of the law of evidence have been scrutinised by experts with the object of simplifying and rationalising it. Among recent legislative developments may be mentioned the Criminal Procedure (Right of Reply) Act 1964; Criminal Evidence Act 1965; Criminal Procedure (Attendance of Witnesses) Act 1967; Criminal Law Act 1967; Road Safety Act 1967; Theft Act 1968; and, the Civil Evidence Act 1968, and also several decisions of the House of Lords and the Judicial Committee. In order to incorporate these into the present edition it has been necessary to rewrite or extensively revise the chapters on Burden of Proof, Facts relevant to show identity, Similar Facts, Hearsay in Criminal and Civil Proceedings, Confessions, Written Statements in Criminal Proceedings, Judgments and Rules of Evidence relating to the course of a trial.

3. The Criminal Evidence Act 1965, the Criminal Justice Act 1967, and the Civil Evidence Act 1968, mark the beginning of the end for the hearsay rule. As it, however, survives in criminal proceedings (See Archbold: Pleading, Evidence, and Practice in Criminal Cases. 1969), the operation of the

rule at common law has been reconsidered. The publication of the statutory instrument which, *inter alia*, amends the Rules of the Supreme Court to accord with the rules and procedures laid down in the Civil Evidence Act, 1968 has also been referred to. According to Part I of this Act, hearsay evidence is to be admissible only by virtue of this Act and other statutory provisions, or by agreement, in "Civil Proceedings", which includes, in addition to civil proceedings in any of the ordinary courts of law, civil proceedings before any other tribunal in relation to which the strict rules of evidence apply, and an arbitration or reference, whether or not under an enactment, it does not include civil proceedings in relation to which the strict rules of evidence do not apply.

4. The relevant section of the instrument mentioned above is Part II of the Civil Evidence Act, 1968. The authors have picked out Rules 3, 7, & 8, as particularly important from out of the seven rules. Rule 3 specifies the particulars which are to be included in a pleading where it is intended to put in evidence by virtue of S 11 or 12 of the Act, a previous conviction, finding of adultery, or adjudication of paternity. Rule 7 adds a new Part III to Order 38 and prescribes procedure to be followed where it is intended to adduce evidence under Part I of the Act, and Rule 8 provides for the application of Part I of the 1968 Act to Admiralty Proceedings.

5. Of the 47 sections in the present volume, the first 14 discuss, *inter alia*, matters for which evidence is unnecessary, burden of proof, facts in issue, and facts excluded; Sections 15 to 23 deal with hearsay evidence, admissions, confessions and statements, and declarations; sections 29 to 39 consider public registers, records and other documents, reputation, judgments, and Oath and Affirmation. Rules of evidence relating to the course of a trial, extrinsic evidence, and weight of evidence, are among the topics covered by the other sections.

6. In the Appendix are included Section 1 of the Criminal Evidence Act, 1898, Section 16 (2) of the Children and Young Persons Act, 1963, and Judges' Rules. The table of cases, the table of statutes, and index are adequate.

R.S.S.

ESTATE DUTY ON SETTLED PROPERTY. By John Mowbray, B.A., Bar at Law. Sweet and Maxwell. London, 1970. (N. M. Tripathi Private Ltd., Bombay). Pp. xvi & 119. Price, Rs. 22 50.

The British Finance Act, 1969 has altered the law in so many ways that the basic law in

respect of persons dying after 15th April 1969 is now entirely different from what it was earlier. Many of the old charging sections have been repealed and new ones added, the rate structure has been altered, and old reliefs have been abolished; and as a result much of the old case law has become obsolete. The law concerning estate duty on settled property has been substantially changed, and the present publication is a close study of these changes. The book contains a full account of the new charging provisions, including "the substituted S. 2 (1) (b)" of the Finance Act, 1894 and the new charge on discretionary settlements, and the rules for ascertaining the extent of the dutiable property. It also includes a full account of the exemptions and reliefs peculiar to the new charging provisions. While approaching the subject from the point of view of surveying the damage after the death, the author has not let the opportunity go to prod the new law for possible loopholes. The law is stated as on 31st October 1969.

2. The author begins by outlining the pre-1969 position and the position subsequent to it. As it originally stood, S. 1 of the Finance Act 1894, which still remains the basic law of estate duty, imposed duty on property 'settled or not settled', passing on the death, and section 2 deemed certain kinds of property to be included in that passing. These included property of which the deceased was competent to dispose of at his death (S. 2 (1) (a)), and property in which an interest ceased on his death (S. 2 (1) (b)). This S. 2 (1) (b) has been replaced by a corresponding substituted section under which settled property passes on the death if the deceased has an interest in possession in it within the last seven years, or previously if he retained a benefit into the seven years. The main definition of 'settlement' for the purpose of deciding whether property is settled property within the substituted S. 2 (1) (b) is an adaptation of the definition of 'settlement' for the purposes of the Settled Land Act, 1925. The substituted S. 2 (1) (b) is not, like the original S. 2 (1) (b) of the Finance Act 1894, confined to interests ceasing on death; it applies to interests continuing after the death, like entailed interests, continuing annuities, and leases for life which continue after the death. It charges duty on settled property, not only where the deceased had an interest in possession in it at his death, but also where he had such interest within the previous seven years. In a separate chapter the author briefly notes the changes in the provisions regarding exemptions and reliefs applying to settled property made by the Finance Act, 1969, with a brief account of the old law in order to enable one to understand the changes and their significance. In the chapter on discre-

tionary settlements, he examines discretionary trusts, the charging provisions, partial benefit and particular exemptions and reliefs, while, in dealing with the purchases of reversionary interests, he covers settlement ceasing before death and continuing settlement. Elsewhere he takes a look at accumulation ceasing on settlor's death, and at accountability and incidence of duty.

3. The nine chapters in the book are divided into convenient sections, the chapter and paragraph numbers being given in the margin in each section; a similar arrangement is followed in the index, although the pages also are duly numbered. There is a table of cases, and a table of statutes. The book should be of real assistance to accountants and legal practitioners who are concerned with estate duty on settled property. R.S.S.

CRIMINAL LAW. By J. C. Smith, M.A., LL.B., Bar-at-Law, and Brian Hogan, LL.B., Bar-at-Law. 2nd Edition, 1969. Butterworths, London. (Eastern Law House Pvt. Ltd., Calcutta). Pp. lxxi & 588. Price, 70s.

The volume under review, which is a textbook about the substantive law of crime, attempts to state and discuss the law which determines whether any act is a crime or not. The book does not deal with the procedure by which the law is enforced or the evidence by which criminal offences are proved, except in so far as these matters are inseparable from the discussion of the substantive law. Procedure and Evidence are equally important subjects, but they are well discussed in such works as *Pleading, Evidence and Practice in Criminal Cases* (Archbold, 1969) and *Criminal Justice and the Treatment of Offenders* (McClean and Wood, 1969), which have already been reviewed in these columns. Since the publication of the first edition of the present work, there have been far-reaching changes in English Criminal law, like the Criminal Law Act, 1967, the Criminal Justice Act, 1967, the Sexual Offences and Abortion Acts 1967 and the Theft Act 1968. There have been other statutory changes and a considerable amount of case law. In the present edition the authors have taken these developments into account and state the law as it stood on 1st February 1969. The discussion of the general principles has been somewhat expanded, but the general plan of the book remains unchanged.

2. The book is divided into two parts, Part I being devoted to general principles, and Part II, to particular crimes. The introductory chapter is concerned with the objectives

which criminal punishment has in view, viz., the prevention of the offender from committing the crime again; the informing of society at large that crime does not pay; the working of retribution—As you sow, so you reap; and the education and reformation of the criminal. Four of the ten chapters in Part I explain crimes of negligence, crimes of strict liability and modes of participation in crime, and incitement, conspiracy and attempt. Chapter 3 classifies offences into treasons, felonies and misdemeanours: arrestable offences, and indictable and summary offences, while chapter 4 examines the elements of a crime—the nature and analysis of *actus reus*, the meaning of *mens rea*, and the coincidence of *actus reus* and *mens rea*. A separate chapter describes the general defences available in a criminal trial like infancy, insanity, diminished responsibility, mistake, drunkenness, necessity, duress, and superior orders.

3. The first three chapters in Part II deal with offences against the person like homicide, non-fatal offences and sexual offences. Murder, manslaughter, suicide, infanticide and child destruction come under the first category; assault and battery, wounding, administering poison, false imprisonment and fire arms and other weapons come next, and in sexual offences are included rape, indecent assault, abduction of women, prostitution, indecent exposure and unnatural offences. Offences against property involving fraud take up a whole chapter under the heads of theft, robbery, deception, cheating, false accounting, blackmail, burglary, handling stolen goods, and forgery. Three chapters dwell on offences against public morals and public order and on road traffic offences. These are comprehensive and cover bigamy, obscene publications, unlawful assembly, public nuisance and libel, reckless driving, and driving under the influence of drink. Offences relating to the administration of justice, like perjury, perverting the course of justice, impeding the apprehension of offenders, and contempt of court, and offences against the security of the State, like treason and violation of official secrets, are considered in the last two chapters.

4. The table of statutes, the table of cases and index are useful. In this attempt to provide the undergraduate—with a complete exposition of the substantive Criminal Law, all the more important crimes are examined, and, as the citation of cases is more extensive than the needs of the undergraduate alone would have required, it should be of assistance to practising lawyers also. R.S.S.

CASE-BOOK ON INDUSTRIAL LAW.

By R. S. Sim, LL.B. (Hons.) Cert. Ed., F. R. S. A., Bar-at-Law, and Vincent Powell-Smith, LL.M., J. C. B., Dip. Com., F. R. S. A. Butterworths & Co. (Publishers) Ltd., 88 Kingsway, London W. C. 2. (Sole selling Agents: Eastern Law House Pvt. Ltd., Calcutta) 1969. Pp. xxv and 387. Price, 32s.

Personnel managers, trade union officials, and others taking professional examinations, have to study industrial law as a special subject. It is becoming more and more important even in the curricula of universities, both in the Law Faculties and in the Departments of Commerce and Industrial Administration. In the present work the authors aim to provide a reasonably-priced case-book covering the subject-matter, and they have also included other source materials in order to add to the usefulness of the book. The book is based upon materials that were available in July 1968, although at the proof stage the authors were able to incorporate an extract from the Government White Paper, *In Place of Strife*, published in January 1969; they have also noted the effect of the Court of Appeal decision in *Torquay Hotels v. Cousins*. The White Paper referred to outlines Government's proposals for reform of the system of industrial relations. The main divisions of this document are:—The role of Government in industrial relations; the present state of industrial relations; the reform of collective bargaining; the extension of collective bargaining; aids to collective bargaining; and new safeguards.

2. The book is divided into three parts. Part I deals with the concept and contract of employment itself, and the duties of the parties, both at common law and by statute. The first chapter covers the creation of the employer-employee, master-servant relationship, vicarious liability, termination of the relationship and remedies for breach of contract, under the heads of damages, injunction and declaration. The next chapter is concerned with the terms of the contract, redundancy payments, wage councils and fair wage clauses. Part II relates to the protection of workpeople and allied matters. So far as statutory provisions go the authors have treated the Factories Act, 1961, but have not included the mines and quarries legislation or that concerning shops and offices. The third chapter dwells on safe working conditions, voluntary assumption of risk and the employee's contributory negligence at common law, while safety provisions, special rules for women and young persons, and the administration of the Factories Act, form the subject of the next chapter. Part III, called Indus-

trial Relations, deals with trade unions, collective bargaining, and the settlement of industrial disputes. It is devoted to the subject of trade unions and their relation to the law of contract, the law of crime, and the law of torts, and the final chapter treats the subject under the heads of common law, statutory provisions, and reform of the law.

3. Repeating his plea the other day for 'one industry, one union,' the President of the Indian Union is said to have urged that a registered trade union should have a minimum membership of at least 10 per cent of the total work force. Chapter 5 of the book gives the English judicial decisions in the matter of union membership and expulsion. Union rules must be strictly followed, but a union rule which is contrary to the Trade Union Act, 1913 will not be enforced by the Courts. An expulsion in accordance with union rules is not open to question in a Court of law, so long as relevant legislation is satisfied and those concerned have acted in good faith. A member cannot be expelled where there is no power of expulsion in the rules, and a resolution expelling a member, which is not in accordance with union rules is *ultra vires*. An expulsion will also be invalid and an appeal will lie to a Court of law where the expulsion is based upon a misinterpretation of a legal term. Where union rules make provision for an appeal against expulsion that appeal procedure must be followed before the Courts will have jurisdiction. A member wrongfully expelled from a trade union, in addition to a declaration of wrongful expulsion and an injunction requiring his restoration to full rights, may also recover damages against the union.

4. At the beginning of each case is a brief headnote which is useful. The table of statutes, the table of cases and the index should also be mentioned. On the whole this is a volume which students of the subject should find of great assistance. R.S.S.

CASE BOOK ON INSURANCE LAW.

By E. R. Harday Ivamy, LL.B., Ph.D., LL.D., Bar-at-Law. Butterworths, London, 1969. (Eastern Law House Pvt. Ltd., Calcutta). Pp. xxviii and 225. Price, 32s.

Believed to be the first case-book devoted exclusively to the law of Insurance, the present book follows the layout of other case-books by the same author. It has been planned in such a way that it can be used with the introductory works on the subjects like Law of Insurance (Preston and Colinsaux, 1938) and also with larger volumes like MacGilliv-

ray's (Law of Insurance, 1961). The author has presented the law of insurance as a whole, and linked up marine and non-marine insurance, for all branches of insurance are held to have developed from marine insurance. He has given a balanced selection of cases, bearing in mind that most of the Law of Marine Insurance has been codified in the Marine Insurance Act, 1906. In regard to this subject, however, he has chosen those cases which are authorities on the interpretation of the words of the sections of that Act.

2. There are eight parts in the book, and the 1st Part, dealing as it does with the general principles of insurance law, covers such subjects as insurable interest, non-disclosure, and misrepresentation, cover-note, premium, alteration of the Policy, exceptions, the conduct of the insured, conditions, construction of the Policy, doctrine of proximate cause, the claim, loss and subrogation. The last three parts are concerned with liability insurance, householder's comprehensive insurance, and jewellery insurance. The topics of injury to the insured, loss or damage to the vehicle, extension clauses, the right of third parties against the insurers, insurable value, warranties, the voyage, assignment of policy, loss and abandonment, salvage and general average, measures of indemnity, and procedure, are considered in two of the Parts, on Motor and Marine Insurance, and Part V, on Life and Personal Accident Insurance, focusses attention on the nature of a contract of life assurance, non-disclosure, and perils insured against.

3. Regarding life insurance, the fact that another insurance company has declined to insure the proposer has been held to be a material one which ought to have been disclosed. Where the Insured dies as a result of drowning, this amounts to "death by accident" within the meaning of a personal accident insurance policy, but death from sunstroke is not death "by accident". An injury is not accidental if it is caused by the intentional act of the assured, even though he does not foresee the effect. The policy sometimes defines "Permanent total disablement" as the "inability of the insured to resume his normal calling". As to motor insurance, the fact that another insurance company has refused to renew an insurance policy has been held to be material to be disclosed. A proposer who is asked whether he suffers from defective vision and replies 'No' is not guilty of making a mis-statement if his eye-sight is sufficient for the purpose of driving, although he wears thick glasses when doing so. Further, although a car may be mechanically sound when unloaded, it is not roadworthy if, when loaded with passengers, it cannot be driven safely. An insurance company must indemnify the insured who has insured

against third party risks, even if the third party's death is caused by negligence or drunkenness of the insured. In fire insurance, normally the insurer is entitled to avoid liability on the ground that the property has been misdescribed, only when the misdescription is material. Damage caused to the insured premises by atmospheric concussion resulting from a fire or explosion in neighbouring premises is not damage by "fire". Actual ignition of the damaged property is necessary; destruction by heat is not enough.

4. The work contains a table of cases, a table of statutes, and an index. R.S.S.

THE LAW OF CONTRACT. 7th Edition by G. C. Cheshire, D.C.L., LL.D., F.B.A., Bar-at-law, and C. H. S. Fifoot, M.A., F.B.A., Bar-at-Law. Butterworths, London, 1969. (Eastern Law House Pvt. Ltd., Calcutta). Pp. lxxviii and 610 and (27). Price not stated.

In the present publication the authors profess to examine the principles underlying the English Law of Contract, to indicate the difficulties which surround their application, to illustrate them from the accidents of litigation and the practices of life, and to justify or excuse their vagaries by a reference to their history, because in the last four years there have been an unusual number of cases concerning the Law in which the decisions or dicta have provoked more than ordinary interest. Fresh thinking has become necessary on old ideas such as, for instance, the problem of fundamental obligation (the *Suisse Atlantique* case), the widening ambit of restraint of trade (the *Easo Petroleum* case), and the recurrent theme of remoteness of damage (The *Heron II* case). In 1968 there was a plethora of statutes on the borderland of law and of social and economic policy, which could not be ignored even if their relation to contract was only incidental. Of these statutes some are now in force, like the Restrictive Trade Practices Act, 1968; others may be enforced by executive order. There has also been the problem of dealing with cases recently decided but still under appeal; the decision in *Gallie v. Lee* in the Court of first instance was being prepared for inclusion, but, after the book had gone to press, the decision was reversed by a judgment of the Court of Appeal.

2. Opening with a historical introduction, the book is divided into nine Parts, the second Part describing the formation of a contract, under the heads of phenomena of agreement, consideration, intention to create legal relations and the contents of the contract, and the fifth, discussing the capacity of infants, corpo-

rations, persons mentally disordered and drunkards, and married women, to make a contract. After considering the elements required to form a contract, the factors that may vitiate it are examined; a 'mistake' at common law may make the contract 'void' and a 'misrepresentation' make it 'voidable.' The English law classifies contracts not only as valid and void or voidable, but also unenforceable though valid. The unenforceable contract is a creature of procedural rather than substantive law and its origin is to be found in the Statute of Frauds, whose history is now examined with a view to observing its surviving effects on the modern law. Several other questions are also considered. Are the reciprocal rights and obligations confined to the contracting parties or may they be extended to persons who took no share in the formation of the contract? Are their rights and obligations transferable by operation of law, as for instance where one of the parties dies before the contract is discharged?

3. Part IV examines the position of contracts that contain a vitiating element under the heads of mistake, misrepresentation, duress and undue influence, contracts rendered void by statute, contracts illegal as being prohibited by statute; contracts illegal at common law on grounds of public policy; and contracts void at common law on grounds of public policy. There is an analytical treatment of discharge of contracts in Part VII under the heads of discharge by performance, discharge by express agreement, discharge under the doctrine of frustration, and discharge by breach. Parts VIII and IX deal respectively with remedies for breach of contract and quasi-contract.

4. The volume has a table of cases, a table of statutes, and an useful index. B. S. S.

CASES ON THE LAW OF CONTRACT. 5th Edition. By G. C. Cheshire, D.C.L., LL.D., F.B.A., and C. H. S. Fifoot, M.A., F.B.A. Butterworths, London, 1969. (Eastern Law House Pvt. Ltd, Calcutta). Pp. xxvi & 510. Price, 50s.

A companion volume to the authors' 'Law of Contract', the present publication is divided into sixteen sections, of which the first seven cover the phenomena of agreement, consideration, intention to create legal relations, the contents of the contract, mistake, misrepresentation, and undue influence. An offer, to be capable of acceptance, must involve a definite promise by the offerer that he will bind himself if the exact terms specified by him are accepted, and it may be made either

to a particular person or to the public at large. There may be a contract the consideration for which is the making of some other contract, which is collateral, although each has an independent existence. If a creditor accepts part payment by a third party in satisfaction of money due to him by a debtor, he cannot afterwards sue the debtor for the balance of the debt. If there is no intention to create legal relations, there may not be a contract even where there is a concluded agreement supported by consideration. Where parties have reached final agreement upon the terms of a contract, but, owing to a mistake, these terms are inaccurately expressed in a later instrument, the Court may rectify the mistake and decree specific performance. A misrepresentation is ground for relief if it is one of the causes that induced the plaintiff to make the contract. An action for rescission of a contract on the ground of innocent misrepresentation must be brought within a reasonable time, and a contract may be rescinded for undue influence in two groups of cases, viz., those in which the parties come within certain specified relations such as parent and child and solicitor and client, and those in which no special relation exists between the parties.

2. Four sections deal with contracts void by statute: Wagering contracts; contracts rendered illegal by statute; contracts illegal at common law on grounds of public policy; and contracts void at common law on grounds of public policy. A contract which is expressly or implicitly forbidden by statute will not be enforced whether or not there is an intention to break the law. Property transferred under an illegal contract is irrecoverable unless the plaintiff can establish a cause of action without being compelled to disclose and to rely on the illegality. If a contract violates no basic feeling of morality but only runs counter to social or economic expediency, it is void; but if it is obviously inimical to the interests of the community, it is illegal. Void at common law on grounds of public policy are contracts in restraint of trade. Contracts which restrain competition by an employee against an employer or by the vendor of a business against the purchaser are *prima facie* void.

3. The last five sections are concerned with infants, privity of contract, discharge of contract, remedies, and quasi-contract. A wife cannot bind her husband contractually unless she has his express or implied authority to contract on his behalf. There is however a presumption that a wife who lives with her husband has his authority to purchase necessities suitable to his style of living. A principal who becomes indebted to a third person upon a contract made by his agent remains

liable for the debt, although he has already paid the amount to the agent. Contractual obligations cannot be assigned, though in certain cases the obligation to perform a contract may be delegated without affecting the rights and liabilities of the contracting parties. A party to an entire contract who has abandoned it after partly performing his obligations can recover nothing for what he has done, and a contract is discharged by 'frustration', which occurs whenever the law recognises that without default of either party, a contractual obligation has become incapable of being performed. The party who commits a breach of contract is liable for the loss thereby caused to the plaintiff, if he had reason to expect that the loss was likely to result. Suits in quasi-contract lie where money is paid by the plaintiff to the defendant's use and where there is a total failure of consideration.

4. In the present edition of the work the authors have removed nine cases and added seven, including the *Suisse Atlantique* case, the *Esso Petroleum* case and *The Heron II* case. They have included the text of the Misrepresentation Act 1967, which awaits the interpretation of the Courts. R.S.S.

LAW AND ORDER: THE SCALES OF JUSTICE. Edited by Abraham S. Blumberg. Trans-action Books. Aldine Publishing Company, 529 South Wabash Avenue, Chicago, III., U. S. A. 1970. Pp. 188. Price, \$ 2.45

Although giving a critical but fair appreciation of the Supreme Court and the judicial and legal systems of the United States, books like *The Honourable Court and Equality* by Statute revealed only one side of the medal; the other, and seamier, side is now exposed by publications like the one under review, which is a merciless indictment of the whole gamut of America's judicial administration, its machinery and processes, which are all so insidiously working for the perpetuation of the numerous inequities and anomalies that disfigure the face of so-called civilised society today. The Fourteenth Amendment to the Constitution of the United States asserts that no State or local government "shall deny any person the equal protection of the laws". The due process clause of the Fifth Amendment provides a similar restraint on the Federal Government. Other clauses of the Bill of Rights guarantee the right to a lawyer, a grand jury indictment, speedy trial, and trial by jury. Do all defendants in American courts get the full benefit of these guarantees? No, say many criminologists and lawyers.

2. The present volume, which consists of

ten articles originally published in the *Trans-action* magazine, seeks to explain how legal inequality has evolved and suggests what must be done to remedy this situation. Central to the present ideology of "Law and Order" is the belief that it can provide for real justice. Yet as the essays in this volume show, the American legal system has often discouraged change and the possibilities of more opportunities for material advancement. Creditors, landlords, and the wealthy tend to receive more favourable treatment by the courts as well as the legislatures and other agencies, while consumers, the young and the blundering pay the consequences. The former group receives the substance of justice; the latter, the form. The "Law and Order" ideology has deceived the middle classes into believing that the good life could be had without addressing ourselves to the underlying issues of poverty, education, health and employment. Unless the poor and the weak receive the kind of protection and resources now available only to the rich and the powerful, it is useless, deplors the author, to prate about law and order.

3. "The Tipped Scales of American Justice", "Lawyers with convictions", "the Lawyers as champion", "Justice Stumbles over Science" and "Juvenile Justice" and "Pornography" are among the titles of the essays included, some of them self-explanatory, others somewhat intriguing, but all of them backed by data assiduously collected, although some readers may consider the publication tendentious in a way. The sum and substance of the argument is that the present ideology of "Law and Order" is so much bunkum and that it should be replaced by a new order of things which would be ushered in by a frontal attack on the citadels of power. As the political and economic struggle intensifies, it is certain that the legal system, the enforcement apparatus, and the courts as political instruments will be at the centre.

4. The Editor of this collection, Mr. Abraham S. Blumberg, is a professor of sociology and law, with major interests in the sociology of law, social stratification, and deviance. He is a member of the New York Bar and the United States Supreme Court Bar and, in his private practice, he specialises in criminal law and constitutional law. R.S.S.

LAW AND ORDER : MODERN CRIMINALS. Edited by James F. Short Jr. Trans-action Books. Aldine Publishing Co. Chicago, U. S. A. 1970, Pp. 188, Price \$ 2.45.

The several essays from the *Trans-action* magazine which comprise the present publica-

tion analyse crimes into those committed by groups with little or no political or economic power, such as the young and minority groups (Part I), those in which the criminal is also the victim, such as abortion, or those in which the victim rationalises his activity as "white collar" or 'respectable' crime (Part II), and those stemming directly from social conflict and dissent, such as political assassination and looting (Part III). Laws define who shall be considered criminal, but much leeway has yet to be made in law enforcement processes, varying in degree with the varying influences at work. It is observed that laws are both explicit and harsher concerning property offences that are committed by the poor (e.g. larceny, burglary and robbery) than they are with respect to the crimes of the 'better classes' (e.g. embezzlement, illegal financial manipulations, and large scale tax evasions). Many types of such law violation are not defined as criminal at all, but rather as violations of civil and administrative law.

2. 'Diagnosing' delinquency is the primary focus of the first essay in the book, and it brings to the task a variety of methods of data collection and measuring devices. The next two papers concern the delinquent gang, 'Why Gangs Fight' treating in some detail a few of the group mechanisms which produce delinquent behaviour and variations in such behaviour. In his book, "Judging Delinquents" R. W. Emerson, of the University of California, thrashes out the problem and discusses how it is being handled in American juvenile Courts. In the II Part of this book, the first essay reports findings from a study of the incidence of criminal victimisation among a selected sample of U. S. population surveyed in 1968. The intricate relationships of a specific type of crime, public attitudes, and social and economic status are illustrated by the third article in this Part, on abortion laws. The 'criminals' of this type are, in a manner of speaking, victims, as their type of behaviour does not harm the property or person of

others—more or less the same as homosexuality and drug addiction.

3. The four essays in Part III of the book study crimes of a political nature, beginning with research and commentary concerning assassination—political homicide, which discusses a typology of motives for assassination with illustrations from the Middle East. The second essay consists of a thoughtful commentary following the assassination of Senator Robert F. Kennedy. The last two essays compare looting in natural disasters and in civil disturbances, and it is found that looting is broadly participated in by local people and is very common in civil disturbances, but rare, and with few participants, who are usually outsiders, in natural disasters.

4. An important conclusion emerging from these essays is that these criminal activities seem to stem from perceptions of inequities and injustices and that the definition of criminal behaviour is becoming "politicized." However that may be, it is well that the United Nations Congress on 'Prevention of Crime and Treatment of Offenders,' which met recently in Japan, should have recommended that special attention should be paid to the administrative, technical and professional structure necessary for more effective action in the area of crime prevention; it felt that young men should be enthused to participate in crime prevention and rehabilitation work.

5. At the end of most of the essays, extra reading lists are provided for the benefit of those interested in the topics under reference.

6. The Editor, James F. Short Jr., is Professor of Sociology and Chairman of the Department at Washington State University. Since 1968 he has served as co-director of research for the National Commission of the Causes and Prevention of Violence. He is also a member of the Research Council, National Council on Crime and Delinquency.

R.S.S.

mised. Clause 3 of the U. P. Wheat Procurement (Levy) Order compels the licensed dealer to deliver to the Controller or his authorised agent every day 50 p.c. of the wheat procured or purchased by him. There is no scope for negotiations there. Supply of wheat pursuant to cl. 3 of the Order and acceptance thereof do not result in a contract of sale. There is no 'sale' within the meaning of S. 2 (h) in such a case and the person supplying wheat is not liable to pay sales tax on the price for wheat supplied. Case law discussed. Judgment of Allahabad High Court, Reversed. (Paras 7, 8, 16)

Cases Referred: Chronological Paras

- (1970) AIR 1970 All 518 (V 57) = 1969 All LJ 424, Commr. of Sales Tax, U. P. Lucknow v. Ram Bilas Ram Gopal 4, 8
- (1969) AIR 1969 SC 343 (V 56) = (1969) 1 SCR 861, State of Rajasthan v. M/s. Karam Chand Thappar & Bros. Ltd. 12
- (1968) AIR 1968 SC 478 (V 55) = (1968) 1 SCR 479, Indian Steel and Wire Products Ltd. v. State of Madras 10
- (1968) AIR 1968 SC 599 (V 55) = (1968) 1 SCR 705, Andhra Sugars Ltd. v. State of Andhra Pradesh 11
- (1963) AIR 1963 SC 1207 (V 50) = 1963 Supp (2) SCR 459, M/s New India Sugar Mills Ltd. v. Commr. of Sales Tax, Bihar 5, 9, 10, 12
- (1958) AIR 1958 SC 560 (V 45) = 1959 SCR 379, State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. 5
- (1955) 1955 AC 696 = 1955-2 All ER 345, Kirkness (Inspector of Taxes) v. John Hudson & Co. Ltd. 13
- (1954) 1954-1 All ER 29 = 1954-1 WLR 40, John Hudson & Co. Ltd. v. Kirkness 13

The following Judgment of the Court was delivered by

SHAH, J.: The appellants who are dealers in food grains supplied to the Regional Food Controller diverse quantities of wheat in compliance with the provisions of the U. P. Wheat Procurement (Levy) Order, 1959. The Sales Tax Officer levied tax under the U. P. Sales Tax Act on the aggregate of the price of wheat by the appellants, rejecting the contention raised by the appellants that the wheat

supplied was not sold by them to the Controller. In appeal the Assistant Commissioner (Judicial) Sales Tax held that the turnover resulting from supplies of wheat was not taxable since there was no "sale" within the meaning of the U. P. Sales Tax Act, 1948. The order was confirmed by the Additional Judge (Revisions) Sales Tax.

2. The Additional Judge (Revisions) Sales Tax referred the following questions to the High Court of Allahabad for opinion:

"(1) Whether the sales made to the Regional Food Controller under the U. P. Wheat Procurement (Levy) Order, 1959, are sales within the meaning of "sale" under S. 2 (h) of the U. P. Sales Tax Act?

(2) Whether in the circumstances of the case, the assessee is liable to pay sales tax on the sales made to the Regional Food Controller under the provisions of the U. P. Wheat Procurement (Levy) Order, 1959?"

3. The questions raised were defective in form. The word "sales" when it first occurs in Question No. (1) should be "supplies". The expression "sales made" in Question No. (2) should be "on the price for wheat supplied". We modify the questions accordingly.

4. The High Court of Allahabad, following their earlier judgment in Commr. of Sales Tax, U. P. Lucknow v. Ram Bilas Ram Gopal, 1969 All LJ 424 = (AIR 1970 All 518) answered the two questions in the affirmative. The appellants have appealed to this Court with special leave.

5. The expression "sale" is defined in S. 2 (h) of the U. P. Sales Tax Act, 1948 as meaning any transfer of property in goods for cash, deferred payment or other valuable consideration, but not including a mortgage, hypothecation, charge or pledge. Power of the Provincial Legislature by virtue of Entry 42 List II of the Government of India Act, 1935, was restricted. The Legislature was competent to legislate for levy of tax only on transactions which were "sales" within the meaning of the Indian Sale of Goods Act, 1930, State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., 1959 SCR 379 = (AIR 1958 SC 560), M/s New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, 1963 Supp (2) SCR 459 = (AIR 1963 SC 1207). It

was observed in M/s New India Sugar Mills' case (1963) Supp (2) SCR 459 = (AIR 1963 SC 1207):

"In popular parlance 'sale' means transfer of property from one person to another in consideration of price paid or promised or other valuable consideration. But that is not the meaning of 'sale' in the Sale of Goods Act, 1930. Section 4 of the Sale of Goods Act provides by its first sub-section that a contract of sale of goods is a contract where the seller agrees to transfer the property in goods to the buyer for a price. "Price" by cl. (10) of S. 2 means the money consideration for sale of goods, and "where under a contract of sale property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell" (sub-section (3), Sec. 4). It is manifest that under the Sale of Goods Act a transaction is called sale only where for money consideration property in goods is transferred under a contract of sale. Section 4 of the Sale of Goods Act was borrowed almost verbatim from Section 1 of the English Sale of Goods Act 56 & 57 Vict. c. 71. As observed by Benjamin in the 8th Edn. of his work on 'Sale', "to constitute a valid sale there must be a concurrence of the following elements, viz., (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised."

It was also observed that the expression "sale of goods" in the Constitution must be understood in the same sense in which it is used in the Sale of Goods Act, 1930. The U. P. Legislature could therefore legislate for levy of sales-tax on a transaction which amounted to a sale within the meaning of the Sale of Goods Act, 1930, and not on any other transaction which was deemed by fiction to be a sale.

6. It is necessary then to determine whether the stocks of wheat supplied by the appellants in compliance with the provisions of the U. P. Wheat Procurement (Levy) Order,

1959, to the Regional Food Controller were sold to that Officer within the meaning of the definition of the word 'sale' in Section 2 (h) of the U. P. Sales Tax Act, 1948. The relevant provisions of the U. P. Wheat Procurement (Levy) Order, 1959, may first be read.

The Preamble to the Order states:

"Whereas the State Government is of the opinion that it is necessary and expedient so to do for maintaining the supplies of wheat and for securing its equitable distribution and availability at fair prices:

Now, therefore, in exercise of the powers conferred by Clauses (e), (f), (h), (i) and (j) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955), x x x the Governor of the State of Uttar Pradesh is pleased to make the following order x x x"

Clause 3 provides:

"(1) Every Licensed dealer shall sell to the State Government at the controlled prices:

(a) Fifty (50) per cent of wheat held in stock by him at the commencement of this Order; and

(b) Fifty (50) per cent of wheat procured or purchased by him every day beginning with the date of commencement of this Order and until such time as the State Government otherwise directs.

(2) The wheat required to be sold to the State Government under sub-clause (1) shall be delivered by the licensed dealer to the Controller or to such other person as may be authorised by the Controller to take delivery on his behalf."

Clause 4 confers powers of entry, search, seizure upon Enforcement Officers: insofar as it is material it provides:

"(1) Any Enforcement Officer may, with a view to securing compliance with this Order or to satisfying himself that this Order has been complied with:

(i) enter with such assistance as may be necessary any premises where he has reason to believe that wheat is procured, purchased or stocked;

(ii) ask of any person all necessary questions;

(iii) examine any books or documents;

(iv) search any premises, vehicles, vessels and air-craft and seize

wheat in respect of which he has reasons to believe that a contravention of the order has been, is being, or is about to be committed and thereafter take or authorise the taking of all measures necessary for securing the production of stocks so seized in a court and for their sale, custody, pending such production.

x x x x "

By Clause 3 of the Order every licensed dealer is directed to "sell" to the State Government 50 per cent of the wheat held in stock by him on the date of the commencement of the Order at the "controlled prices". Again out of the stock of wheat procured or purchased by him every day beginning with the date of commencement of the Order he is directed to "sell" 50 per cent of that stock. The Order enjoins the licensed dealer to deliver the quantities specified in sub-clause (1) of Clause 3 either to the Controller or to such other person as may be authorised by the Controller to take delivery on his behalf. To ensure that the licensed dealer carries out his obligation the Enforcement Officers may enter any premises where they have reason to believe that wheat is procured, purchased or stocked, and may make necessary enquiries, examine any books or documents and search any premises, vehicles, vessels and air-craft and seize wheat in respect of which they have reason to believe that a contravention of the Order has been, is being, or is about to be committed.

7. Obligation to deliver wheat of the quantity specified arises out of the statute. The Order takes no account of the volition of the licensed dealers and until the State Government directs otherwise, of the Controller or the authorised officer. The Order imposes an obligation upon the licensed dealer who is defined in Clause 2 (d) as meaning a person holding a valid licence under the U. P. Foodgrains Dealers Licensing Order, 1959, to deliver the quantities of wheat specified in the Order. The State Government is directed by the Order to pay for the wheat supplied at the controlled rate. The source of the obligations to deliver the specified quantities of wheat and to pay for them is not in any contract, but in the statutory order. In our judgment Clause 3 sets up a machinery

for compulsory acquisition by the State Government of stocks of wheat belonging to the licensed dealers. The Order, it is true, makes no provision in respect of the place and manner of supply of wheat and payment of the controlled price. It contains a bald injunction to supply wheat of the specified quantity day after day, and enacts that in default of compliance the dealer is liable to be punished if it does not envisage any consensual arrangement. It does not require the State Government to enter into even an informal contract. A sale predicates a contract of sale of goods between persons competent to contract for a price paid or promised: a transaction in which an obligation to supply goods is imposed, and which does not involve an obligation to enter into a contract, cannot be called a 'sale', even if the person supplying goods is declared entitled to the value of goods, which is determined or determinable in the manner prescribed. Assuming that between the licensed dealer and the Controller, there may be some arrangements about the place and manner of delivery of wheat, and the payment of "controlled price", the operation of Clause 3 does not on that account become contractual.

8. The High Court relied upon the following observations in Ram Bilas Ram Gopal's case, 1969 All LJ 424 = (AIR 1970 All 518):

"Analysing Clause 3 of the Levy Order it is clear that a licensed dealer is obliged to sell to the State Government fifty per cent of the wheat held in stock by him at the commencement of the Order, and thereafter fifty per cent of the wheat daily procured or purchased by him beginning with the date of commencement of the Order until such time as the State Government otherwise directs. The price at which the wheat is sold is the maximum price fixed in the Wheat (Uttar Pradesh) Price Control Order, 1959, as notified by the Government of India. Delivery of the wheat has to be given by the dealer to the Regional Food Controller or a person authorised by him in that behalf. The dealer has no option but to sell the specified percentage of wheat to the State Government. The State Government has also no option but to purchase fifty per cent of the

wheat held in stock by the dealer at the commencement of the Levy Order. As regards the wheat procured or purchased daily by the dealer thereafter, it is open to the State Government to say that from any particular date it will not purchase any or all of the specified percentage of wheat. Therefore, as regards that wheat the Levy Order leaves it open to one of the parties, namely the State Government to decide when it will stop purchasing wheat from the dealer. That in substance is Clause 3 of the Levy Order and it embodies the total sum of obligations imposed on the dealer and the State Government. All other details of the transaction are left open to negotiation. It leaves it open to the parties to negotiate in respect of the time and the mode of payment of the price, the time and mode of delivery of wheat, and other conditions of the contract."

Clause 3 of the Order compels the licensed dealer to deliver to the Controller or his authorised agent every day 50 per cent of the wheat procured or purchased by him. There is no scope for negotiations there. Assuming that the Controller may designate the place of delivery and the place of payment of price at the controlled rate, and the licensed dealer acquiesces therein, or even when in respect of those two matters there is some consensual arrangement, in our judgment, supply of wheat pursuant to Clause 3 of the Order and acceptance thereof do not result in a contract of sale. The High Court observed that:

"x x x whatever compulsive or coercive force is used to bring about a transaction under Clause 3 of the Levy Order, it must be traced to legislation. It cannot be attributed to the State Government as a party to the transaction. This, then, is clear. There is nothing in the Levy Order which can be accused of vitiating the free consent of the parties as defined under Section 14 of the Indian Contract Act, when entering into the contract of sale."

But these observations assume a contract of sale which the Order does not contemplate. If there be a contract, the restrictions imposed by statute may not vitiate the consent. But the contract cannot be assumed.

9. We may refer to certain decisions of this Court on which reliance was placed at the Bar. In *M/s. New India Sugar Mills' case*, 1963 Supp (2) SCR 459 = (AIR 1963 SC 1207) under the Sugar and Sugar Products Control Order, 1946, a scheme was devised for equitable distribution of sugar. The consuming States intimated to the Sugar Controller of India their requirements of sugar and the factory owners sent statements of stocks of sugar held by them. The Controller made allotments to various States and addressed orders to the factory owners directing them to supply sugar to the States in question in accordance with the despatch instructions from the State Governments. Under the allotment orders, *M/s. New India Sugar Mills Ltd.*, in Bihar despatched stocks of sugar to the State of Madras. The State of Bihar treated the transaction as a sale and levied tax thereon under the Bihar Sales Tax Act, 1947. The tax payer contended that the supplies of sugar, pursuant to the directions of the Controller, did not result in sales, and that no tax was exigible on such transactions. A majority of the Court observed that despatches of sugar pursuant to the directions of the Controller were not made in pursuance of any contract of sale. There was no offer by the tax payer to the State of Madras, and no acceptance by the latter; the tax payer was under the Control Order compelled to carry out the directions of the Controller and it had no volition in the matter. Intimation by the State of its requirements of sugar to the Controller or communication of the allotment order to the assessee did not amount to an offer. Nor did the mere compliance with despatch instructions issued by the Controller, which the assessee had not the option to refuse to comply with, amount to acceptance of an offer or to making of an offer. A contract of sale of goods postulates a voluntary arrangement regarding goods between the contracting parties. It was held that in the case before the Court there was no such voluntary arrangement.

10. In two later decisions of this Court the true character of transactions in which supplies of commodities were made pursuant to Control Orders was examined. In *Indian*

Steel & Wire Products Ltd. v. State of Madras, (1968) 1 SCR 479 = (AIR 1968 SC 478) the tax-payer supplied certain steel products to various persons in the State of Madras pursuant to the directions given by the Steel Controller exercising powers under the Iron and Steel (Control of Production and Distribution) Order, 1941. The authorities of the State of Madras assessed the turnover of the tax-payer resulting from those transactions to sales tax under the Madras General Sales Tax Act. The tax-payer contended that the transactions of supply did not result in sales and were on that account not exposed to sales-tax, because steel products were supplied pursuant to the directions of the Iron and Steel Controller made under Cl. 10-B of the Order there being no mutual assent between the parties to the transaction. This Court held that the supplies were made pursuant to the directions issued under Cl. 5 of the Order and not pursuant to the directions issued under Clause 10-B of the Order. It was observed that the Orders were in respect of goods not yet manufactured, whereas under Clause 10-B directions could be given only in respect of goods already in stock, and since Cl. 5 did not require the Controller to regulate or control every facet of a transaction between a producer and the person to whom the tax-payer supplied iron and steel products the transactions were consensual. Cl. 5 of the Order read as follows:

"No producer or stock-holder shall dispose of or agree to dispose of or export or agree to export from British India any iron or steel, except in accordance with the conditions contained or incorporated in a general or special written order of the Controller."

Clause 10-B provided:

"The Controller may, by a written order require any person holding stock of iron and steel, acquired by him otherwise than in accordance with the provisions of Clause 4 to sell the whole or any part of the stock to such person or class of persons and on such terms and conditions as may be specified in the Order."

Comparing the terms of Clause 5 with the terms of Clause 10, the Court observed that liberty of con-

tract in large measure was reserved to the producer or stockholder and to the purchaser in the matter of disposal of iron & steel. The obligation imposed by Clause 5 was, it was said, not to dispose of or agree to dispose of or export or agree to export any iron or steel except in accordance with the conditions contained or incorporated in the order of the Controller and that since there was liberty of contract between the parties but subject to restrictions, the transaction could be regarded as a sale. It was observed at page 489 (of SCR) = (at page 484 of AIR):

"But under Clause 5 he can authorise a producer or a stockholder to dispose of any iron or steel whether the same is in stock or not in accordance with the conditions contained or incorporated in a special or general written order issued by him. In the instant case, as can be gathered from the correspondence already referred to, the order issued by the Controller could be complied with only after manufacturing the required material. Hence, the order issued by the Controller could not have been issued under Clause 10-B."

The Court then observed:

"..... the area within which there can be bargaining between a prospective buyer and an intending seller of steel products, is greatly reduced. Both of them have to conform to the requirements of the order and to comply with the terms and conditions contained in the order of the Controller. Therefore they could negotiate only in respect of matters not controlled by the order or prescribed by the Controller."

The Court also observed:

"It would be incorrect to contend that because law imposes some restrictions on freedom to contract, there is no contract at all. So long as mutual assent is not completely excluded in any dealing, in law it is a contract. On the facts of this case for the reasons already mentioned, it is not possible to accept the contention of the learned counsel for the appellant that nothing was left to be decided by mutual assent."

The Court in that case distinguished the case in *M/s. New India Sugar Mills' case*, 1963 Supp (2) SCR 459 = (AIR 1963 SC 1207) and expressly reserved their opinion on the question

whether supplies of goods pursuant to the directions issued under cl. 10B of the Order may be regarded as sales. The decision in *Indian Steel & Wire Products Ltd.'s case*, (1968) 1 SCR 479 = (AIR 1968 SC 478) does not justify the view that even if the liberty of contract in relation to the fundamentals of the transaction is completely excluded a transaction of supply of goods pursuant to directions issued under a control Order may be regarded as a sale.

11. In *Andhra Sugars Ltd. v. State of Andhra Pradesh*, (1968) 1 SCR 705 = (AIR 1968 SC 599) again, in the view of the Court liberty of contract between parties to transactions relating to supply of sugarcane was not ruled out. Under the *Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1961*, the occupier of a sugar factory had to buy sugarcane from cane-growers in conformity with the directions of the Cane Commissioner. Under section 21 of the Act the State Government had power to tax purchases of sugarcane for use, consumption or sale in a sugar factory. Certain owners of sugar factories contended that "S. 21 was invalid." They contended that they were compelled by law to buy cane from the cane-growers, and since purchases made by them were not under agreements, the price paid for sugarcane could not be taxed under a statute enacted in exercise of the power in Entry 54 List II of the Seventh Schedule to the Constitution. This Court held that under Act 45 of 1961 and the rules framed thereunder, the cane-grower in the factory zone was free to make or not to make an offer of sale of cane to the occupier of the factory: if the cane-grower made an offer, the occupier of the factory was bound to accept it, and the agreement resulting therefrom was recorded in writing and was signed by the parties. The consent of the occupier of the factory was free as defined in S. 14 of the *Indian Contract Act*. The compulsion of law is it was said not coercion as defined in S. 15 of the Act. The agreements were enforceable by law and were regarded as contracts of sale as defined in S. 4 of the *Indian Sale of Goods Act*.

12. In a later decision of this Court, *State of Rajasthan v. M/s. Karam Chand Thappar & Bros. Ltd.*, (1969) 1

SCR 861 = (AIR 1969 SC 343), the assessee who (sic) had acquired monopoly rights to supply coal in Rajasthan and sold coal to the State of Rajasthan. The Sales Tax Officer sought to tax the turnover from supplies of coal made to the State of Rajasthan. It was held by this Court that the colliery Control Order super-imposed upon the agreement between the parties the rate fixed by the Control Order and by reason of such super-imposition of the rate fixed by the Control Order the mutual assent of the parties and the voluntary character of the transactions were not affected. The decision of this Court in *M/s. New India Sugar Mills' case*, 1963 Supp (2) SCR 459 = (AIR 1963 SC 1207) was distinguished on the ground that there was in the case then in hand mutual assent between the parties, to the transaction of supply of coal.

13. The decision of the House of Lords in *Kirkness (Inspector of Taxes) v. John Hudson & Co. Ltd.*, 1955 AC 696 is instructive. In that case liability to pay income-tax on the difference between the compensation received for requisition of certain wagons by the Minister of Transport was in issue. A majority of the House held that there was no sale of the wagons and no income-tax was payable. Viscount Simonds observed:

"x x x the taxpayers' wagons were not sold, and it would be a grave misuse of language to say that they were sold. To say of a man who has had his property taken from him against his will and been awarded compensation in the settlement of which he has had no voice, to say of such a man that he has sold his property appears to me to be as far from the truth as to say of a man who has been deprived of his property without compensation that he has given it away. Alike in the ordinary use of language and in its legal concept, a sale connotes the mutual assent of two parties. So far as the ordinary use of language is concerned, it is difficult to avoid being dogmatic but for my part, I can only echo what Singleton, L. J., said in his admirably clear judgment ((1954) 1 All E. R. 29 at page 32):

"What would any one accustomed to the use of the words 'sale' or 'sold' answer? It seems to me that every

one must say 'the taxpayer did not sell'."

14. On the date of the commencement of the U. P. Wheat Procurement (Levy) Order, upon the licensed dealer was imposed a liability to deliver half the quantity of wheat on hand, and he had also to supply to the State Government 50 p.c. of the quantity of wheat procured or purchased by him every day beginning with the date of commencement of the Order. If he failed to carry out the obligation he was liable to be penalized. To ensure that he carried out his obligation his premises were liable to be searched and his property sequestered. The order ignored the volition of the dealer.

15. We are unable to hold that there was any contract between the assessee and the State pursuant to which the goods were sold within the meaning of the U. P. Sales Tax Act.

16. The appeals are allowed. The order passed by the High Court is set aside. The answer to the two questions as reframed by us will be in the negative. The appellants will be entitled to their costs in this Court and in the High Court. One hearing fee. Appeals allowed.

AIR 1970 SUPREME COURT 2007 (V 57 C 430)

(From: Bombay)

J. M. SHELAT AND I. D. DUA, JJ.

Gajanan and others, Appellants v. Seth Brindaban, Respondent.

Civil Appeal No. 1982 of 1966, D/-20-7-1970.

(A) Debt Laws — C. P. and Berar Moneylenders' Act (13 of 1934). Sections 11F, 11H and 2 (v) — Absence of registration as moneylender — Does not prohibit and invalidate isolated transaction of moneylending.

Person registered as moneylender in one District entering into isolated transaction of moneylending on a mortgage in different district — Suit on mortgage can proceed without registration Certificate — "Moneylender" under the Act means a person who in the regular course of business advances a loan and excludes isolated transactions of moneylending. AIR 1954 Nag 44 & (1965) 67 Bom LR 816

& AIR 1962 Madh Pra 117 (FB), Approved; 1918 A. C. 199, Distinguished. (Paras 10, 12 and 14)

(B) Precedents — Principle of stare decisis.

Where the meaning of a statute is ambiguous and capable of more than one interpretation and one view accepted by the highest court has stood for a long period during which many transactions, such as dealings in property and making of contracts, have taken place on the faith of that interpretation the Court would normally be reluctant to put upon it a different interpretation which would affect those transactions. To justify the reversal of a decision of the highest court which has prevailed for a considerable length of time there should be some exceptional reason when such reversal is likely to create serious embarrassment to those who had acted on the faith of what seemed to be the settled law. (Para 13)

Cases Referred: Chronological Paras

- (1965) 67 Bom LR 816 = ILR
- (1966) Bom 402, Hajarimal v. Harinarayan 7, 8, 9
- (1964) 1964 MPLJ Note No. 102, Gurumukh Rai v. Hari Har Singh 11
- (1963) 1963 MPLJ Note No. 119, Kishan Lal v. Laxmibai 11
- (1962) AIR 1962 Madh Pra 117 (V 49)=1962 MPLJ 78 (FB), Janki Bai v. Ratan Melu 7, 8, 9, 12, 13-A
- (1960) 1960 MPLJ Note No. 198, Chaith Ram v. Baparimal 11
- (1958) 60 Bom LR 1247 = ILR (1959) Bom 113, Wasudeo Bhairulal v. Ramchandra 7, 13-A
- (1958) 1958 MPLJ Note No. 11, Hariprasad v. Sobhalal 11
- (1954) AIR 1954 Nag 44 (V 41)= 1953 Nag LJ 517, Patiram v. Baliram 6, 8, 9, 12, 13-A
- (1952) AIR 1952 Hyd 58 (V 39)= ILR (1952) Hyd 95 (FB), Shamshir Ali v. Ratnaji 6
- (1941) AIR 1941 Nag 177 (V 28)= 1941 Nag LJ 194, Sitaram Shrawan v. Bajya Parnya 10, 11, 13-A
- (1932) AIR 1932 PC 207 (V 19)= 59 Ind App 376, Lasa Din v. Mt. Gulab Kunwar 8
- (1918) 1918 AC 199 = 87 LJ KB 246, Cornelius v. Phillips 6, 9
- (1910) 1910 AC 514 = 79 LJ KB 1050, Whitman v. Sadler 6

The following Judgment of the Court was delivered by

DUA, J.: This is an appeal with certificate under Art. 133 (1) (a) of the Constitution by Gajanan and his two sons Janardhan and Nanaji who figured as defendants 1, 4 and 5 respectively in the suit instituted by Seth Brindaban, respondent in this appeal. It is directed against the judgment and decree of the Bombay High Court (Nagpur Bench) dated February 7, 1966 allowing the plaintiff's appeal in part against the dismissal of his suit by the trial court, and granting him a decree for Rs. 1,60,000/- against the appellants. The other two defendants, Rajeshwar and Narhari, were also the sons of Gajanan; the dismissal of the suit against them was upheld by the High Court. The suit for foreclosure of three mortgages was instituted on December 1, 1950. The plaintiff claimed a decree for foreclosure of the mortgages; the mortgage amount due was stated to be Rs. 1,07,269/2/- with future interest. The suit was contested on various grounds but the main point with which we are concerned in this appeal was raised in the amended written statement allowed by the court on December 15, 1959, nine years after the institution of the suit. According to the amended plea: (i) the plaintiff being a moneylender within the meaning of C. P. Money Lenders' Act (XIII of 1934) and no certificate under S. 11F of that Act having been secured by him the transaction in dispute was void and the suit was, therefore, incompetent, (ii) production in court of moneylender's licence was necessary for the maintenance of the suit; and (iii) the plaintiff had not maintained proper accounts of the moneylending business and had not given Diwali notices to the defendant in respect of this debt and this omission disentitled him to claim interest.

2. Seven additional issues were framed on the amended pleas. They are mainly concerned with the provisions of the Moneylenders' Act. The trial court repelled the plaintiff's submission that the case was governed by the Bombay Moneylenders' Act. It was contended on his behalf that with effect from February 1, 1960 the provisions of C. P. & Berar Moneylenders' Act had ceased to apply to the terri-

tory in question and in its place the Bombay Moneylenders' Act was made applicable. The Bombay Act was thus claimed to govern this case. Disagreeing with this submission the trial court held the Bombay Act to be prospective only and, therefore, inapplicable to pending cases. The present suit which had been instituted in 1950 in respect of a transaction of 1947 was accordingly held to be governed by the provisions of the C. P. & Berar Moneylenders' Act. The plaintiff was found to have contravened sections 11F and 11H of the C. P. Act and, therefore, disentitled to maintain the suit. He was also held disentitled to claim interest as he had not sent statement of accounts as required by that Act. As regards the liability of defendants 2 and 3, they were held not to be bound by the mortgages, but it was observed that a simple money decree could be passed against them provided the claim was otherwise legally enforceable. In case the plaintiff's claim deserved to be decreed then in the trial court's view there had to be three decrees because there were three mortgages covering three separate properties. The share of defendant no. 5 was also held to be bound by the three mortgages dated September 12, 1947. The registration of documents at the instance of the court was found to be proper and lawful. The decision in the previous suit was held to operate as *res judicata*. The suit, as observed earlier was dismissed on the ground of violation of the C. P. Act.

3. On appeal to the High Court the following seven points fell for determination.

"(1) Was the appellant a moneylender within the meaning of the C. P. and Berar Moneylenders Act and was he required to obtain a moneylender's licence for Chanda District because the transaction pertains to property in Chanda district?

(2) Were the documents duly attested vis-a-vis respondents 2 and 3 who had appended their signatures to the documents? if it is held that the documents were not attested so far as defendants 2 and 3 are concerned, what will be the effect on the liability of defendants 2 and 3?

(3) Could a personal decree for payment of money be passed against defendants 2 and 3?

(4) Is the appellant entitled to claim interest because of his failure to send statements of account as required by section 3 (b) of the C. P. and Berar Moneylenders Act?

Was the appellant liable to maintain accounts as provided by section 3 (a) of the Moneylenders Act?

(5) Are the three instruments validly registered or is the registration void?

(6) Are the findings on issues 1 to 6 in the present suit barred on the principle of res judicata because the subject matter of those issues was also the subject matter of identical issues in the previous litigation finally decided between the parties?

(7) Could a decree be passed against respondent no. 5 after he attained majority, respondent No. 5 not having himself executed the instruments sued upon?"

On behalf of the plaintiff (appellant in the High Court) it was stated that he had made an application for the certificate but had not yet obtained the same. The High Court held that Section 11H of the C. P. & Berar Moneylenders' Act did not apply to the case. It, however, observed that the Court would have normally granted time to the plaintiff to produce the necessary certificate if the Act had been held applicable. In the opinion of the High Court the plaintiff was doing moneylending business in Yeotmal District and had obtained the requisite licence for that district in August, 1947 which was thereafter regularly renewed. The transaction in question was held to be an isolated transaction which did not clothe the plaintiff with the character of a moneylender carrying on the business of moneylending in Chanda District. It further observed that though the transaction in question related to property at Chanda and payment was also made at Chanda, the amount was paid from the Wani shop where the accounts were maintained. This was in Yeotmal District for which the plaintiff held the necessary certificate. On this view the High Court disagreed with the conclusion of the trial court. The High Court further added that it was not the defendants' case that the plaintiff had been carrying on money lending business in Chanda District after 1950 or in 1959 or even in April, 1960 when the suit was decided. The

three documents executed by the court were also held to be duly executed and duly registered so as to be binding on defendants 1, 4 and 5. In regard to defendants 2 and 3, the High Court felt that even a money decree could not be passed against them and the suit against them must fail in its entirety. The conclusion of the trial court that the decision in the previous suit operated as res judicata was upheld. In the final result the plaintiff was held entitled to a decree for the principal sum of Rs. 80,000 on the basis of the three mortgages and a further sum of Rs. 80,000 by way of interest, the total amount being Rs. 1,60,000/-. This decree was made against defendants 1, 4 and 5. They were given six months' time to pay up the amount with further interest at 6 p.c. per annum on the principal amount till realisation. If the amount was not paid the mortgages were to stand foreclosed. The suit against defendants 2 and 3 was dismissed without costs.

4. On appeal in this Court the principal question raised centres round the provisions of the C. P. & Berar Moneylenders' Act.

5. This Act which came into force on April 1, 1935 was enacted with the object of making better provision for the regulation and control of the transactions of moneylending so as to secure protection to ignorant debtors against the evil of fraud and extortion on the part of unscrupulous moneylenders without unduly interfering with freedom of private contract. It was framed broadly on the lines of the Punjab Regulation of Accounts Act (No. 1 of 1930) but it embodied, in addition, the principle of Damdupat so that the creditors were not encouraged to postpone unconscionable enforcement of their claims. The courts were also empowered to fix instalments for execution of decrees. "Moneylender" as defined in cl. (v) of S. 2 means a person who in the regular course of business advances a loan as defined in this Act and it includes his legal representatives and successors in interest. "Loan" as defined in cl. (vii) means an actual advance whether of money or in kind at interest and it includes any transaction which the court finds to be in substance a loan. It does

not include *inter alia* an advance made on the basis of negotiable instrument other than a promissory note. In 1940 this Act was amended by C. P. & Berar Act XIV of 1940 and Sections 11-A to 11-J were added. In the definition of "moneylender" also it was added in the end, "and moneylending shall be construed accordingly". According to S. 11-B every person carrying on or intending to carry on the business of moneylending is required to get himself registered by an application made to the Sub-Registrar of any sub-District of the District or anyone of the districts in which he carries on or intends to carry on such business. The registration certificate does not entitle the holder thereof to carry on the business of moneylending in other districts for which he does not hold such certificate. Section 11F debars a person from carrying on the business of moneylending in any district unless he holds a valid registration certificate in respect of that district. Sub-section (2) of this section makes contravention of this section a penal offence punishable with fine extending to Rs. 100/- and in case of a previous conviction the fine may extend to Rs. 200/-. According to S. 11H no suit for the recovery of a loan advanced by a moneylender is to proceed in a civil court until the court is satisfied that he holds a valid registration certificate or that he is not required to have such a certificate by reason of the fact that he does not carry on the business of moneylending in any of the districts of Madhya Pradesh. The question which arises for consideration in this case is whether the suit out of which this appeal arises is incompetent and whether the transaction of moneylending is void and, therefore, unenforceable in courts of law.

6. On behalf of the appellants strong reliance was placed on the decision of the House of Lords in *Cornelius v. Phillips*, 1918 AC 199. In that case, distinguishing and explaining an earlier decision of the House of Lords in *Whiteman v. Sadler*, 1910 AC 514, S. 2 (2) of the Moneylenders' Act, 1900 (63 & 64 Vic. c. 51) was held to have the effect of rendering void a transaction of moneylending carried out at an hotel at some distance from the moneylender's registered address

in contravention of S. 2 (1) (b). The transaction was held to amount to a carrying on of his business by the moneylender. Relying on the ratio of this decision it was urged before us on behalf of the appellants that the transaction in question in the present case must be held to be void and, therefore, unenforceable in courts of law. A similar argument on the authority of this decision was raised before a Bench of the Nagpur High Court in *Patiram v. Baliram*, 1953 Nag LJ 517 at p. 522 = (AIR 1954 Nag 44 at p. 47) but was not accepted. The case of 1918 AC 199 was distinguished and it was observed:

"The learned counsel for the applicant then relied on the House of Lords' decision in 1918 AC 199 which was a case under the English Moneylenders Act. The question which had arisen in that case was the same as the question in this case, namely whether the transaction was void or it only exposed the moneylender to liability for criminal proceedings without rendering the transaction void. It was decided in that case that the transaction amounted to a carrying on of his business by the moneylender at an address other than his registered address in contravention of section 2 sub-section (1) (b) of the Moneylenders' Act, 1900 and that the effect of the Act was to avoid the transaction. A comparison of the English Moneylenders Act, 1900 and the Central Provinces and Berar Moneylenders Act, 1934 will clearly show that the two differ on several important points. The definition of "moneylender" in the two Acts is not the same. The former contains provisions regarding "registered name" and "registered address" which are not to be found in the latter. Section 2 (1) (c) of the former expressly prohibits individual agreements which is not the case with the latter. So the cases decided under the English Moneylenders Act cannot be of much help in deciding cases under the Central Provinces and Berar Moneylenders Act. We may here quote the warning given by their Lordships of the Privy Council in *Lasa Din v. Mt. Gulab Kunwar*, AIR 1932 PC 207 at p. 211. 'It is, they think, always dangerous to apply English decisions to the construction of an Indian Act'.

We, therefore, do not propose to discuss the other cases under the English Moneylenders Act cited by the learned counsel for the applicant."

After referring to Section 11B and to Maxwell on Interpretation of Statutes the Court observed:

"This special statute which trenches on the contractual rights must be construed strictly against those who seek to avail of it. There are no reasons to suppose that the Legislature intended that every transaction of moneylending made after the amendment came into force till the lender was able to obtain a registration certificate was invalid and unenforceable thereby enriching the debtor at the cost of the creditor without any fault of the latter. The learned counsel has not brought to our notice any compelling reasons to accept his construction which manifestly leads to injustice to the moneylenders." (p. 523).

The final conclusions of the court were expressed in these words:

"It will be clear from all this discussion that section 11F applies to the business of moneylending and not to an individual transaction of lending money and that the condition is attached and the penalty is imposed for the convenience of collection of the revenue, and the legislature did not declare an individual transaction of moneylending made by the moneylender who had not obtained a registration certificate invalid. It is not necessary for the validity of the contract of loan that the moneylender must be registered on the date of the transaction. He, however, cannot obtain a decree on his loan unless he possesses a valid registration certificate on the date on which the decree is to be passed. Though the transactions of moneylending are not affected for want of a registration certificate, a moneylender is exposed to the penalty provided by section 11F of the Act for carrying on the business without a valid registration certificate. We may cite *Shamshir Ali v. Ratnaji*, AIR 1952 Hyd 58 (FB) in support."

7. The appellants' counsel also tried to distinguish the Full Bench decision of the Nagpur Bench in *Hajaram v. Harinarayan*, (1965) 67 Bom LR 816 (which overruled *Wasudeo*

Bhairulal v. Ramchandra, (1958) 60 Bom LR 1247), by submitting that the Full Bench had left open the question of the transaction entered into by a moneylender in contravention of Section 11F being void and opposed to public policy. It is true that this precise question was not considered by the Full Bench to be necessary to decide in that case but the court added:—

"Assuming that the transaction is void, the plaintiff may be able to obtain relief under S. 65 of the Contract Act."

Earlier in the course of the judgment the learned Chief Justice speaking for the Full Bench had also observed:

"The principal reason for the contrary view taken in (1958) 60 Bom LR 1247, is that as S. 11-F prohibits a moneylender from carrying on the business of moneylending without a valid registration certificate and also provides a penalty for the contravention of this provision, a suit on a moneylending transaction entered into by an unregistered moneylender cannot be maintained. With respect, it may be pointed out that the Legislature itself has not barred a civil suit in respect of such a transaction. The only obstacle which it has placed in the way of a plaintiff in such a case is that the suit shall not proceed until a valid registration certificate has been produced. The Legislature has also in sub-sec. (2) of Sec. 11-F specified the penalty for contravention of the provisions of sub-sec. (1) of S. 11-F, that is, for carrying on moneylending business without a certificate. It has not prescribed any additional penalty such as that a suit to recover a loan advanced by an unregistered moneylender shall not lie or shall be dismissed. It is not open to a Court to subject a person to any penalty other than what the Legislature has prescribed."

The decision of the Full Bench of the Madhya Pradesh High Court in *Janki Bai v. Ratan Melu*, AIR 1962 Madh Pra 117 (FB), was also referred to with approval. In *Janki Bai's* case, AIR 1962 Madh Pra 117 (FB), also the decision of the House of Lords in 1918 AC 199, was distinguished and it was expressly observed that it would be unsafe to call in aid the decision relating to the interpretation of S. 2 of the English Act for construing S. 11-F of

the C. P. Act. In regard to the true meaning of S. 11-F the Full Bench, after an elaborate discussion summed up its view thus:

"The considerations having a bearing on the construction of S. 11-F of the Act may now be summed up. The registration of a moneylender does not afford to his debtors any additional protection not available under the other provisions of the Act. An unregistered moneylender can be punished only for the collective act of carrying on the business of moneylending and not for every loan advanced by him without a registration certificate. In a moneylender's suit, his failure to obtain a registration certificate is not regarded as a vital consideration and is, for that reason, not required to be tried before considering the case on merits. On the other hand, S. 11-H of the Act envisages that a loan advanced by an unregistered moneylender can be recovered by him if he subsequently obtains a registration certificate which is in force at the time of the suit.

These considerations clearly indicate that section 11-F was not enacted for the protection of persons dealing with moneylenders. Its only object appears to be the protection of the revenue. This conclusion is further supported by the fact that the annual fee payable for a registration certificate was subsequently raised from Rs. 4/8/- to Rs. 12/-. Therefore, on the basis of the principles already stated, a loan advanced by an unregistered moneylender cannot be regarded as impliedly prohibited by S. 11-F."

Section 11-F was also held in this decision not to bar individual advances.

8. The principal question which arises is whether the view of law as taken by the Nagpur High Court in the Pati Ram case, 1953 Nag LJ 517 = (AIR 1954 Nag 44) (supra) in 1953, by a Full Bench of the Madhya Pradesh High Court in the Janaki Bai case, AIR 1962 Madh Pra 117 (FB) (supra) in 1961 and by the Full Bench of the Bombay High Court sitting at Nagpur in the Hajarimal case, (1965) 67 Bom LR 816 (supra) in 1965 is so clearly erroneous that this Court should upset their interpretation of the C. P. Act.

9. In considering this question we must keep in view the warning given by the Privy Council in *Isadas* (supra) that while construing Indian statutes it is dangerous to apply English decisions to the construction of Indian enactments. Now, the C. P. Act as originally enacted in 1935 was not modelled on the English Act of 1900. Indeed, the English Act which was construed by the House of Lords in *Cornelius*, 1918 AC 199 (supra) in 1917 was amended in 1927 when Sections 2 and 3—interpreted in *Cornelius*, 1918 AC 199 (supra), — were repealed. This was long before 1935 when the C. P. Act was enacted broadly, as already pointed out, on the lines of the Punjab Regulation of Accounts Act 1 of 1930 with the addition of the rule of *Damdapat* and extended power of Courts to fix instalments for execution of decrees. We are also inclined to think, in agreement with the decisions of the Nagpur High Court in *Pati Ram*, 1953 Nag LJ 517 = (AIR 1954 Nag 44) (supra) and *Hajarimal*, (1965) 67 Bom LR 816 (supra) and of the Madhya Pradesh High Court in *Janki Bai*, AIR 1962 Madh Pra 117 (FB) (supra) that the provisions of the English Act construed in *Cornelius*, 1918 AC 199 (supra) and of the C. P. Act, with which we are concerned, are not completely identical. The statutory schemes of the two enactments do seem to us to differ materially. This has been discussed at some length in the aforesaid decisions of the Nagpur and Madhya Pradesh High Courts and we do not consider it necessary to enter on an exhaustive discussion and cover the same ground again as we are inclined to agree with the final conclusions arrived at in those cases. Turning to the scheme of the Act which concerns us let us see if the transaction of money-lending which is the subject matter of the suit out of which this appeal arises is void and, therefore, unenforceable in courts of law and if for that reason the suit is incompetent. We have already referred to the broad outlines of the Act. We may now examine its scheme more closely to see if the impugned transaction is hit by its prohibitory provisions and the progress of the present suit barred. Before considering its statutory scheme it may be pointed out that though this Act having been initially enacted in what was

then known as the Central Provinces and was named "the Central Provinces Moneylenders Act, 1934" it was later extended to what is now known as the State of Madhya Pradesh with slight formal modifications not affecting the substance of the statutory scheme. Now, it is described as the "M. P. Moneylenders Act, 1934".

10. "Moneylender" as defined in Section 2 (v) of the Act means a person who, in the regular course of business advances a loan as defined in this Act and it includes, subject to the provisions of Section 3, the legal representatives and successors-in-interest of the person who advanced the loan; and the expression "moneylending" is also to be construed accordingly. By virtue of Section 2 (ix) "Sub-Registrars" appointed under the Indian Registration Act are to function under the present Act. Section 11-A enjoins every Sub-Registrar to maintain a register of moneylenders in the prescribed form. Section 11-B renders it obligatory for every person who carries on or intends to carry on the business of moneylending to get himself registered by an application to the Sub-Registrar of the sub-district in which he carries on or intends to carry on such business. The application is required inter alia to specify the district or districts in which the applicant carries on or intends to carry on business of moneylending. Section 11-D provides that the registration certificate granted under S. 11-D shall not entitle the holder thereof to carry on the business of moneylending in other districts. Section 11-F which bars persons from carrying on business of moneylending without registration certificate also provides a penalty for the contravention of this provision. Section 11-C provides for composition of offences covered by Section 11-F (i). According to S. 11-H no suit for the recovery of a loan advanced by a moneylender is to proceed in a civil Court until the Court is satisfied that he holds a valid registration certificate or that he is not required to have such certificate by reason of the fact that he does not carry on the business of moneylending. From the scheme of these provisions it is evident that for a person to be a moneylender he must, in the regular course of business, advance a loan. There is a long catena of autho-

rities on the statutes regulating and controlling moneylenders in which the expression "moneylender" has been so construed as to exclude isolated transaction or transactions of moneylending. Vivian Bose J. while dealing with the Act which concerns us, in *Sitaram Shrawan v. Bajya Parnya*, AIR 1941 Nag 177, said:

"The word 'regular' shows that the plaintiff must have been in the habit of advancing loans to persons as a matter of regular business. If only an isolated act of moneylending is shown to the Court it is impossible to state that that constitutes a regular course of business. It is an act of business, but not necessarily an act done in the regular course of business."

11. This decision was followed by T. C. Shrivastava J., of the Madhya Pradesh High Court in *Hariprasad v. Sobhalal*, MFA No. 124 of 1956, D/- 18-12-1957 = 1958 MPLJ Note No. 11 and by Shiv Dayal, J., of the same High Court in *Gurmukh Rai v. Hari Har Singh*, SA No. 39 of 1961, D/- 26-3-1964 = 1964 MPLJ Note No. 102. The same view was taken by K. L. Pandey J., of the same High Court in *Chaith Ram v. Baparimal*, C. R. No. 374 of 1959, D/- 1-7-1960 = 1960 MPLJ Note No. 198. In this case both Section 2 (v) and Section 11-H of the Act came up for construction. In *Sitaram Shrawan*, AIR 1941 Nag 177 (supra) it was also held that the person seeking advantage of the Moneylenders Act has to prove that the plaintiff is a moneylender. To the same effect is the decision by T. C. Shrivastava J., in *Kishanlal v. Laxmi-bai*, C. R. P. No. 109 of 1962, D/- 20-7-1962 = 1963 MPLJ Note No. 119.

12. Section 11-F on its plain reading only prohibits the carrying on of the business of moneylending in any district without holding a valid registration certificate in respect of that district. It does not prohibit and, therefore, does not invalidate an isolated transaction of lending money. Such an isolated transaction seems to us to be outside the rigour of the prohibition. The fact that a registered moneylender in one district has entered into an isolated transaction of lending money in another district in which he is not registered would not make any difference in this respect and such isolated transaction would not be hit

by the prohibitory mandate. Section 11-H also operates only against the suits by moneylenders on loans advanced by them and would similarly exclude from its purview a suit on an isolated transaction not entered into by a moneylender in the regular course of the business of moneylending. The statutory scheme thus clearly seems to indicate that it is only the business of moneylending which is sought to be controlled and individual transactions of lending money do not fall within the mischief which was sought to be remedied by the Act. An individual transaction of lending money has not been declared to be void and as we construe the Act as a whole, interference with freedom of contract appears to have been limited only to the extent necessary for regulating and controlling the business of moneylending. Section 11-G which provides for composition of offences also suggests that individual transactions are not considered void. We are, therefore, of the opinion that the view of law taken by the Nagpur and M. P. High Courts in *Pati Ram*, 1953 Nag LJ 517 = (AIR 1954 Nag 44) (supra) and *Hajarimal* (1965) 67 Bom LR 816 (supra) and *Janki Bai*, AIR 1962 Madh Pra 117 (supra) is in conformity with the statutory intent and is, therefore, correct.

13. There is also another aspect which may legitimately be kept in view. People in arranging their affairs are entitled to rely on a decision of the highest court which appears to have prevailed for considerable length of time and it would require some exceptional reason to justify its reversal when such reversal is likely to create serious embarrassment for those who had acted on the faith of what seemed to be the settled law. Where the meaning of a statute is ambiguous and capable of more interpretations than one, and one view accepted by the highest court has stood for a long period during which many transactions such as dealings in property and making of contracts have taken place on the faith of that interpretation the court would ordinarily be reluctant to put upon it a different interpretation which would materially affect those transactions.

13-A. In the case before us the construction placed by the Nagpur and Madhya Pradesh High Courts on the

relevant provisions of the C. P. Act seems to have been accepted all these years beginning with *Sitaram Shrawan*, AIR 1941 Nag 177 (supra) in 1941 (except for a short period between 1958 and 1962) and rights to property and under contracts seem to have been founded on the faith of that construction. A Division Bench of the Bombay High Court sitting at Nagpur in *Wasudeo*, (1958) 60 Bom LR 1247 (supra), of course, dissented in 1958 from the view of the Division Bench of the Nagpur High Court in *Pati Ram*, 1953 Nag LJ 517 = (AIR 1954 Nag 44) (supra) without referring the point of dissent to a larger Bench. But a Full Bench of the Madhya Pradesh High Court disagreed with the *Wasudeo* case, (1958) 60 Bom LR 1247 (supra), vide *Janki Bai*, AIR 1962 Madh Pra 117 (FB) (supra). It, therefore, seems obvious that titles and transactions must have been founded on the view of law which, by and large, stood almost uniformly as enunciated in *Sitaram Shrawan*, AIR 1941 Nag 177 (supra) in 1941 and later in *Pati Ram*, 1953 Nag LJ 517 = (AIR 1954 Nag 44) (supra) and it would, in our opinion, be unjust to disturb them by adopting the interpretation suggested on behalf of the appellant on the authority of the English decisions. Now, assuming that two views on the statutory scheme of the Act are possible and assuming the interpretation canvassed on behalf of the appellant to be preferable to that accepted in the impugned judgment we are unable to say that the construction adopted in the judgment under appeal is so clearly and patently erroneous that it should, in the larger interests of justice, be upset notwithstanding the fact that it is likely to disturb rights to property and under contracts founded upon this construction. The fact that contravention of Section 11-F (i) of the Act is made a penal offence is an additional factor against the propriety of overruling and upsetting the established view unless we feel convinced that the established view is clearly erroneous. As already discussed, we are not so convinced but are on the other hand inclined to agree with the established view.

14. There is still another circumstance which may appropriately be noticed. Sections 11-C, 11-E (i) and

11-G (i) of the Act were amended by M. P. Act 40 of 1965. Had the construction placed by the courts on Section 11-F and other provisions of the Act been considered by the Legislature to be contrary to the legislative intentment, one would have ordinarily expected an amendment clarifying its intention because the Legislature must be fixed with the knowledge of the construction placed on the Act by the courts. No such action was taken by the Legislature. This circumstance is, of course, not conclusive but it is not wholly irrelevant and certainly deserves to be noticed as carrying some presumptive weight. As the appellant was not carrying on the business of moneylending in Chanda District, the single transaction in dispute in that district was not covered by the Act and the suit could proceed in the normal way without a registration certificate.

15. On the view we have taken the only question which remains to be noticed relates to the argument that there should be three mortgage decrees instead of one. This matter is one of procedure and form and it does not materially affect the substantive rights of the parties. We are, therefore, disinclined on this ground to direct modification of the impugned decree. The appeal accordingly fails and is dismissed but without costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 2015 (V 57 C 431)

(From Kerala: ILR (1968) 1 Ker 384)
HIDAYATULLAH C. J., G. K. MITTER
AND A. N. RAY, JJ.

E. M. Sankaran Namboodiripad, Appellant v. T. Narayanan Nambiar, Respondent.

Criminal Appeal No. 56 of 1968, D/- 31-7-1970.

Contempt of Courts Act (1952), S. 3
— Acts or words spoken tending to obstruct administration of justice —
Amounts to contempt of court.

The law of contempt stems from the right of the courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of

justice. This right is exercised in India by all courts when contempt is committed in *facie curiae* and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a court of record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts. There are many kinds of contempts. The chief forms of contempt are insult to Judges, attacks upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of courts, witnesses or the parties, abusing the process of the court, breach of duty by officers connected with the court and scandalising the Judges or the courts. The last form occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disregard. In this conduct are included all acts which bring the court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single Judge or a single court but may in certain circumstances, be committed in respect of the whole of the judiciary or judicial system. (Para 6)

While it is intended under Art. 19 that there should be freedom of speech and expression, it is also intended that in the exercise of the right, contempt of court shall not be committed. Each case must be examined on its own facts and the decision must be reached in the context of what was done or said. (Para 11)

Where therefore a person charged the judiciary as "an instrument of oppression" and the judges as "guided and dominated by class hatred, class interests and class prejudices, instinctively favouring the rich against the poor", it is clearly an attack upon Judges calculated to raise a sense of disrespect and distrust of all judicial decisions. It weakens the authority of law and law courts and the person is guilty of contempt of court. That the person did not intend any such result cannot serve as a justification. AIR 1938 Bom 197 & Criminal Appeal No. 110 of 1966, D/- 3-5-1962 (SC) Distinguished. Case law discussed.

(Para 33)

Cases Referred: Chronological Paras

- (1968) 1968-2 WLR 1204 = 1968-2 All ER 319, R. v. Metropolitan Police Commr. 7
- (1964) 11 Law Ed 2d 686 = 376 US 254, New York Times Co. v. L. B. Sullivan 12
- (1962) AIR 1962 SC 955 (V 49) = 1962 Supp (2) SCR 769 = 1962 (2) Cri LJ 103, Kedar Nath Singh v. State of Bihar 12
- (1962) Criminal Appeal No. 110 of 1960, D/- 3-5-1962 (SC) in re Basudeo Prasad Advocate Patna High Court 10
- (1957) 1 Law Ed 1498 = 354 US 476, Samuel Roth v. United States of America 12
- (1948) 93 Law Ed 1131 = 337 US 1, Arthur Terminiello v. City of Chicago 12
- (1938) AIR 1938 Bom 197 (V 25) = ILR (1938) Bom 179 = 39 Cri LJ 440, Govt. Pleader, High Court, Bombay v. Tulsidas Subhanrao 7
- (1936) AIR 1936 PC 141 (V 23) = 1936 All LJ 671, Andre Paul Terence Ambard v. Attorney General of Trinidad and Tobago 8
- (1925) 71 Law Ed 1095 = 274 US 357, Charlotte Anita Whitney v. People of the State of California 12
- (1900) 1900-2 QB 36 = 69 LJ QB 502, R. v. Gray 8
- (1899) 1899 AC 549 = 68 LJ PC 137, McLeod v. St. Aubyn 7, 8
- The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: Mr. E. M. S. Namboodiripad (former Chief Minister of Kerala) has filed this appeal against his conviction and sentence of Rs. 1000/- fine or simple imprisonment for one month by the High Court of Kerala for contempt of Court. The judgment, February 9, 1968, was by majority — Mr. Justice Raman Nair (now Chief Justice) and Mr. Justice Krishnamoorthy Iyer formed the majority. Mr. Justice Mathew dissented. The case has been certified by them as fit for appeal to this Court under Article 134 (1) (c) of the Constitution.

2. The conviction is based on certain utterances of the appellant, when he was Chief Minister, at a Press Conference held by him at Trivandrum, on November 9, 1967. The report of the Press Conference was published the

following day in some Indian newspapers. The proceedings were commenced in the High Court on the sworn information of an Advocate of the High Court, based mainly on the report in the Indian Express. The appellant showed cause against the notice sent to him and in an elaborate affidavit stated that the report 'was substantially correct, though it was incomplete in some respects.'

3. The offending parts of the Press Conference will be referred to in this judgment, but we may begin by reading it as a whole. This is what was reported.

"Marx and Engels considered the judiciary as an instrument of oppression and even today when the State set-up has not undergone any change it continues to be so. Mr. Namboodiripad told a news conference this morning. He further said that Judges are guided and dominated by class hatred, class interests and class prejudices and where the evidence is balanced between a well dressed pot-bellied rich man and a poor ill-dressed and illiterate person the Judge instinctively favours the former, the Chief Minister alleged. The Chief Minister said that election of Judges would be a better arrangement, but unless the basic State set-up is changed, it could not solve the problem. Referring to the Constitution the Chief Minister said the oath he had taken was limited only to see that the constitutional provisions are practised. 'I have not taken any oath' the Chief Minister said "that every word and every clause in the Constitution is sacred".

Before that he had also taken an oath. Mr. Namboodiripad said, holding aloft a copy of the Marxist party's programme and read out extracts from it to say that the oath (party—Ed.) had always held that nothing much could be done under the limitations of the Constitution.

Raising this subject of Constitution and judiciary suo motu at the lag end of his news conference the Chief Minister said so many reports have appeared in the press that Marxists like himself, Mr. A. K. Gopalan, and Mr. Imbichi Baba (Transport Minister) were making statements critical of the judiciary "presumably with the idea that anything spoken about the court is contempt of court".

His party had always taken the view, the Chief Minister said, that Judiciary is part of the class rule of the ruling classes. And there are limits to the sanctity of the judiciary. The judiciary is weighted against workers, peasants and other sections of the working classes and the law and the system of judiciary essentially serve the exploiting classes. Even where the judiciary is separated from the executive it is still subject to the influence and pressure of the executive. To say this is not wrong. The judiciary he argued was only an institution like the President or Parliament or the Public Service Commission. Even the President is subject to impeachment. After all, sovereignty rested not with any one of them but with the people. Even with regard to Judges confidential records are being kept—why? The judge is subject to his own idiosyncrasies and prejudices. "We hold the view that they are guided by individual idiosyncrasies, guided and dominated by class interests, class hatred, and class prejudices. In these conditions we have not pledged ourselves not to criticise the judiciary or even individual judgments."

This did not mean, he explained, that they could challenge the integrity of the individual judge or cast reflections on individual judgments, the Chief Minister contended.

He did not subscribe to the view that it was an aspersion on integrity when he said that judges are guided and dominated by class hatred and class prejudices. "The High Court and the Supreme Court can haul me up, if they want" he said".

4. The affidavit which he filed later in the High Court explained his observations at the press conference, supplied some omissions and pleaded want of intention to show disrespect and justification on the ground that the offence charged could not be held to be committed, in view of guarantee of freedom of speech and expression under the Constitution. He stated that his observations at the press conference did no more than give expression to the Marxist philosophy and what was contained in Chapter 5 of the programme of the Communist Party of India (Marxist) adopted in November 1964. His pleas in defence were accepted by Justice Mathew who found nothing objectionable which could be

termed contempt of court. The other two learned Judges took the opposite view. Judgment was entered on the basis of the majority view.

5. In explaining his press conference the appellant added that it did not offend the majesty of law, undermine 'the dignity of courts' or obstruct the administration of justice. Nor did it have any such tendency. He claimed that it contained a fair criticism of the system of judicial administration in an effort to make it conform to the peoples' objective of a democratic and egalitarian society based on socialism. He considered that it was not only his right but also his duty to educate public opinion. He claimed that the statement read as a whole amounted to a fair and reasonable criticism of the present judicial system in our country, that it was not intended to be a criticism of any particular judge, his judgment or his conduct, and that it could not be construed as contempt of court. He added that he had always enforced the judgments of the courts and shown respect to the judiciary and had advocated the independence of the judiciary and decried all attempt to make encroachments upon it. Criticism of the judiciary, according to him, was his right and it was being exercised by other parties in India. He denied that it was for the courts to tell the people what the law was and asserted that the voice of the Legislatures should be supreme. He, however, found his party at variance with the other parties in that according to the political ideology of his party the State (including all the three limbs — the Legislature, the Executive and the Judiciary) was the instrument of the dominant class or classes, so long as society was divided into exploiting and exploited classes, and parliamentary democracy was an organ of class oppression. He concluded that his approach to the judiciary was:

(a) the verdicts of the Courts must be respected and enforced;

(b) no aspersions should be cast on individual judges or judgments by attributing motives to judges;

(c) criticism of the judicial system or of judges going against the spirit of legislation should be permissible; and

(d) education of the people that the State (including the judiciary) was an instrument of exploitation of the

majority by the ruling and exploiting classes, was legitimate.

These principles, he submitted, were not transgressed by him and also summed up his observations and the press conference.

6. The law of contempt stems from the right of the Courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all Courts when contempt is committed *in facie curiae* and by the superior Courts on their own behalf or on behalf of Courts subordinate to them even if committed outside the Courts. Formerly, it was regarded as inherent in the powers of a Court of Record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts. There are many kinds of contempts. The chief forms of contempt are insult to judges, attacks upon them, comment on pending proceedings with a tendency to prejudice fair trial, obstruction to officers of Courts, witnesses or the parties, abusing the process of the Court, breach of duty by officers connected with the Court and scandalising the judges or the Courts. The last form occurs, generally speaking, when the conduct of a person tends to bring the authority and administration of the law into disrespect or disregard. In this conduct are included all acts which bring the Court into disrepute or disrespect or which offend its dignity, affront its majesty or challenge its authority. Such contempt may be committed in respect of a single judge or a single Court but may, in certain circumstances, be committed in respect of the whole of the judiciary or judicial system. The question is whether in the circumstances of this case the offence was committed.

7. In arguing the case of the appellant Mr. V. K. Krishna Menon contended that the law of contempt must be read without encroaching upon the guaranteed freedom of speech and expression in Article 19 (1) (a) of the Constitution, that the intention of the contemner in making his statement at the press conference should be examined in the light of his political views as he was at liberty to put them before

the people and lastly the harm done to the Courts by his statements must be apparent. He admitted that it might be possible to say that the speech constituted contempt of Court but submitted that it would be inexpedient to do so. He stated further that the species of contempt called scandalising the Court had fallen in desuetude and was no longer enforced in England and relied upon *McLeod v. St. Aubyn*, 1899 AC 549. He further submitted that the freedom of speech and expression gave immunity to the appellant as all he did was to give expression to the teachings of Marx, Engels and Lenin. Lastly, he contended that a general remark regarding Courts in general did not constitute contempt of Court and relied upon *Govt. Pleader, High Court, Bombay v. Tulsidas Subhanrao*, ILR (1938) Bom 179 = (AIR 1938 Bom 197) and the observations of Lord Denning M.R. in *R. v. Metropolitan Police Commr*, (1968) 2 WLR 1204.

8. It is no doubt true that Lord Morris in 1899 AC 549 at page 561 observed that the contempt of Court known from the days of the *Star Chamber* of *Scandalum Justicie Curiae* or scandalising the judges, had fallen into disuse in England. But as pointed out by Lord Atkin in *Andre Paul Torence Ambard v. The Attorney General of Trinidad and Tobago*, AIR 1936 PC 141 at page 143 the observations of Lord Morris were disproved within a year in *R. v. Gray*, (1900) 2 QB 36 at p. 40. Since then many convictions have taken place in which offence was held to be committed when the act constituted scandalising a judge.

9. We may dispose of the Bombay case above cited. The contemner in that case had expressed contempt for all Courts. *Beaumont, C. J.*, (Wasoodew, J., concurring) held that it was not a case in which action should be taken. The case did not lay down that there could never be contempt of Court even though the Court attacked was not one but all the Courts together. All it said was that action should not be taken in such a case. If the Chief Justice intended laying down the broad proposition contended for, we must overrule his dictum as an incorrect statement of law. But we think that the Chief Justice did not say anything like that. He was

also influenced by the unconditional apology and therefore discharged the rule.

10. Another case cited in this connection may be considered here. In Criminal Appeal No. 110 of 1960 (SC) (In Re Basudeo Prasad, Advocate, Patna High Court) decided on May, 3, 1962, the offending statement was that many lawyers without practice get appointed as judges of the High Courts. The remark was held by this Court not to constitute contempt of Court. The remark was made after the report of the Law Commission was published and this Court held that the person concerned, who was then the Secretary of the Indian Council of Public Affairs and an advocate, was entitled to comment on the choice of judges and that the remarks were within the proper limits of public criticism on a question on which there might be differences of opinion. In our judgment that case furnishes no parallel to the case we have here. Each case must be examined on its own facts and the decision must be reached in the context of what was done or said.

11. The appellant has contended before us that the law of contempt should be so applied that the freedom of speech and expression are not whittled down. This is true. The spirit underlying Article 19 (1) (a) must have due play but we cannot overlook the provisions of the second clause of the article. While it is intended that there should be freedom of speech and expression, it is also intended that in the exercise of the right, contempt of Court shall not be committed. The words of the second clause are;

"Nothing in sub-clause (a) of Cl. (1) shall affect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the sub-clause in relation to contempt of Court, defamation or incitement to an offence."

These provisions are to be read with Articles 129 and 215 which specially confer on this Court and the High Courts the power to punish for contempt of themselves. Article 19 (1) (a) guarantees complete freedom of speech and expression but it also makes an

exception in respect of contempt of Court. The guaranteed right on which the functioning of our democracy rests, is intended to give protection to expression of free opinions to change political and social conditions and to advance human knowledge. While the right is essential to a free society, the Constitution has itself imposed restrictions in relation to contempt of Court and it cannot therefore be said that the right abolishes the law of contempt or that attacks upon judges and Courts will be condoned.

12. Mr. V. K. Krishna Menon read to us observations from Samuel Roth v. United States of America, (1957) 1 Law Ed. 1498 at page 1506; Arthur Terminiello v. City of Chicago, (1948) 93 Law Ed. 1131 at page 1134; Charlotte Anits Whitney v. People of the State of California, (1925) 71 Law Ed. 1095 and New York Times Co. v. L. B. Sullivan, (1964) 11 Law Ed. 2d 686, on the high-toned objective in guaranteeing freedom of speech. We agree with the observations and can only say that freedom of speech and expression will always prevail except where contempt is manifest, mischievous or substantial. The question always is on which side of the line the case falls. The observations of this Court in Kedar Nath Singh v. State of Bihar, 1962 Supp (2) SCR 769 = (AIR 1962 SC 955) in connection with sedition do not lend any assistance because the topic there discussed was different. Freedom of speech goes far but not far enough to condone a case of real contempt of Court. We shall, therefore, see whether there was any justification for the appellant which gives him the benefit of the guaranteed right.

13. The appellant has maintained that his philosophy is based upon that of Marx and Engels. Indeed he claims to be descended from the last philosophe and seeks to educate the exploited peoples on the reality behind class oppression. As a Marxist-Leninist he advocates the radical and revolutionary transformation of the State from coercive instrument of exploiting classes to an instrument which the exploited majority can use against these classes. In this transformation he wishes to make the State wither away and with the State its organs, namely, the Legislature, the Executive and the Judiciary also to change. He

has justified the press conference as an exposition of his ideology and claims protection of the first clause of Art. 19 (1) which guarantees freedom of speech and expression. The law of contempt, he says, cannot be used to deprive him of his rights.

14. All this is general but the appellant attacked the judiciary directly as "an instrument of oppression" and the judges as "dominated by class hatred, class interests and class prejudices", "instinctively" favouring the rich against the poor. He said that as part of the ruling classes the judiciary "works against workers, peasants and other sections of the working classes" and "the law and the system of judiciary essentially serve the exploiting classes". Even these statements, he claims, are the teachings of Marx, Engels and Lenin whose follower he is. This was also the submission of his counsel to us.

15. The appellant is only partly right. He and his counsel may be said to have distorted the approach of Marx, Engels and Lenin, and we proceed to explain how, Marx believed in man's inherent rationalism and virtue and depended upon them to create a better society where there would be no injustice and oppression and everyone would be able to share the fruits of man's labour and genius. He attacked all forms of social evils. Hence his sympathy for the neglected and the 'injured and insulted' labouring masses. Marx was neither first nor alone in this. Before him the Judeo-Christians demanded Social justice. Others who preached social equality and denounced social injustice were the Utopian Socialists and the Christian Socialists. They had all pointed out inequalities of civilization based on urban industrial development. We had thus Auguste Comte's Cours de philosophie positive, Feuerbach's History of New Philosophy and the writings of Hegel.

16. Marx's contribution was to create a scientific and ethical approach to the problem of inequality. He adopted the Hegelian dialectical form to explain how the capitalist society had arisen and showed how it would meet its fall. His view was that it nursed within itself the germ of its own destruction. In his classic book Das Kapital he disclosed the clues for

the transition from capitalism to socialism. His labour theory was that the capitalist did not give to labour a due share from the value of the goods produced by labour because of the iron law of wages and this left the surplus labour value thereby saved in the hands of the capitalist. In this way the capitalist became an exploiter who grew rich on the exploited labour surplus and could indulge in what he called 'capitalist luxuries'. The introduction of machinery further cut down labour value and increased unemployment leading to reduction of wages. In this way the means of production passed into the hands of a few. Marx saw that this led to tensions which Marx thought would ultimately destroy the capitalist system. He saw the Revolution drawing nearer which would destroy 'classes' and the exploitation of man by man. There was in his view one obstruction to the triumph of the working classes and that was government established by the capitalists who could frame laws to enforce the differences. From this stemmed his hostility to the State, its government and its laws.

17. The Communist Manifesto, which spoke of class struggle, particularly between the bourgeoisie and the proletarians, gave a history of the domination of the ruling classes converting everyone not belonging to itself into paid wage-labourers. He said that these reactionaries were gearing all production to their own benefit and power. Describing the communists in this context, the Manifesto said that they had no separate interests but represented the Proletariat as a whole, irrespective of nationalities and that the class struggle was universal. The communists were to settle the lines of action and their aim was abolition of property — not property of the common man but the bourgeois property of the capitalist created by surplus from wage-labour and resulting in accumulation of capital in the hands of the capitalist. According to the communists, this capital became not a personal but social power and the fight visualized in the Manifesto was the termination of its class character. Wage-labour would thus leave no surplus, nor would it lead to accumulation of more wage-labour yielding still greater surplus but the gains of production would go to enrich labour

in the communist society. Freedom according to the Manifesto never meant the abolition of property in toto but the abolition of the bourgeois individuality. What was done away with was not property but the means of subjugating labour of others to one's own use. This in short is the communist thesis of social equality as one gathers from the Manifesto.

18. Next follow the steps for achieving the betterment of what Saint Simon described as the largest and poorest class. Engels in his Analysis of Socialism explained the different types but we are not concerned with them here. The Radicals' appeal followed the forces of reaction released in the 1880s by Tzar Alexander III. The Populists of Plekhanov were routed and driven out. Then in 1890 the young intellectuals took up the cause of socialism and Marxism provided the answer where the moderation and escapism of the Populists had failed. The former was based on a scientific approach while Populism was empiric and tended to make Russia, as Bulgakov wrote, 'a peasant and crude country'. The Populists based themselves on the Peasant Communes. The rise of Vladimir Lenin at this time determined the future of Marxism and his classic "the State and Revolution" appears to be in the mind of the appellant when he made his pronouncements. We are doubtful if he has fully appreciated the literature, if he has read it.

19. Lenin's teachings on the State had removed the distortions of Marxism from the minds of the people. He quoted long extracts from Marx and Engels to establish his points. Lenin first took up Engel's Origin of the Family Private Property and the State. The State, according to Engels, was not the image and reality of Reason as Hegel had maintained before. It was the product of society, a power standing above society like the Leviathan of Hobbes. According to Lenin the State was the product and manifestation of the irreconcilability of class antagonism. The State emerged when class antagonisms could not objectively be reconciled. The distortion which had crept into Marxism was that the State was regarded as an organ for the reconciliation of the classes. Lenin reinterpreted Marx and,

according to him, the State could neither arise nor maintain itself if it were possible to reconcile classes. Marx had thought of the State as an organ of class rule and an organ of oppression. The views of the Monshiviks and other Socialist revolutionaries were exactly the converse.

20. The disputes which have arisen in our country over the inviolability of property as a fundamental right have the same foundations. One side views that the chapter on Fundamental Rights reconciles, through itself, the basic and fundamental class antagonisms and the State is no longer required to play any part. The other side would give to one of the organs of the State, namely, the legislature, a continual power of readjustment through laws and amendments of the Constitution. Both views do not accord with the Communist Manifesto and hence the distrust of the Constitution by the communists disclosed by the appellant.

21. Lenin, however, thought that the State degenerated into an instrument for the exploitation of the oppressed classes and wielded special public powers to tax and maintain armies. Engels thought that this made the State stand above society and the officers of the State were specially protected as they had the protection of the laws. From this sprung his hostility to the State. Engels summed it up thus:

"The State is by no means a power forced on society, from without. Neither as little is it 'the reality of the ethical idea', 'the image and reality of reason' as Hegel maintains. The State is a product of society at certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it is cleft into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms, classes with conflicting economic interests, might not consume themselves and society in sterile struggle, a power seemingly standing above society becomes necessary for the purpose of moderating the conflict, of keeping it within the bounds of 'order'. And this power, arisen out of society, but placing itself above it, and increasingly alienating itself from it, is the State."

Lenin resumed this thought further thus:

"This expresses with perfect clarity the basic idea of Marxism on the question of the historical role and meaning of the state. The State is the product and the manifestation of the irreconcilability of class antagonisms. The state arises when, where and to the extent that class antagonisms objectively cannot be reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable."

22. Having viewed the state in this way these writers from Marx to Lenin viewed it as the instrument for the exploitation of the oppressed classes. The Paris Commune of 1871 had stated its conclusions how the state gets above society but it was blurred in a reactionary manner later by Kautsky in 1912. Lenin cleared the misconception in an exposition of Engel's philosophy:

".....As the state arose from the need to hold class antagonisms in check, but as it arose, at the same time, in the midst of the conflict of these classes, it is, as a rule, the state of the most powerful economically dominant class, which through the medium of the state, becomes also the politically dominant class and thus acquires means of holding down and exploiting the oppressed classes..... the modern representative state is an instrument of exploitation of wage labour by capital."

Engels added further:

"In a democratic republic wealth exercises its power indirectly, but all the more surely first by means of the direct corruption of 'officials' and second, by means of 'an alliance between the Government and Stock Exchange'."

Lenin gave the example that "at the present time, imperialism and the domination of the banks have 'developed' both these methods of upholding and giving effect to the omnipotence of wealth in democratic republics of all descriptions into an unusually fine art". He concluded that "a democratic republic is the best possible political shell for capitalism" and that "it establishes its power so securely, so firmly, that no change whether of persons, of institutions, or of parties in the bourgeois democratic republic can shake it."

23. Therefore, Marx, Engels and Lenin thought in terms of 'withering away of the state'. Although Lenin thought that Engel's doctrines were an adulteration of Marxism, he was not right. Marx himself believed in this. In his *Poverty of Philosophy*, Marx says:

".....The working class, in the course, of development, will substitute for the old bourgeois society an association which will exclude classes and their antagonism, and there will be no more political power properly so-called, since political power is precisely the official expression of antagonism in bourgeois society."

Marx and Engels in the *Manifesto* had considered the true state to be "the proletariat organised as the ruling class." It was the Kautskyites (the Dictatorship of the Proletariat) who, misunderstanding the doctrines of Marx, taught that the Proletariat needed the state. According to Marx the proletariat needed a state which must wither away leading to the dictatorship of the proletariat.

24. In this fight for power the Communist *Manifesto* gave a purely abstract solution. It was the substitution of the commune for the bourgeois state machinery and a fuller democracy. The Army was to be replaced by armed people, the officials were to be elected and also the Judges. The Commune was not to be a 'talking Parliament' but a 'working body'. It was to be the executive and the legislature at the same time. The principles were formulated by Engels thus:

"The necessity of political action by the proletariat and of its dictatorship as the transition to the abolition of classes and with them the state....."

25. The thesis on the withering away of the state was to be accompanied by a restatement of the functions of the law. Law made by the bourgeois rulers was castigated as involving class supremacy. The Hegelian doctrine of the apotheosis of Reason was replaced by the invocation of economic necessity as the only foundation for laws. The laws which preserved privileges were to go, laws which kept the power of the bourgeois above the people were to go, only laws creating equality and preserving society from internal decay and disruption were to be tolerated.

26. In all the writings there is no direct attack on the judiciary selected

as the target of people's wrath. Nor are the Judges condemned personally. Engels regarded the Courts as one of the means adopted by the law for effectuating itself. It was thus that he wrote:

"The centralised state power, with its ubiquitous organs, standing army, police, bureaucracy, clergy, and judicature organs wrought after the plan of a systematic and hierarchic division of labour — originates from the days of absolute monarchy, serving nascent middle-class society as mighty weapons in its struggles against feudalism".

This is not a castigation of the judiciary as being dishonestly ranged against the people but only a recital of a historic fact in feudal societies. He only said that the judicial functionaries must be divested of 'sham independence' which marked their subservience to succeeding Governments, and, therefore, be elected. In one of his letters to the Spanish Federal Council of the International Workingmen's Association London, February 13, 1871, he talked of the power of the possessing classes — the landed aristocracy and the bourgeoisie—and said that they kept the working people in servitude not only by their wealth got by the exploitation of labour but also by the power of the state, by the army, the bureaucracy, and the Courts. He was not charging the judiciary with taking sides but only as an evil adjunct of the administration of class legislation. The fault was with the state and the laws and not with the judiciary. Indeed in no writing which we have seen or which has been brought to our notice, Marx or Engels has said what the appellant quotes them as saying.

27. We have summarized into a very small compass, many thousands of words in which these doctrines have been debated from Plekhanov to Lenin through the thoughts of Kautsky, Kerensky, Lesalle, Belinsky and others who attempted a middle line between the revisionism of Bernstein and the Bolshevik views of Lenin. We have done so because Mr. V. K. Krishna Menon sneered that many people learn about communism through Middleton Murray!

28. It will be noticed that in all these writings there is not that mention of Judges which the appellant has

made. Either he does not know or has deliberately distorted the writings of Marx, Engels and Lenin for his own purpose. We do not know which will be the more charitable view to take. Marx and Engels knew that the administration of justice must change with laws and changes in society, there was thus no need to castigate the Judges as such beyond saying that the judicial system is the prop of the state.

29. The Courts in India are not *sui generis*. They owe their existence, form, powers and jurisdictions to the Constitution and the laws. The Constitution is the Supreme law and the other laws are made by Parliament. It is they that give the Courts their obligatory duties, one such being the settlement of disputes in which the state (by which we mean those in authority) are ranged against citizens. Again they decide disputes in which class interests are apparent. The action of the Courts when exercised against the state proves irksome to the state and equally when it is between two classes, to the class which loses. It is not easily realized that one of the main functions of Courts under Constitution is to declare actions, repugnant to the Constitution or the laws (as the case may be), to be invalid. The Courts as well as all the other organs and institutions are equally bound by the Constitution and the laws. Although the Courts in such cases imply the widest powers in the other jurisdictions and also give credit where it belongs they cannot always decide either in favour of the state or any particular class. There are innumerable cases in which the decisions have gone against what may be described in the language of communism as the exploiting classes.

30. For those who think that the laws are defective the path of reform is open, but in a democracy such as ours to weaken the judiciary is to weaken democracy itself. Where the law is silent the Courts have discretion. The existence of law containing its own guiding principles, reduces the discretion of Courts to a minimum. The Courts must do their duty according to their own understanding of the laws and the obligations of the Constitution. They cannot take their cue

from sentiments of politicians nor even indirectly give support to something which they consider to be wrong or against the Constitution and the laws. The good faith of the Judges is the firm bed-rock on which any system of administration securely rests and an attempt to shake the people's confidence in the Courts is to strike at the very root of our system of democracy. The oft-quoted anger of the Executive in the United States at the time of the New Deal and the threat to the Supreme Court (which the United States had the good sense not to pursue) should really point the other way and it should be noted that today the security of the United States rests upon its dependence on Constitution for nearly 200 years and that is mainly due to the Supreme Court.

31. The question thus in this case is whether the appellant has said anything which brings him out of the protection of Art. 19 (1) (a) and exposes him to a charge of contempt of Court. It is obvious that the appellant has misguided himself about the true teachings of Marx, Engels and Lenin. He has misunderstood the attack by them on state and the laws as involving an attack on the judiciary. No doubt the Courts, while upholding the laws and enforcing them, do give support to the state but they do not do so out of any impure motives. They do not range themselves on the side of the exploiting classes and indeed resist them when the law does not warrant an encroachment. To charge the judiciary as an instrument of oppression, the Judges as guided and dominated by class hatred, class interests and class prejudices instinctively favouring the rich against the poor is to draw a very distorted and poor picture of the judiciary. It is clear that it is an attack upon Judges which is calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions. It weakens the authority of law and law courts.

32. Mr. V. K. Krishna Menon tried to support the action of the appellant by saying that Judges are products of their environment and reflect the influences upon them of the society in which they move. He contended that these subtle influences enter into decision-making and drew our attention to

the writings of Prof. Laski, Justice Cordozo, Holmes and others where the subtle influences of one's upbringing are described. This is only to say that Judges are as human as others. But Judges do not consciously take a view against the conscience or their oaths. What the appellant wishes to say is that they do. In this he has been guilty of a great calumny. We do not find it necessary to refer to these writings because in our judgment they do not afford any justification for the contempt which has patently been committed. We agree with Justice Raman Nair that some of them have the exaggerations of the confessional. Others come from persons like the appellant who have no faith in institutions hallowed by age and respected by the people.

33. Mr. V. K. Krishna Menon exhorted us to give consideration to the purpose for which the statement was made, the position of the appellant as the head of a State, his sacrifices, his background and his integrity. On the other hand, we cannot ignore the occasion (a press conference), the belief of the people in his word as a Chief Minister and the ready ear which many in his party and outside would give to him. The mischief that his words would cause need not be assessed to find him guilty. The law punishes not only acts which do in fact interfere with the Courts and administration of justice but also those which have that tendency, that is to say, are likely to produce a particular result. Judged from the angle of Courts and administration of justice, there is not a semblance of doubt in our minds that the appellant was guilty of contempt of Court. Whether he misunderstood the teachings of Marx and Engels or deliberately distorted them is not to much purpose. The likely effect of his words must be seen and they have clearly the effect of lowering the prestige of Judges and Courts in the eyes of the people. That he did not intend any such result may be a matter for consideration in the sentence to be imposed on him but cannot serve as a justification. We uphold the conviction.

34. As regards sentence we think that it was hardly necessary to impose a heavy sentence. The ends of Justice in this case are amply served by ex-

posing the appellant's error about the true teachings of Marx and Engels (behind whom he shelters) and by sentencing him to a nominal fine. We accordingly reduce the sentence of fine to Rs. 50/-. In default of payment of fine he will undergo simple imprisonment for one week. With this modification the appeal will be dismissed.

Appeal dismissed.

AIR 1970 SUPREME COURT 2025 (V 57 C 432)

(From Bombay: AIR 1953 Bom 153)
V. BHARGAVA, K. S. HEGDE AND
A. N. RAY, JJ.

Goswami Shri Mahalaxmi Vahuji,
Appellant v. Shah Ranchhoddas Kali-
das (Dead) and others, Respondents.

Civil Appeal No. 1784 of 1966, D/-
9-9-1969.

(A) Evidence Act (1872), Sec. 114,
Illus. (g) — Question in issue whether
temple and its property was private
property of defendant or public trust
— Previous Goswamis maintaining ac-
counts — Defendant Goswami not
producing accounts — Court can draw
inference that if produced they would
go against defendant—Documents from
Registers of temple property — Tops
of documents containing title of regis-
ter appearing to be deliberately torn
— Inference adverse to defendant held
could reasonably be drawn from sur-
rounding circumstances. (Para 7)

(B) Civil P. C. (1908), O. 6, R. 2 —
Plea in written statement that suit
properties were private properties of
Maharaj and that there was no trust
private or public — Case argued before
Supreme Court that properties were
partly of private trust and partly pri-
vate property of Maharaj — Defendant
cannot be allowed to set up a case
wholly inconsistent with that pleaded.
(Para 8)

(C) Hindu Law — Religious endow-
ment — Public trusts — Tests —
Temple belonging to Vallabha Sampra-
dayees — Common feature of such
temple is that the ground floor is used
as the place of worship and the first
floor as the residence of Goswami
Maharaj. Therefore, the fact that
Gokulnathji temple at Nadiad had the

appearance of a residential house does
not in any manner militate against the
contention that the temple in question
is a public temple. AIR 1963 SC 1638,
Rel. on. (Para 12)

(D) Hindu Law — Religious endow-
ment — Public Trust — Tests —
Temple of Shree Gokulnathji at Nadiad
belonging to Vallabha Sampardayees—
Custom that public are asked to enter
temple only after Goswami has finish-
ed worship — This is no circumstance
to show that temple is private one —
Power to manage temple includes
power to maintain discipline within its
precincts. (Para 12)

(E) Hindu Law — Religious endow-
ment — Public trust — Public temple
— Tests to see whether temple is
public — Criteria indicated.

(Paras 15, 16, 17)

(F) Hindu Law — Religious endow-
ment — Public trust — Haveli (Temple)
at Nadiad of Shree Gokulnathji and
the properties attached thereto are
properties of public religious trust
created by followers of Vallabh cult
residing in Nadiad — The Goswami
Maharaj is not a mere manager, but
have an important place — He is the
Maha Prabhu — Vallabh devotees
worship their deity through him — In-
come from temple properties has to be
primarily used for the expenses of the
sevas and utsavas in the temple, the
upkeep, renovation and improvements
of the temple premises but subject to
these demands, the Maharaj has a
right to utilise the temple income in
maintaining himself and his family in
a reasonably comfortable manner.
AIR 1953 Bom 153, Affirmed.

(Paras 36, 37)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1638 (V 50) =	
(1964) 1 SCR 561, Shri Govind- lalji Maharaj v. State of Rajas- than	9
(1960) AIR 1960 SC 100 (V 47) =	
(1960) 1 SCR 773, Narayan Bhagwant Rao Gosavi Balaji- wale v. Gopal Vinayak Gosavi	16
(1957) AIR 1957 SC 133 (V 44) =	
1956 SCR 756, Deoki Nandan v. Murlidar	16
(1934) AIR 1934 PC 230 (V 21) =	
61 Ind App 405, Mundacheri Koman v. Achutan Nair	16
(1924) AIR 1924 PC 44 (V 11) =	
5 LRPC 125, Lakshmana v. Subramania	16

M/s. D. Narasaraaju and A. K. Sen, Sr. Advocates (M/s. Balkrishan Acharya and S. S. Shukla, Advocates with them), for Appellant; Mr. S. T. Desai, Sr. Advocate (Mr. M. N. Shroff, Advocate, with him), for Respondents Nos. 3 and 4; M/s. K. K. Jain, M. K. Garg, and H. K. Puri, Advocates, for Respondents Nos. 13 (a) to 13 (f).

The following Judgment of the Court was delivered by

HEGDE, J.: The main question for decision in this appeal is whether the Haveli at Nadiad in which the idol of Shree Gokulnathji is installed as well as the other properties detailed in plaint schedules A & B are the properties of a public religious trust created by the followers of Vallabh cult residing at Nadiad.

2. The history of the suit institution and its management as also the various pleas taken by the parties have been elaborately set out by the High Court in a well considered judgment. Hence we shall refer only to such pleas as are necessary to decide the contentions advanced before us.

3. The plaintiffs are the residents of Nadiad. They are Vaishnavites. They belong to the Vallabh Sampradaya. They sued for a declaration that the properties mentioned in Schedules A & B of the plaint are properties of the ownership of the trust mentioned earlier. They are suing on behalf of the Vallabha Sampradayeys residing at Nadiad. According to their case as finally evolved that even during the last quarter of the 18th Century, the Mandir of the Gokulnathji existed at Nagarwad in Nadiad Prant, but in about 1821, a new Mandir was constructed by the followers of the Vallabha school at Santh Pipli, Nadiad and the idol of Gokulnathji which was previously worshipped at Nagarwad was taken and consecrated there. In about 1831 they invited Goswami Mathuranathji, a direct descendant of Shri Vallabhacharya to come over to Nadiad and take up the management of the Mandir as its Maha Prabhu. According to the plaintiffs the Mandir in question was constructed by the Vallabha Sampradayeys and the expenses of the sevas as well as the utsavas performed in the Mandir were contributed by them. They further say that the properties belonging to the trust

were purchased from the contributions made by the devotees of that temple. They assert that the persons belonging to the Vallabha Sampradaya have a right to have darshan of the deities in the Mandir, according to usage, as of right. In short their case is that the Mandir in question is a place of public religious worship by the persons belonging to the Vallabha Sampradaya and the Maha Prabhu is only a trustee. He has a right to reside in the upstairs portion of the Mandir and further he can utilise a reasonable portion of the income of the trust, after meeting the requirements of the trust for his maintenance as well as the maintenance of the members of his family. They contend that the suit properties were dedicated to Shree Gokulnathji and the Maha Prabhu has no independent right of his own in those properties. It is further said that the management of the temple was carried on efficiently by Mathuranathji and his descendants till about the time Annirudhalalji became the Maha Prabhu in Samv. 1955. Annirudhalalji under evil advice sought to secure the Jamnagar Gadi and for that purpose spent enormous sums of money from out of the funds belonging to the suit temple. He also incurred considerable debts in that connection. He died in Samv. 1992. Thereafter defendant No. 1, his widow took over the management of the suit temple and its properties. During her management she began to assert that she was the absolute owner of the suit properties including the suit temple. She alienated several items out of the suit properties. Hence they were constrained to bring the suit under appeal for the declaration mentioned earlier and also for a further declaration that the alienations effected by her are illegal, improper and unauthorised and not binding on the deity. They also sought a mandatory injunction against defendants Nos. 2, 7 to 14 to restore lot No. 2 property in Sch. A to defendant No. 1 for the benefit of the deity Shree Gokulnathji after declaring that the sale deed dated 19, April, 1953, passed by defendant No. 1 to defendant No. 2 in respect of it is illegal, improper, unauthorised and without consideration and the same is not binding on the deity. They have also asked for a permanent injunction against defendants 3, 4, 5 and 6 restraining them

from enforcing the mortgages, dated 14th March, 1939, 27th January, 1942, 12th January, 1942 and 17th December 1941, passed by defendant No. 1 in their favour. The suit was mainly contested by defendant No. 1. According to her Goswami Mathuranathji Maharaj was the owner of the idol Shri Gokulnathji. It is he who established the Haveli at Nadiad and founded his Gadi there; he was not only the owner of the Haveli but he was also the owner of the deities that were being worshipped in that Haveli. She further pleaded that as per the tenets and usages of the Vallabha school, it is not possible for the members of that cult to found a temple. They can only worship through the Acharya (Maha Prabhu) in his house known as Haveli. According to their cult the Goswami Maharaj otherwise known as Maha Prabhu is the emblem of God head and the living representative of divinity. She went further and took up the plea that according to the Vallabha Sampradaya no deity can own any property. She further averred that Mathuranathji Maharaj and his descendants received from time to time presents and gifts made by his followers. Those presents were made to them as a mark of reverence and respect to them and with a view to receive their grace. They were the absolute owners of the idols they worshipped, the presents and gifts made to them and of the properties acquired by them. She denied that the Haveli in which Shri Gokulnathji is worshipped is a public temple. She also denied that the Vallabh Sampradayeys were entitled to have the Darshana of that deity in that Haveli as of right. She denied the plaint averments that all or any portion of the suit properties were acquired from the funds raised by the devotees or that the sevas or festivals were conducted from out of the contributions made by them. She justified the impugned alienations mainly on the ground that she had absolute right to deal with the suit properties as she pleased. The other defendants supported the defence taken by the 1st defendant. They further pleaded that the alienations effected in their favour were supported by consideration and they were bona fide alienees and therefore those alienations are not open to challenge.

4. The trial court dismissed the plaintiff's suit principally on the ground that as per the tenets and usages of Vallabha School it is impermissible for Vallabh Sampradayeys to found a public temple and therefore, it is not possible to uphold the pleas advanced on behalf of the plaintiffs. In appeal the High Court reversed the judgment and decree of the trial court. It accepted the plaintiffs' case that suit properties were the properties of a public religious trust and the alienations impeached were not valid and binding on the trust. This appeal has been brought by the 1st defendant. The alienees have not appealed against the decree of the High Court. In this Court they merely supported the pleas taken by the 1st defendant.

5. In this case voluminous evidence both oral and documentary has been led by the parties. Fifty-one witnesses were examined in court and two on commission. The oral evidence mainly relates to the tenets and beliefs of the devotees of the Vallabh Cult and the usages that prevail in their places of worship.

6. Before proceeding to examine the issues arising for decision in the case it is necessary to mention certain circumstances which have a bearing on those issues. At the stage of pleadings it was common ground between the parties that Mathuranathji was the first person to be recognised as their Maharaj by the Vallabh Sampradayeys of Nadiad. The plaintiffs' case as mentioned earlier, was that there was a temple of Shree Gokulnathji at Nagarwad in Nadiad even before Mathuranathji arrived at that place and according to them Mathuranathji had in fact been invited by the Vallabh Sampradayeys of Nadiad to take over the management of the temple that was already existing. In her written statement defendant No. 1 admitted that Mathuranathji was the first descendant of Vallabha to settle down in Nadiad. According to her he brought with him the idol of Shree Gokulnathji and started worshipping that idol in his Haveli. At a later stage the 1st defendant changed her version and put forward the theory that the ancestors of Mathuranathji had brought the idol of Shree Gokulnathji to Nadiad and installed the same there long before Mathuranathji came to that place. This significant deviation

in the 1st defendant's case has evidently been introduced to meet the evidence led on behalf of the plaintiffs about the existence of Gokulnathji temple even before Mathuranathji was born in 1806.

7. Yet another circumstance that has to be borne in mind in appreciating the evidence adduced by the parties is about the manner in which Mathuranathji and his descendants were managing the Haveli. They had maintained regular and systematic accounts. It is obvious they were maintaining two sets of accounts, one relating to the income and expenses of the deity and another relating to the personal income and expenses of the Maharaj. But when the 1st defendant was summoned to produce those accounts, the accounts relating to certain important periods were not produced and no satisfactory explanation is forthcoming for their non-production. From this omission the High Court has drawn the inference that those account-books have been kept back as the evidence which those books would have afforded was not favourable to the 1st defendant's case. We agree with that conclusion. Similarly, certain important documents have been kept back by the 1st defendant. Some of those documents were available at the time of the inventory but when the 1st defendant was summoned to produce them she failed to do so. This circumstance has again led the High Court to infer that those documents were deliberately kept back in order to suppress material evidence supporting the plaintiffs' case. Two of the important documents produced into court namely Exhs. 501 and 503 were found to have been tampered with. Exh. 501 appears to be a register of the temple properties but the title page of that book has been mutilated. The top portion of that page had been clearly cut and removed. It is reasonable to assume that the portion that has been removed contained the title of the register. Possibly it mentioned that it is the property register of Shree Gokulnathji's temple. It is reasonable to draw this inference from the surrounding circumstances. Exh. 503 is the register relating to the expenses incurred for repairs of Shree Gokulnathji's temple. That register was also tampered with. The original book was not made available to us for examina-

tion, but the High Court which had the opportunity of examining that book has made the following remarks in its judgment:

"A new slip was affixed to this document, and the heading which showed that the properties belonged to Shree Gokulnathji's temple was torn out." The High Court has also held that Exh. 633, which evidences the sale of S. No. 1840, was torn in such a way as to justify the plaintiffs' complaint that in the torn portion was the description of the Maharaj as the Vahiwatdar of the temple. The High Court observed:

"We have looked at all these three documents (Exts. 501, 503 and 633) and we are satisfied that the complaint made by the plaintiffs against the advisers of defendant No. 1 cannot be said to be without substance. It seems to us clear, on examining these documents that the advisers of defendant No. 1 have unscrupulously tampered with the documents. This conduct naturally raises suspicion against the defence, and we would be justified in drawing an inference against defendant No. 1 by holding that, if the books of account which have been kept back by her had been produced they would have supported the plaintiffs' case."

We agree with these observations.

8. We may now proceed to examine the material on record for finding out the true character of the suit properties viz., whether they are properties of a public trust arising from their dedication of those properties in favour of the deity Shree Gokulnathji or whether the deity as well as the suit properties are the private properties of Goswami Maharaj. In her written statement as noticed, earlier, the 1st defendant took up the specific plea that the idol of Shri Gokulnathji is the private property of the Maharaj; the Vallabh Cult does not permit any dedication in favour of an idol and in fact there was no dedication in favour of that idol. She emphatically denied that the suit properties were the properties of the deity Gokulnathji but in this Court evidently because of the enormity of evidence adduced by the plaintiffs, a totally new plea was taken namely that several items of the suit properties had been dedicated to Gokulnathji

but the deity being the family deity of the Maharaj, the resulting trust is only a private trust. In other words the plea taken in the written statement is that the suit properties were the private properties of the Maharaj and that there was no trust, private or public. But the case argued before this Court is a wholly different one viz., the suit properties were partly the properties of a private trust and partly the private properties of the Maharaj. The 1st defendant cannot be permitted to take up a case which is wholly inconsistent with that pleaded. This belated attempt to bypass the evidence adduced appears to be more a manoeuvre than a genuine explanation of the documentary evidence adduced. It is amply proved that ever since Mathuranathji took over the management of the shrine, two sets of account books have been maintained, one relating to the income and expenses of the shrine and the other relating to that of the Maharaj. These account books and other documents show that presents and gifts used to be made to the deity as well as to the Maharaj. The two were quite separate and distinct. Maharaj himself has been making gifts to the deity. He has been, at times utilising the funds belonging to the deity and thereafter reimbursing the same. The account books which have been produced clearly go to show that the deity and the Maharaj were treated as two different and distinct legal entities. The evidence afforded by the account books is tell-tale. In the trial court it was contended on behalf of the 1st defendant that none of the account books produced relates exclusively to the affairs of the temple. They all record the transactions of the Maharaj, whether pertaining to his personal dealings or dealings in connection with the deity. This is an obviously untenable contention. That contention was given up in the High Court. In the High Court it was urged that two sets of account books were kept, one relating to the income and expenditure of the deity and the other of the Maharaj, so that the Maharaj could easily find out his financial commitments relating to the affairs of the deity. But in this Court Mr. Narasaraaju, learned Counsel for the appellants realising the untenability of the contention advanced in the courts below

presented for our consideration a totally new case and that is that Gokulnathji undoubtedly is a legal personality; in the past the properties had been dedicated in favour of that deity; those properties are the properties of a private trust of which the Maharaj was the trustee. On the basis of this newly evolved theory he wanted to explain away the effect of the evidence afforded by the account books and the documents. We are unable to accept this new plea. It runs counter to the case pleaded in the written statement. This is not a purely legal contention. The 1st defendant must have known whether there was any dedication in favour of Shree Gokulnathji and whether any portion of the suit properties were the properties of a private trust. She and her advisers must have known at all relevant times the true nature of the accounts maintained. Mr. Narasaraaju is not right in his contention that the plea taken by him in this Court is a purely legal plea. It essentially relates to questions of fact. Hence we informed Mr. Narasaraaju that we will not entertain the plea in question.

9. We shall now proceed to assess the evidence adduced in this case to find out whether the plaintiffs have succeeded in establishing that the suit temple and the properties annexed thereto constitute a public trust. Before doing so, it is necessary to examine certain basic contentions advanced on behalf of the appellant. It is the case of the appellant that Vallabh Sampradayeys cannot worship in a public temple; according to their cult they can have the Darshan of one or the other swaroops of Lord Krishna in the house of their Maharaj. In other words their cult prohibits public worship. They can only worship through their Maharaj and that too in his Haveli. In support of this contention great deal of reliance was placed in the High Court and the trial court on the views expressed by Dr. Bhandarkar in his Works on 'Vaishnavism, S'aivism and Minor Religious systems'. The views expressed by Dr. Bhandarkar had greatly weighed with the trial court and it is mainly on the basis of those views, the trial court rejected the plaintiffs' suit. The High Court after examining the doctrines of Vallabha School, its tenets and usages as well

as the views expressed by eminent writers like Dr. Radhakrishnan and Dasgupta came to the conclusion that it would not be correct to say that worship in public temple is prohibited by the Vallabha cult though in the absence of any positive evidence it may be taken that the place where the Vallabha Sampradayeys worship is a private temple. It is not necessary for us to go into that controversy in view of the decision of this Court in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan*, 1964-1 SCR 561 = (AIR 1963 SC 1638). In that case this court was called upon to consider whether Nathdwara Temple in Udaipur, a temple founded by the Vallabha Sampradayeys is public temple or not. After examining the various treatises on the subject including Dr. Bhandarkar's book on 'Vaishnavism, S'aivism and Minor Religious Systems', this Court observed at p. 585 of SCR) = (at page 1648 of AIR).

"Therefore, we are satisfied that neither the tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple. Some temples of this cult may have been private in the past and some of them may be private even today. Whether or not a particular temple is a public temple must necessarily be considered in the light of the relevant facts relating to it. There can be no general rule that a public temple is prohibited in Vallabha School."

10. In view of this decision Mr. Narasaraaju, learned Counsel for the appellant did not press forward the contention that the Vallabha School prohibits worship in public temple.

11. Yet another contention taken on behalf of the appellant is that the architecture of the building in which Gokulnathji is housed and the nature of that building is such as to show that it is not a public temple. It was urged that that building does not possess any of the characteristics of a Hindu temple. It has not even a dome. This contention again has lost much of its force in view of the decision of this Court referred to earlier. Evidence establishes that Vallabha's son and his immediate successor Vithaleshwar had laid down a plan for the construction of temples by the Vallabha Sampradayeys. He did not approve the idea of

constructing rich and costly buildings for temples. Evidently he realised that religious temple buildings were not safe under the Mohomedan rule. For this reason he advised his followers to construct temples of extremely simple type. The external view of those temples gave the appearance of dwelling houses. It appears to be a common feature of the temple belonging to the Vallabha Sampradayeys that the ground-floor is used as the place of worship and the first floor as the residence of Goswami Maharaj. Therefore the fact that Gokulnathji temple at Nadiad had the appearance of a residential house does not in any manner militate against the contention that the temple in question is a public temple.

12. It was said that according to the usage prevailing in that temple, the public are asked to enter the temple only after the Maharaj had finished his worship. This circumstance again is of no consequence. Each sect nay each temple has its own customs. The usage pleaded by the appellant is not inconsistent with that temple being a public temple. The appellant attempted to prove that on two occasions certain individuals were forbidden from entering the temple. In the first place this plea has not been satisfactorily established. Further according to the evidence adduced on behalf of the appellant those individuals were kept out of the temple because of some act of indiscipline on their part. The power to manage a temple includes within itself the power to maintain discipline within the precincts of that temple.

13. The only other circumstance relied on by the appellant to establish that the temple in question is not a public temple is that the sale proceeds of Nagarwad Haveli were credited to the account of the Maharaj. The learned Judges of the High Court have carefully looked into that aspect. After examining the relevant evidence on record they arrived at the conclusion that though initially the amount in question was credited to the account of the Maharaj at a subsequent stage it was transferred to the account of the temple by means of adjustment entries. The learned Counsel for the appellant was unable to satisfy us that this conclusion of the High Court was incorrect.

14. We shall now see how far the plaintiffs have succeeded in establishing that Gokulnathji Mandir is a public Mandir. The burden of establishing that fact is undoubtedly on them.

15. Though most of the present day Hindu public temples have been founded as public temples, there are instances of private temples becoming public temples in course of time. Some of the private temples have acquired great deal of religious reputation either because of the eminence of its founder or because of other circumstances. They have attracted large number of devotees. Gradually in course of time they have become public temples. Public temples are generally built or raised by the public and the deity installed to enable the members of the public or a section thereof to offer worship. In such a case the temple would clearly be a public temple. If a temple is proved to have originated as a public temple, nothing more is necessary to be proved to show that it is a public temple but if a temple is proved to have originated as a private temple or its origin is unknown or lost in antiquity then there must be proof to show that it is being used as a public temple. In such cases the true character of the particular temple is decided on the basis of various circumstances. In those cases the courts have to address themselves to various questions such as—

(1) Is the temple built in such imposing manner that it may prima facie appear to be a public temple?

(2) Are the members of the public entitled to worship in that temple as of right?

(3) Are the temple expenses met from the contributions made by the public?

(4) Whether the sevas and utsavas conducted in the temple are those usually conducted in public temples?

(5) Have the management as well as the devotees been treating that temple as a public temple?

16. Though the appearance of a temple is a relevant circumstance, it is by no means a decisive one. The architecture of temples differs from place to place. The circumstance that the public or a section thereof have been regularly worshipping in the temple as a matter of course and they

can take part in the festivals and ceremonies conducted in that temple apparently as a matter of right is a strong piece of evidence to establish the public character of the temple. If votive offerings are being made by the public in the usual course and if the expenses of the temple are met by public contribution, it is safe to presume that the temple in question is a public temple. In brief the origin of the temple, the manner in which its affairs are managed, the nature and extent of gifts received by it, rights exercised by the devotees in regard to worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the character of the temple are factors that go to establish whether a temple is a public temple or a private temple. In *Lakshmana v. Subramania*, AIR 1924 PC 44, the Judicial Committee was dealing with a temple which was initially a private temple. The Mahant of this temple opened it on certain days in each week to the Hindu public free to worship in the greater part of the temple, and on payment of fees in one part only. The income thus received by the Mahant was utilised by him primarily to meet the expenses of the temple and the balance went to support the Mahant and his family. The Privy Council held that the conduct of the Mahant showed that he had held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship and the inference was, therefore, that he had dedicated it to the public. In *Mundacheri Koman v. Achutan Nair*, 61 Ind App 405 = (AIR 1934 PC 230), the Judicial Committee again observed that the decision of the case would depend on the inferences to be derived from the evidence as to the way in which the temple endowments had been dealt with and from the evidence as to the public user of the temples. Their Lordships were satisfied that the documentary evidence in the case conclusively showed that the properties standing in the name of the temples belonged to the temples and that the position of the manager of the temples was that of a trustee. Their Lordships further, added, that if it had been shown that the temples had originally been private temples they would have been slow to hold that the admission

of the public in later times possibly owing to altered conditions would affect the private character of the trusts. In *Deoki Nandan v. Murlidar*, 1956 SCR 756 = (AIR 1957 SC 133), this Court observed that the issue whether a religious endowment is a public or a private one is a mixed question of law and fact, the decision of which must depend on the application of legal concepts of a public and private endowment to the facts found. Therein it was further observed that the distinction between a public and private endowment is that whereas in the former the beneficiaries, which means the worshippers, are specific individuals and in the latter the general public or class thereof. In that case the plaintiff sought to establish the true scope of the dedication from the user of the temple by the public. In *Narayan Bhagwant Rao Gosavi Balajiawale v. Gopal Vinayak Gosavi*, (1960) 1 SCR 773 = (AIR 1960 SC 100) this Court held that the vastness of the temple, the mode of its construction, the long user of the public as of right, grant of land and cash by the Rulers taken along with other relevant factors in that case were consistent only with the public nature of the temple.

17. In examining the evidence adduced by the plaintiffs in proof of the fact that the temple in question is a public temple we have to bear in mind the tests laid down by the courts for determining whether a given temple is a public temple or not.

18. The case for the plaintiffs is that this temple originated as a public temple. According to them it was founded long before Mathuranathji was born; the idol of Gokulnathji was originally worshipped at Nagarwad and later on the suit temple was built and that idol installed therein. We have earlier seen that the case of the 1st defendant on this point was that the idol of Gokulnathji was the private property of Mathuranathji. Mathurnathji brought that idol along with him when he came to Nadiad and worshipped the same as his private deity. This part of her case was given up at a later stage, and she put forward a new case to the effect that the idol of Gokulnathji was brought by the ancestors of Mathuranathji to Nadiad and it is they who started worshipping that idol at Nadiad. From

this it is clear that the appellant has no consistent case as to the origin of the worship of Gokulnathji at Nadiad. The new plea put forward by her was evidently intended to meet the evidence adduced to show that the idol of Gokulnathji was being worshipped at Nadiad even before Mathuranathji was born. In order to show that the idol of Gokulnathji was being worshipped in Nadiad even in the 18th century, oral evidence of local repute has been adduced by the plaintiffs. In the very nature of things that evidence cannot but be inconclusive. In this connection the plaintiffs have also placed reliance on Exh. 791, an extract showing the list of Devasthanans in the Pargana of Nadiad to which the former Baroda State was making contributions, one of such Devasthan is the "Shree Gokulnathji". This extract relates to Fasli Samvat 1833 (i.e., 1781-82 A. D.). On the basis of this Exhibit, we are asked to conclude that the suit temple was in existence even before 1781-1782 A. D. The evidence afforded by this document undoubtedly probabilises the version of the plaintiffs but it cannot be said with any definiteness that the entry in question relates to the suit temple. Therefore, it is not possible to come to a positive conclusion that the suit temple originated as a public temple nor there is any conclusive evidence before us to determine the date of its origin. All that we can say is that the origin of this temple is lost in antiquity. Therefore for determining whether it is a public temple or not we must depend on other circumstances.

19. It is established by the evidence on record that Gokulnathji is neither the Nidhi Swaroop nor Seva Swaroop of Mathuranathji's branch. Therefore it is unlikely that Mathuranathji branch would have installed the idol of Shree Gokulnathji for their private worship though the idol of Shree Gokulnathji is one of the Swaroops of Lord Krishna. The plea taken by the appellant that Gokulnathji was one of the Nidhi Swaroop given to the branch of Mathuranathji by Vallabha is opposed to the documentary evidence produced by herself. That plea has not been pressed before us for our acceptance.

20. From the account books produced in this case, it is clear that ever since 1865 two sets of accounts had

been maintained by the Maharaj, one relating to the temple and another relating to him. The temple accounts are referred to as "Nichen Khata" and Maharaj's accounts as "Uparna Khata". At this stage we may emphasize that the evidence disclosed that the entire ground floor is being used as the place of worship of Gokulnathji and upstairs portion as the residence of the Maharaj. For the years 1877 to 1892, no books of accounts have been produced. The appellant has stated that these books are not with her. But this is not a satisfactory explanation for their disappearance. The temple accounts for the years 1892 to 1894 have been produced but the personal accounts of the Maharaj for those years have not been produced. Again for the years 1900 to 1907, only the temple accounts have been produced but for the period from 1908 and 1934 both the sets have been produced. Again for the period 1935 to 1943, only the temple account books have been produced and not the personal account books of the Maharaj. This pick and choose method adopted in the matter of producing account books unmistakably indicate that the appellant was deliberately keeping back unfavourable evidence. Evidence on record establishes that some of the documents which were there at the time of the inventory were not produced when summoned. Under those circumstances the High Court was justified in drawing an adverse inference against the appellant.

21. The existence of two sets of accounts clearly goes to indicate that the Maharaj had always considered the temple as an entity different from themselves. That circumstance goes to negative the contention of the appellant that the deity was owned by the Maharaj and therefore the deity as well as the suit properties are his private properties.

22. Right back in 1861 under a gift deed executed by a devotee by name Bai Jasubai, two fields and a house were gifted in favour of the temple of Gokulnathji Maharaj at Nadiad. The properties gifted by Jasubai were sold in 1865 and the sale proceeds credited in the 'Nichen Khata'. In 1865 when Sri Vrajratna Maharaj left Nadiad he made a present of Rs. 5/- to the idol of Shree Gokulnathji. This was also credited in the 'Nichen Khata'.

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23. Then we come to Ex. 593, an application made by several merchants and other residents of Nadiad to the Collector of Kaira in the year 1866. That application recites that the ancestors of the applicants had voluntarily levied a cess known as Laga on several articles for the benefit of the suit temple. Originally this Laga was separately recovered from the devotees by the Maharaj but later on at the request of the merchants the same used to be recovered by the Government along with the custom duty and made over to Maharaj for the benefit of the temple. Therein it was prayed that the newly established municipality should be directed to collect the Laga along with its dues and make it over to the Maharaj. That application was signed by a large number of persons. That application *inter alia* states:—

"There is a temple of Shree Gokulnathji at Nadiad. A son of our preceptor, Shree Goswami Mathuranathji performs the seva in the said temple. Our ancestors have granted for his expenses from the town a laga on several articles which may be received, a list whereof is enclosed herewith."

The signatories to that application must have been familiar with the history of the suit temple. We can reasonably assume that the facts stated therein are correct. Those facts support the case of the plaintiffs.

24. We next go to the entries in the account books. In the temple accounts for the year 1870, there is a credit entry of Rs. 27/4/-. It is in respect of the fine imposed by the Mahajan on three persons who appear to have played mischief at the time of darshan. This entry clearly shows that the supervision of the temple, in a general sense, vested in the Mahajan of the place. It appears from the accounts that in 1874, the Mahajan examined the account books of the temple—see Exh. 308. This conduct on the part of the Mahajan would be inconsistent with the appellant's claim that Gokulnath's shrine is her private property. In 1881 one Bai Harkore under her will made certain bequests in the name of the Gokulnathji Maharaj at Nadiad for providing Samagri for Shree Gokulnathji. This is a bequest to the idol. Therein there is no reference to the Maharaj. Then we come to

Exh. 534, under which a substantial portion of lot No. 1 of the suit properties wherein the temple is situated was purchased on April 4, 1835. The sale deed was taken in the name of Pari Pranvallabh Vrajlal and others on behalf of Shree Gokulnathji of Nadiad. This is a clear indication that the deity of Gokulnathji was treated by the devotees as an independent legal entity. Further the importance of this document is that it is taken in the name of the representatives of the public and not in the name of the Maharaj. Under Exh. 691, a gift was made in 1833 in the name of Vrajratnalaji for and on behalf of Shree Gokulnathji temple. The donor paid Rs. 1,200 and desired that a meal of six breads every day should be given till the temple exists to the person whom the Maharaj would name and if the person named by the Maharaj does not come to take the meal the same should be given to any visitor to the temple. Still more significant is the bequest contained in Exh. 512, the will executed by one Bai Vasant. Under this will two bequests were made, one in favour of the temple of Shree Gokulnathji and the other in favour of the Maharani Vahuji who was then the Maharani of the temple. This will was executed on September 20, 1897. Under a prior will executed by the same devotee (Exh. 189), the same distinction between the Maharaj and the temple is to be found. That document was executed in 1838. Similarly when bhets (presents) were made by the devotees to the idol as well as to the Maharaj, they were separately credited in the respective account books. As an illustration, we may refer to entries in the account books for the year 1896. Therein Rs. 22 was credited to the temple accounts and Rs. 5 to the Maharaj's personal account. The account books clearly show the various presents made to the temple as well as to the Maharaj.

25. It is established by evidence that in 1896 when the question of taxing the income of the Maharaj came up for consideration, the Maharaj pleaded that the income of the temple cannot be treated as his income. The balance sheets prepared in that connection showed the income of the temple separately from that of the Maharaj. The correspondence that

passed between the Maharaj and the authorities in that connection establishes beyond doubt that the Maharaj did not treat the income of the temple as his income. The contention that the admission in question was made under wrong advice receives no support from the evidence on record. Similarly with regard to the payment of the municipal tax, the properties of the Maharaj had been treated separately from that of the temple.

26. In 1907 one Shah Chaganlal made a gift of some property to the temple. That property was subject to a mortgage. The donor directed that the Maharaj of the temple should divide the annual income of the mortgaged property into nine shares, out of which one share should be given for the samagri of Shree Gokulnathji on Posh Vad 3rd of every year and eight shares of the income should be given for the samagri of the said Gokulnathji every year on Vaishakh Sud 8th. In that document the Maharaj was shown as the agent of the temple. This property was subsequently sold and the sale proceeds were credited to the temple accounts. The accounts show numerous other instances of receipts and expenses relating to the temple as distinguished from that of the Maharaj. The High Court has enumerated those receipts and expenses with elaborate fulness. It would be superfluous to refer to them. The above-mentioned instances go to falsify the contention of the appellant that the idol of Shree Gokulnathji was the private property of the Maharaj. On the other hand they establish that the temple in question was treated by all concerned as a public temple.

27. In proof of her case that the suit temple and the properties are individual properties of the Maharaj, the appellant relied on the wills executed by Vrajratnalaji in 1882 and Maharani Vahuji in 1898. Under the former the testator provided for the management of the properties mentioned therein after his death. Therein he asserted his right to make *vahivat* according to his pleasure of movable and immovable properties shown in the will during his lifetime. One of the stipulations in the will was that if he dies leaving no son, natural or

adopted, those properties should go to his wife, as owner subject to the condition that the expenses of worship of "his Shree Thakorji" according to usage should come out of its income. There are similar assertions in the will executed by Maharani Vahuji in 1898. These statements are at best self serving statements. They have little evidentiary value. They are likely to have been made by the executants of those wills under a misconception as to their rights. If the account books for the years 1877 to 1892 had been produced we would have been able to find out how Vrajatanlalji himself dealt with the properties of the temple.

28. There is clear, consistent and reliable evidence to show that Vallabha Sampradaes have been worshipping in the suit temple as of right. There is also evidence to show that the temple has all along been primarily maintained from the contributions made by the devotees belonging to the Vallabha School. The suit temple appears to be an important temple attracting a large number of devotees. Utsavas and other festivals are performed in that temple in a reasonably grand scale. The devotees as well as the Maharaj were treating that temple as a public temple. From the facts proved we have no hesitation in agreeing with the High Court that the temple in question is a public temple.

29. This takes us to the question whether all or any of the properties detailed in the plaint schedule are proved to be that of the temple. We have earlier come to the conclusion that the temple has been getting substantial contributions from its devotees in diverse ways. It was also the recipient of several gifts. It had adequate resources to make the acquisitions with which we are concerned in this case. The temple is exclusively managed by the Goswamiji Maharaj. It maintains regular accounts. Maharaj also maintains his separate accounts. Therefore it was easy for the appellant to prove the source from which the acquisitions in question were made and how their income was treated. The appellant has led no evidence to show that they were her own properties. She has failed to produce some of the accounts relating to the relevant periods. In

this background let us proceed to examine the title to the suit properties.

30. Lot No. 1 is the site in which the suit temple is situate. It was conceded on behalf of the appellant that if we come to the conclusion that the suit temple is a public temple that item of property will have to be considered as the property of the temple. Lot No. 2 is the garden land in Survey No. 2031. It is used for raising flowers for worship in the temple. That land appears to have been granted to Mathuranathji but the appellant admitted in her deposition that item of property was at all time managed by the Haveli and whoever is the owner of the Haveli is the owner of the garden. This admission is corroborated by considerable other evidence. Vaishnav merchants of Nadiad contributed for the expenses of installation of an electric pump in that garden and for its subsequent repairs. All expenses incurred for that garden have always been debited and all income received therefrom credited to the temple accounts. That garden is included in the Patriks of the temple property, prepared long before the present dispute arose. When a part of that property was compulsorily acquired on three different occasions, the compensation received was credited to the temple account. These circumstances conclusively establish that lot No. 2 is temple property.

31. Lot No. 3 is the building known as Goshala. Its survey No. is 994. It is used for the purpose of tethering the cows reared for supplying milk and butter for the worship of Bal-krishnalalji, one of the deities installed in the temple. This property is included in Exs. 500 and 501. It is shown in the property register as the property belonging to the Devasthan Charity. The balance sheet prepared in 1896 treats the rent of the shops and houses in that site as the income from temple properties — See Exh. 1048. We think the High Court was right in concluding on the basis of this evidence that that item belongs to the temple.

32. Lot No. 4 is a shop bearing city survey No. 720. This property was gifted by Kuber Jetha Vashram as per his will Exh. 673 for the samagri of the temple. The bequest is made in favour of Shree Gokulnathji

Maharaj. Hence this is clearly an item of property belonging to the suit temple.

33. Lot No. 5 is survey No. 121. It is gifted under Exh. 610 dated June 29, 1868. The gift is purported to have been made in favour of the Maharaj but the income from this property has always been credited to the temple accounts, the earliest entry being that of the year 1870. In the property register, this property is shown as temple property and the rent note Exh. 535 is taken in the name of the Vahivatdar of Shree Gokulnathji. Hence this item of the property should also be held to be that of the temple.

34. Lot No. 6 consists of 14 small items of property. They are all agricultural fields. They have been shown in the property register as the properties of the temple. Out of 14 items in this lot, items Nos. 6, 9, 11, 12 and 14 originally belonged to the Maharaj but they have been all along dealt with by the Maharaj as temple property. Item No. 1 in lot No. 6 belongs to the temple. The mortgage Exh. 608 relates to this item and the same was executed in favour of the temple on May 17, 1897. A rent note in respect of this property was taken on April 22, 1915 in the name of the Vahivatdar of the temple. Items 2, 3 and 4 of that lot are shown in the record of rights in the name of the Maharaj but the income from those properties and the expenses incurred for the same have always been entered in the temple accounts. Item 5 of this lot had been gifted to the temple under Exh. 1049. Item 8 of this lot had been purchased in the name of the Maharani Vahuji on June 2, 1897 for Rs. 1150. The income of this property has been shown in the temple accounts. So far as item 10 is concerned though the record of rights stands in the name of the Maharaj personally, its sale price (Rs. 800-0-6) has been credited to the temple accounts. From all this it is clear that the temple is the owner of lot No. 6.

35. Now coming to lot No. 7, the entries in the account books clearly show that this is temple property. The consideration for the purchase of a portion of it was paid from the temple funds. A portion of that property had been gifted to the temple under Exh. 461.

36. Lot No. 8 was purchased in 1877 from the temple funds and lot No. 13 was gifted to the temple. Lot No. 9 was received by the temple under will Exh. 512 and lot No. 10 was always treated as temple property in the account books. So also lots Nos. 11 and 12. Similarly lots Nos. 13 and 14 were always being treated as temple properties. We are in agreement with the learned judges of the High Court that the properties detailed in the plaint schedule are all temple properties.

37. For the reasons mentioned above this appeal must fail. But before we conclude we should like to clarify one aspect which undoubtedly is implicit in the judgment of the High Court. The Goswami Maharajs or Maharanis are not mere managers. In the temples belonging to the Vallabha School they have an important place. The Maharaj is the Maha Prabhu. The Vallabh devotees worship their deity through him. It is true that the income from temple properties has to be primarily used for the expenses of the *sevas* and *utsavas* in the temple, the upkeep, renovation and improvements of the temple premises but subject to these demands, the Maharaj has a right to utilise the temple income in maintaining himself and his family in a reasonably comfortable manner. The learned Counsel for the plaintiffs conceded this position. This suit has been brought by the plaintiffs with the sole purpose of preserving the temple's assets and maintaining its dignity. They do not want to undermine the position or prestige of their Maha Prabhu.

38. In the circumstances of the case we see no useful purpose in directing the appellant to pay the costs of the plaintiffs in this appeal. She can only pay the same from temple funds. The alienees have not appealed against the judgment of the High Court. When we mentioned this aspect to Mr. S. T. Desai, learned Counsel for the plaintiffs he indicated that the parties may be left to bear their own costs in this appeal.

39. For the reasons mentioned above this appeal is dismissed but we make no order as to costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 2037
(V 57 C 433)(From Andhra Pradesh: 1966-2 Andh
LT 27)**V. RAMASWAMI AND I. D. DUA, JJ.**Navalkha and Sons, Appellants v. Sri
Ramanya Das and others, Respondents.Civil Appeals Nos. 1085 and 1086 of
1967, D/- 27-10-1969.

(A) Companies (Court) Rules (1959),
R. 273 — Sale subject to confirmation
— Property does not vest in auction
purchaser unless sale is confirmed —
Before confirmation Court must satisfy
itself that price fetched is reasonable
— Sale confirmed without being so
satisfied — Confirmation is not proper
exercise of jurisdiction — (Civil P. C.
(1908), O. 21, R. 92).

Where the acceptance of the offer by
the Commissioners is subject to confir-
mation of the Court the offerer does
not by mere acceptance get any vested
right in the property so that he may
demand automatic confirmation of his
offer. The condition of confirmation by
the Court operates as a safeguard
against the property being sold at in-
adequate price whether or not it is a
consequence of any irregularity or
fraud in the conduct of the sale. In
every case it is the duty of the Court
to satisfy itself that, having regard to
the market value of the property, the
price offered is reasonable. Unless the
Court is satisfied about the adequacy
of the price the act of confirmation of
the sale would not be a proper exer-
cise of judicial discretion. AIR 1921
Mad 286 and AIR 1925 Mad 318 and
AIR 1940 Mad 42 and AIR 1951 Mad
986, Ref. (Para 6)

(B) Companies (Court) Rules (1959),
R. 273 — Sale held not by public auc-
tion and without due publicity — Con-
firmation of such sale — Prejudice is
inherent — Court in appeal will set
aside confirmation.

Rule 273 of the Companies (Court)
Rules provides that all sales shall be
made by public auction or by inviting
sealed tenders or in such manner as
the Judge may direct. Where the auc-
tion in question no doubt was conduct-
ed in a public place but it was not a
public auction inasmuch as it was not
open to the general public but was
confined to two named persons, and
secondly it was not held after due

publicity, but immediately after
it was decided upon, the sale
in question was not a public
sale which implies sale after giving
notice to the public wherein every
member of the public is at liberty to
participate. The denial of opportu-
nity to purchase the property by per-
sons who would have taken part in
the auction bid but for want of notice
is a serious matter. (Para 8)

It is true that the discretion exercis-
ed by the Judge in confirming the sale
ought not to be interfered with unless
the Judge has gone wrong on principle.
The prejudice was inherent in the
method adopted inasmuch as there
was no publicity and the auction
through public was confined only to
two persons. In these circumstances
the Company Judge ought not to have
confirmed the bid offered in such an
auction. (Para 8)

Cases Referred: Chronological Paras

- (1951) AIR 1951 Mad 986
(V 38) = 1951-2 Mad LJ 353,
A. Subbaraya Mudaliar v.
K. Sundararajan 6
(1940) AIR 1940 Mad 42 (V 27) =
50 Mad LW 699, S. Soundara-
rajan v. Mahomed Ismail 6
M/s. Roshan and Co. 6
(1925) AIR 1925 Mad 318 (V 12) =
82 Ind Cas 793, Rathnasami
Pillai v. Sabapathi Pillai 6
(1921) AIR 1921 Mad 286 (V 8) =
24 Mad LW 35, Gordhan Das
Chuni Lal v. Kathimathinatha
Pillai 6

The following judgment of the Court
was delivered by

RAMASWAMI, J.: These appeals
are brought by certificate from the
judgment of the Andhra Pradesh High
Court dated September 24, 1965 in
O. S. A. Nos. 3 and 4 of 1965.

2. In the winding up proceedings
of Hyderabad Vegetable Products Co.,
Ltd. (in liquidation) the 5th respon-
dent (Official Liquidator) sought per-
mission of the Court for the sale of
immovable and movable properties and
actionable claims of the Company.
This application was Company Appli-
cation No. 67 of 1963. A shareholder
of the Company one Sirajuddin Babu
Khan also made an application C. A.
No. 93 of 1964 to a similar effect. On
these applications an order was passed
by Jagan Mohan Reddi J., on April 17,
1964 appointing respondents 2, 3 and 4

as Joint Commissioners for the purpose of selling immovable and movable properties and actionable claims of the aforesaid Company in accordance with the terms and conditions mentioned in the order. Accordingly a sale proclamation August 1, 1964 was drawn and issued by the respondents 2 to 4 inviting offers for the purchase of movable and immovable properties and actionable claims of the Company as a single unit. According to the terms and conditions of sale the commissioners were not bound to accept the highest offer and were at liberty to reject any offer without assigning any reason. Immediately after the offer was accepted by the commissioners the offeror had to deposit 15 per cent. of the offer amount as initial deposit and the balance of the amount together with the amount required on non-judicial stamp paper within 15 days from the date of acceptance. Acceptance of the offer by the Commissioners was subject to the condition of confirmation by the High Court and the offeror was entitled to take delivery of possession of the properties only after such confirmation. It was made abundantly clear in clause 16 that in all matters relating to the sale of the properties the decision of the Commissioners shall be final and shall be binding subject to the control of the High Court. One of the conditions also was that the proclamation of sale was to be advertised twice in each of the five leading dailies The Statesman, The Times of India, The Hindu, Indian Express and the Hindustan Times to ensure wide publicity and the Commissioners were also required to get the proclamation printed and distributed among the likely purchasers. The Commissioners got published the proclamation in four leading dailies only; The Hindu, Indian Express, The Statesman and the Hindustan Times. No publication was made in the Times of India nor was the advertisement made twice in any of the said newspapers. In two of them there were two insertions but in the remaining papers there was only one insertion. In addition to the advertisement the Commissioners got printed 300 copies and posted them to various industrial concerns. The last date fixed for the receipt of the offers was September 8, 1964. Not even a single offer was received by that time. The time for receipt of offers was extend-

ed by the Court to the end of November, 1964 at the instance of the Commissioners. The appellant Navalkha and Sons happened to be the sole offeror. It has offered a sum of Rupees 7,91,001/- which was made of Rupees 2,50,000/- for the immovable property and Rs 5,41,001/- for the machinery. It made no offer for the actionable claims. The appellant made deposit of Rs. 50,000 in the shape of demand draft drawn on the State Bank of Hyderabad. The offer was accepted by the Commissioners on December 2, 1964. The appellant was called upon to deposit 15 per cent. of the amount of the offer as initial deposit immediately and the balance together with the amount required for non-judicial stamp paper within 15 days from the date of acceptance. The appellant did make the initial deposit. The Commissioners then made an application on December 3, 1964 to the High Court for confirmation of the sale. On December 11, 1964 the High Court extended time for payment of the balance amount for two weeks. On December 24, 1964 one Gopaladas Darak made an offer of Rs. 8,50,000/- saying that he could not offer in time because he came to know of the sale only two days prior to that date and it was due to the fact that there was no adequate publicity. To show his bona fides he gave a demand draft for a sum of Rs. 1,00,015/-. The learned Judge decided that the property did not fetch its proper price and there was possibility of higher bids. Instead of directing a fresh auction or calling for fresh offers the learned Judge thought it proper to arrange an open bid in the Court itself on that very day, as between the appellant and Gopaladas Darak. Before starting the bid the learned Judge gave time to the appellant to think over and say whether it was willing to accept the course decided upon and to participate in the auction bids. The appellant consented and volunteered to take part in the bid and became the highest bidder at Rs. 8,82,009/-. The learned Judge accepted the said bid as final bid and concluded the sale in favour of the appellant directing it to pay the balance of the money together with the amount required for non-judicial stamp on or (before) 31-1-1965 making it clear that in case of default the deposit already made would be forfeited. The appel-

lant paid the balance of the amount on January 30, 1965. On the same day one Padam Chand Agarwal made an application (C. A. 44 of 1965) offering Rs. 10,00,000. He complained that publicity of the sale of the property was not adequately made and he came to know of the advertisement very late. He was prepared to enhance the offer to Rs. 10,00,000/- and was also willing to participate in open bid if the Court so decided with Rs. 10,00,000/- as initial bid. The learned Judge rejected his request and by his order dated February 19, 1965 held that the sale should be confirmed in favour of the appellant. Aggrieved by this Order Padam Chand Agarwal filed appeal No. 4 of 1965. One Ramnuja Das, a contributory also chose to prefer an appeal (appeal No. 3 of 1965) against the order of confirmation. According to him, the publicity given was inadequate and the first offer given by the appellant was too low and the Court has rightly refused to confirm the acceptance of the offer. His grievance was that the learned Judge should have held the auction only after due publicity but has not done so and the same course followed did not achieve the object of getting adequate price of the property.

3. Both appeals 3 and 4 are, therefore, directed against the confirmation of the auction sale held in Court on December 24, 1964. These appeals were allowed by Letters Patent Bench consisting of the Chief Justice and Kumarayya J., and the order of the learned single Judge dated February 19, 1965 read with his previous order dated December 24, 1965 was set aside. It was directed that the learned Judge should take fresh steps for the sale of the property either by calling sealed tenders or by auction in accordance with law. The tenders would be called or the auction would take place with the requisite condition of minimum offer or starting bid of Rs. 10,00,000/-.

4. It was argued by Mr. V. S. Desai on behalf of the appellants that the discretion of the learned Company Judge was not erroneously exercised when he accepted the bid of the appellant in the auction held on December 24, 1964 and consequently there was no justification for the Division Bench to interfere with the order of the learned Single Judge. We are unable to accept this argument as correct.

5. Rule 273 of Companies (Court) Rules, 1959 is to the following effect:

"Procedure at sale.—Every sale shall be held by the Official Liquidator, or, if the Judge shall so direct, by an agent or an auctioneer approved by the Court, and subject to such terms and conditions, if any, as may be approved by the Court. All sales shall be made by public auction or by inviting sealed tenders or in such manner as the Judge may direct."

6. The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. In *Gordhan Das Chuni Lal v. Kanthimathinatha Pillai*, AIR 1921 Mad 286, it was observed that where the property is authorised to be sold by private contract or otherwise it is the duty of the Court to satisfy itself that the price fixed is the best that could be expected to be offered. That is because the Court is the custodian of the interests of the Company and its creditors and the sanction of the Court required under the Companies Act has to be exercised with judicial discretion regard being had to the interests of the Company and its creditors as well. This principle was followed in *Rathnasami Pillai v. Sabapathi Pillai*, AIR 1925 Mad 318 and *S. Soundararajan v. Mahomed Ismail*, M/s. Roshan and Co., AIR 1940 Mad 42. In *A. Subbaraya Mudaliar v. K. Sundararajan*, AIR 1951 Mad 986, it was pointed out that the condition of confirmation by the Court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the

Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud. It is well to bear in mind the other principle which is equally well settled namely that once the court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received. (See the decision of the Madras High Court in Roshan and Co's case, AIR 1940 Mad 42).

7. In the present case the Division Bench has come to the conclusion that publicity was not as wide as originally proposed by the Commissioners in their affidavit. The publication was made in four dailies namely The Hindu, Indian Express, Hindustan Times and The Statesman. There was no publication in the Times of India. Further out of the four newspapers in which publication was made only in two there were two insertions and in the remaining two there was only one insertion. This was contrary to what the Commissioners have promised in their affidavit dated July 8, 1964. No doubt, other efforts were made for giving publicity but these efforts were not sufficient to attract more than one offer. When the case came for confirmation on December 24, 1964 there was an application by Babukhan that the property was of much higher value and that fresh offers must be invited again with wider publicity. There is also the affidavit of the State Government dated August 29, 1963 in which the value of the property was shown as Rs. 13,40,000/-. Besides, on that very day, one Gopaldas Darak had come before the Court with a higher offer showing his bona fides and earnestness by depositing more than one lakh of rupees. He came with the complaint that there was not sufficient publicity as to attract people from the north and that as soon as he came to know he gave his offer. In these circumstances the learned single Judge was right in expressing his reluctance to confirm the offer of Navalkha & Sons. He therefore decided to have an open bid as between the appellant and Darak in the court itself on that very day. The com-

plaint of Padam Chand Agarwal is that the second step taken by the Single Judge of holding an auction without giving wide publicity was not justified in law. Rule 273 of the Companies (Court) Rules provides that all sales shall be made by public auction or by inviting sealed tenders or in such manner as the Judge may direct. It appears that on April 17, 1964 at the instance of the Official Liquidator and at the instance of a contributory the Court had approved of the terms and conditions of sale which provide for calling of sealed tenders. On December 24, 1964 the learned Judge realised the inefficacy of this course and decided to abandon the original procedure and put the properties to auction. But having made up his mind to resort to auction the learned Judge confined the auction to only two persons namely the previous tenderer and the fresh tenderer. The auction in question no doubt was conducted in a public place but it was not a public auction because it was not open to the general public but was confined to two named persons. Secondly it was not held after due publicity. It was held immediately after it was decided upon. It is, therefore, obvious that the sale in question was not a public sale which implies sale after giving notice to the public wherein every member of the public is at liberty to participate. No doubt, the device resorted to considerably raised the previous bid yet it was not an adequate price having regard to the market value of the property to which reference has already been made. The denial of opportunity to purchase the property by persons who would have taken part in the auction bid but for want of notice is a serious matter. In our opinion the learned Judge having decided on December 24, 1964 that the property should be put to auction should have directed auction by public sale instead of confining it to two persons alone. Since there was want of publicity and there was lack of opportunity to the public to take part in the auction the acceptance of the highest bid by the learned Judge was not a sound exercise of discretion. It is contended on behalf of the appellant that confirmation was discretionary with the court and the Division Bench ought not to have interfered with the discretion exercised by the Company Judge. It is true that the discretion exercised

by the Judge ought not to be interfered with unless the Judge has gone wrong on principle. As already pointed out the learned Company Judge having decided to put the property to auction went wrong in not holding the auction as a public auction after due publicity and this has resulted in prejudice to the Company and the creditors in that the auction did not fetch adequate price. The prejudice was inherent in the method adopted. The petition of Padam Chand Agarwal also suggests that want of publicity, had resulted in prejudice. In these circumstances the Company Judge ought not to have confirmed the bid of the appellant in the auction held on December 24, 1964. We are accordingly of opinion that the Division Bench was right in holding that the order of the Company Judge dated February 19, 1965 should be set aside and there should be fresh sale of the property either by calling sealed tenders or by auction in accordance with law. The tender will be called or the auction will take place with the minimum offer or with the starting bid of ten lakh rupees.

8. For these reasons we hold that the judgment of the Division Bench of the Andhra Pradesh High Court dated September 24, 1965 is correct and these appeals must be dismissed with costs. One set of hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 2041 (V 57 C 434)

(From Patna)*

J. C. SHAH AND K. S. HEGDE, JJ.
Civil Appeal No. 159 of 1969:

M/s. Shree Krishna Gyanodaya Sugar Ltd., Appellant v. The State of Bihar and others, Respondents.

Civil Appeal No. 291 of 1969:

M/s. Laxmi Narain Ram Narain, Appellant v. The State of Bihar and others, Respondents.

Civil Appeal No. 371 of 1969:

M/s. Lakshminarain Ramnarain, Lalpur, Appellant v. M/s. Shree Krishna Gyanodaya Sugar Ltd. and others, Respondents.

*(C. W. J. C. Nos. 197 and 234 of 1968 — Pat.)

EN/EN/B/676/70/CWM/D

AND
Petn. for Special Leave to Appeal (Civil) No. 999 of 1969:

M/s. Shree Krishna Gyanodaya Sugar Ltd., Petitioner v. State of Bihar and others, Respondents.

Civil Appeals Nos. 159, 291 and 371 of 1969 and Petn. for Special Leave to Appeal (Civil) No. 999 of 1969, D/- 8-4-1970.

Constitution of India, Article 133 (1), Clauses (a) and (c) — Grant of certificate under Clause (a) on ground that subject matter of dispute is incapable of valuation — Erroneous. C. W. J. C. Nos. 197 and 234 of 1968 (Pat), Reversed.

A certificate under Clause (a) of Article 133 (1) can be granted only when the High Court certifies that the amount of the value of the subject matter of the dispute in that Court as well as in appeal to Supreme Court was not less than Rs. 20,000. A subject matter which is incapable of valuation cannot be considered to be a subject matter of the value of not less than Rs. 20,000. Civil Appeal No. 272 of 1969, D/- 9-3-1970 (SC), Rel. on. (Para 2)

Where the subject matter of dispute is grant of licence for supply of liquor, the grant of certificate by High Court under Article 133 (1) (a) is erroneous. It will be open to the High Court to consider afresh the applications for certificate under Article 133 (1) (c). C. W. J. C. Nos. 197 and 234 of 1968 (Pat), Reversed. (Para 2)

Cases Referred: Chronological Paras

(1970) Civil Appeal No. 272 of 1969, D/- 9-3-1970, Satyanarain Prasad v. State of Bihar 2

The following judgment of the Court was delivered by

HEGDE, J. — Civil Appeals Nos. 159 and 291 of 1969 arise from two writ petitions (C. W. J. C. Nos. 197 and 234 of 1968) before the High Court of Judicature at Patna, filed by two companies (appellants in C. As. Nos. 159 and 291 of 1969) manufacturing alcohol in the State of Bihar. In C. W. J. C. No. 197 of 1968, the petitioners challenged the licence granted to the 4th respondent therein (the petitioners in C.W.J.C. No. 234 of 1968) for supplying alcohol. Similarly in C. W. J. C. No. 234 of 1968, the petitioners challenged the licence

granted to the petitioners in C. W. J. C. 197 of 1968. Both those writ petitions were dismissed by the High Court. Thereafter the appellants in Civil Appeal No. 159 of 1969 moved the High Court for certificate under Clauses (a), (b) and (c) of Article 133 of the Constitution. The High Court did not consider their prayer under Clauses (b) and (c) of Article 133 of the Constitution but granted a certificate under Article 133 (1) (a) on the ground that the subject matter of appeal is incapable of valuation. Civil Appeal No. 371 of 1969 brought by special leave is directed against the order granting that certificate. In C. W. J. C. 234 of 1968 certificate was asked for only under Article 133 (1) (a) and (b) and the High Court was pleased to grant a certificate under Article 133 (1) without specifying whether it is under Clause (a) or (b) of Article 133 (1). But from the order granting the certificate, it appears to be one under Article 133 (1) (a). Quite clearly the subject matter of both the petitions was incapable of valuation as in the writ petitions, the licences given to one or other of the parties were asked to be cancelled.

2. In our opinion, the High Court erred in granting certificates under Clause (a) of Article 133 (1). A certificate under that clause can be granted only when the High Court certifies that the amount of the value of the subject matter of the dispute in that court as well as in appeal to this Court was not less than Rupees 20,000/-. A subject matter which is incapable of valuation cannot be considered to be a subject matter of the value of not less than Rs. 20,000/- — see *Satyanarain Prasad v. State of Bihar*, Civil Appeal No. 272 of 1969 D/- 9-3-1970. Hence no certificate under Art. 133 (1) (a) could have been granted. Hence Civil Appeal No. 371 of 1969 is allowed and the certificate granted in Civil Appeal No. 159 of 1969 is revoked. We suo motu revoke the certificate granted in Civil Appeal No. 291 of 1969. In the result Civil Appeals Nos. 159 and 291 of 1969 are dismissed. It will be open to the High Court to consider afresh the applications made by the appellants in those appeals for certificates under clause (c) of Art. 133 (1). Special Leave Petition No. 999 of 1969 is adjourned sine die. The parties may move the Court to

take up that petition after the High Court decides the question whether the appellants in Civil Appeals Nos. 159 and 291 of 1969 are entitled to any certificate under clause (c) of Art. 133 of the Constitution. In the circumstances of the case we make no order as to costs in these appeals.

Order accordingly.

AIR 1970 SUPREME COURT 2042 (V 57 C 435)

(From Mysore: AIR 1968 Mys 156)

S. M. SIKRI, G. K. MITTER,
K. S. HEGDE, A. N. RAY AND
P. JAGANMOHAN REDDY JJ.

In Civil Appeal No. 1617 of 1967.

Chandra Bhawan Boarding and Lodging, Bangalore, Appellant v. State of Mysore and another, Respondents.

In W. P. No. 207 of 1967; All Mysore Hotels Assocn. and another, Petitioners v. The State of Mysore and another, Respondents; Chandra Bhawan Boarding and Lodging Bangalore, Intervener.

Civil Appeal No. 1617 of 1967 and Writ Petn. No. 207 of 1967, D/- 29-9-1969.

(A) Constitution of India, Art. 14 — Power conferred under S. 5 (1), Minimum Wages Act is not arbitrary or unguided.

It is true that the procedural inequality, if real and substantial is also within the vice of Article 14. But then, before a power can be held to be bad the same should be an unguided and unregulated one. But if a power is given to an authority to have recourse to different procedures under different circumstances, that power cannot be considered as an arbitrary power. Power under Section 5 (1) Minimum Wages Act is given to the State Government and not to any petty official. The State Government can be trusted to exercise that power to further the purposes of the Act. It is not the law that the guidance for the exercise of a power can be gathered from the circumstances that led to the enactment of the law in question i.e. the mischief that was intended to be remedied, the preamble to the Act or even from the scheme of the Act. The legislative policy is enumerated with sufficient clearness in the Minimum

Wages Act. The Government is merely charged with the duty of implementing that policy. There is no basis for saying that the legislature had abdicated any of its legislative functions. The legislature has prescribed two different procedures for collecting the necessary data. One contained in Section 5 (1) (a) and the other in Section 5 (1) (b). In either case it is merely a procedure for gathering the necessary information. The Government is not bound by the advice given by the Committee appointed under Section 5 (1) (a). Discretion to select one of the two procedures prescribed for collecting the data is advisedly left to the Government.

Which procedure should be adopted in any particular employment depends on the nature of the employment and the information the Government has in its possession about that employment. Hence, the powers conferred on the Government cannot be considered as either unguided or arbitrary. It cannot therefore be said that the power conferred under Section 5 (1) is an arbitrary power. (Held that the power was not arbitrarily exercised.) AIR 1955 SC 25 and AIR 1955 SC 33, Rel. on. (Paras 8, 9)

Dictum: "Prima facie the rates fixed for hotel industry appear to be reasonable. We are not convinced that the rates prescribed would adversely affect the industry or even a small unit therein. If they do, then the industry or the unit as the case may be has no right to exist. Freedom of trade does not mean freedom to exploit. The provisions of the Constitution are not erected as the barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the preamble to the Constitution. They do not permit any kind of slavery, social, economic or political. It is a fallacy to think that under our Constitution there are only rights and no duties. While rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other. The provisions of Part IV enable the legislatures and the Government to impose various duties on the citizens. The provisions

therein are deliberately made elastic because the duties to be imposed on the citizens depend on the extent to which the directive principles are implemented. The mandate of the Constitution is to build a welfare society in which justice social, economic and political shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met."

(Para 13)

(B) Minimum Wages Act (1948), Section 5 (1) — Power conferred under, is not arbitrary or unguided — Art. 14 of Constitution is not violated.

(Paras 8, 9)

(C) Constitution of India, Art. 226 — Natural justice — Principles apply to exercise of administrative power as well.

Dividing line between an administrative power and quasi judicial power is quite thin and is being gradually obliterated. The principles of natural justice apply to the exercise of the administrative powers as well. But those principles are not embodied rules. What particular rule of natural justice, if any, should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame work of the law under which the inquiry is held and the constitution of the tribunal or body of persons appointed for the purpose. AIR 1970 SC 150, Rel. on.

(Para 14)

(D) Minimum Wages Act (1948), Section 5 (1) — Whether power given to fix minimum wages is administrative or quasi judicial, rules of natural justice apply — Reasonable opportunity held had been given before fixing minimum wages to parties concerned — Order was not vitiated by failure to constitute committee under Sec. 5 (1) (a).

(Paras 14, 15)

(E) Minimum Wages Act (1948), Section 5 — Government can fix different minimum wages for different industries or in different localities — The fixation of minimum wages depends on the prevailing economic conditions, the cost of living in a place, the nature of the work to be performed and the conditions in which the work is performed. AIR 1963 SC 806, Foll.

(Para 16)

(F) Minimum Wages Act (1948), Section 3 (3) — Fixing of different rates

of minimum wages for different industries or in different localities by dividing State into zones is not opposed to S. 3 (3) or scheme of the Act. (Zones held made on rational basis).

(Para 16)

(G) Constitution of India, Art. 14 — State can fix different rates of minimum wages for different industries or different localities. (Para 16)

(H) Minimum Wages Act (1948), Section 5 — Notification fixing minimum wage merely saying that if employer supplies free meals to employees, he may deduct the sum mentioned in notification — It is only option given and not duty imposed — Supplying food is amenity — Notification does not fix minimum wages in kind.

(Para 18)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 150 (V 57) =

1969-2 SCC 262, A. K. Karaipak v Union of India 14

(1963) AIR 1963 SC 806 (V 50) =

(1963) Supp 1 SCR 524, M/s. Bhikusa Yamas Kshatriya v. Sangamner Akola Taluka Bidi Kamgar Union 16

(1962) AIR 1962 SC 12 (V 49) =

1962-1 SCR 946, U. Unnichoyl v. State of Kerala 8

(1955) AIR 1955 SC 25 (V 42) =

1955-1 SCR 735, Edward Mills Co. Ltd., Beawar v. State of Ajmer 10

(1955) AIR 1955 SC 33 (V 42) =

1955-1 SCR 752, Bijay Cotton Mills Ltd. v. State of Ajmer 10

(1954) AIR 1954 SC 545 (V 41) =

1955-1 SCR 448, Surajmall Mohhta and Co. v. A. V. Vishwanatha Sastri 8

In C. A. No. 1917 of 1967: Mr. A. K. Sen, Sr. Advocate (Mr. R. Gopalakrishnan, Advocate with him), for Appellant; In W. P. No. 207 of 1967: Mr. S. T. Desai, Sr. Advocate (M/s. S. N. Prasad and R. B. Datar, Advocates with him), for Petitioners; In C. A. No. 1617 of 1967 and Respondent No. 1 in W. P. No. 207 of 1967: Mr. Niren De, Attorney General, for India, (M/s. S. S. Javali and S. P. Nayar, Advocates with him), for Respondents Nos. 1 and 2; In W. P. No. 207 of 1967: Mr. S. S. Khanduja Advocate, for Respondent No. 2; In W. P. No. 207 of 1967: Mr. R. Gopalakrishnan Advocate, for Intervener.

The following Judgment of the Court was delivered by

HEGDE, J.:—The above-mentioned appeal by certificate as well as the petition under Art. 32 of the Constitution raise identical questions of law for decision. In both these proceedings the validity of the notification issued by the Government of Mysore in S. O 1038, dated the 1st June, 1967 fixing the minimum wages of different classes of employees in residential hotels and eating houses in the State of Mysore, under the provisions of the Minimum Wages Act, 1948 (to be hereinafter referred to as the Act) is called into question. The Civil Appeal arises from the decision of the High Court of Mysore rejecting the various contentions advanced on behalf of some of the hotel owners questioning the validity of the impugned notification. The writ petition is filed by the All Mysore Hotels Association, Bangalore and the Madras Woodland Hotel raising these very contentions.

2. The impugned notification was challenged on several grounds before the High Court but in this Court only some of those grounds were pressed. The grounds urged in this Court are:

(1) Section 5 (1) of the Act is violative of Art. 14 of the Constitution as it confers unguided and uncontrolled discretion on the Government to follow either of the alternative procedures prescribed in clauses (a) and (b) of that sub-section.

(2) The provisions of the Act are unconstitutional as they confer arbitrary power without guidance to the Central and the State Governments concerned to fix minimum rates of wages and thus interfere with the freedom of trade guaranteed under Art. 19 (1) (g) of our Constitution.

(3) It was incumbent on the Government to appoint a Committee under Sec. 5 (1) (a) of the Act to inquire into and advise it in the matter of fixing minimum wages. Its failure to do so has resulted in fixing minimum wages arbitrarily.

(4) Fixing of minimum wages under the provisions of the Act being a quasi-judicial act, the Government's failure to observe the principles of natural justice has vitiated its decision.

(5) It was not permissible for the Government to fix different minimum wages in different industries.

(6) The division of the State into zones and fixing different rates of minimum wages for different zones was impermissible under the Act.

(7) The division of the State into zones was not done on any rational basis and

(8) The valuation of the food to be provided to the employees is unreasonably low and the same was done without the authority of law.

3. The Act came to be enacted to give effect to the resolutions passed by the minimum wages fixing Machinery Convention held at Geneva in 1928. The relevant resolutions of the Convention are embodied in Arts. 223 to 228 of the International Labour Code. The object of these resolutions as stated in Art. 224 was to fix minimum wages in industries "in which no arrangements exist for the effective regulation of wages by collective agreements or otherwise and wages are exceptionally low". The Central Legislature enacted the Act in 1948 and it came into force on March 15, 1948. The long title to the Act says that it is an Act for fixing minimum rates of wages for certain employments. The preamble to the Act says that "it is expedient to provide for fixing minimum rates of wages in certain employments". Section 2 defines certain terms. Section 3 empowers the appropriate Government which expression is defined in Sec. 2 (b) to fix the minimum rates of wages payable to the employees employed in an employment specified in Part I or in part II of the Schedule and in any employment added to either part in exercise of the powers granted under Section 27 of the Act. Clause (b) of Sec. 3 (2) empowers the appropriate Government to review at such intervals as it may think fit, such intervals not exceeding five years, minimum rates of wages so fixed and revise the minimum rates, if necessary. Sub-section (3) of that section stipulates that in fixing or revising minimum rates of wages under that section different minimum rates of wages may be fixed in different scheduled employments for different classes of work in the same scheduled employment for adults, adolescents, children and apprentices and for different localities. Section 4 prescribes the different methods in which the minimum rates of wages

can be fixed. Section 5 is important for our present purpose. It reads thus:

"(1) In fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act or in revising minimum rates of wages so fixed, the appropriate Government shall either—

(a) appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision, as the case may be, or

(b) by notification in the Official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date, not less than two months from the date of the notification on which the proposals will be taken into consideration.

(2) After considering the advice of the committee or committees appointed under clause (a) of sub-section (1) or as the case may be, all representations received by it before the date specified in the notification under clause (b) of that sub-section, the appropriate Government shall, by notification in the Official Gazette, fix or, as the case may be, revise the minimum rates of wages in respect of each scheduled employment, and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue:

Provided that where the appropriate Government proposes to revise the minimum rates of wages by the mode specified in clause (b) of sub-sec. (1), the appropriate Government shall consult the Advisory Board also".

4. Section 7 says that for the purpose of co-ordinating the work of committees and sub-committees appointed under Sec. 5 and for advising it generally in the matter of fixing and revising the rates of wages, the appropriate Government should appoint an Advisory Board. Section 8 provides for the appointment of a Central Advisory Board. Section 9 prescribes the composition of the various committees and sub-committees under Section 5 and the Advisory Boards under Sections 7 and 8. Section 11 authorises the appropriate Government to fix wages in kind under certain circumstances and to fix its value in terms of money. Section 12 stipulates that

the employer shall pay to every employee engaged in a scheduled employment the minimum rates of wages fixed by the notification. The other provisions of the Act except Sec. 27 are not relevant for our present purpose. Section 27 empowers the appropriate Government to add to either part of the Schedule any employment in respect of which it is of opinion that the minimum rates of wages should be fixed under the Act.

5. The Schedule to the Act as it originally stood did not include residential hotels and eating houses but they were brought into Part I of the Schedule by the State Government on June 18, 1959 in exercise of its powers under Sec. 27.

6. The State Government of Mysore fixed the minimum rates of wages to different categories of employees in residential hotels and eating houses situate within the municipal limits of Bangalore, Mysore, Hubli, Mangalore and Belgaum as well as in the area of the Kolar Gold Fields Sanitary Board as per its notification published on June 16, 1960. That notification was quashed by the High Court of Mysore on November 10, 1961, at the instance of some of the proprietors of residential hotels and eating houses in proceedings under Art. 226 of the Constitution on the sole ground that as the notification in question applied only to certain parts of the State and not to the whole of it, it was invalid. A fresh notification under Sec. 5 (1) (b) of the Act containing certain proposals was issued by the State Government for fixing minimum wages for different classes of employees in residential hotels and eating houses on December 9, 1964 but no further action was taken on the basis of that notification. On October 28, 1966, the State Government after consulting the Mysore State Minimum Wages Advisory Board published in the Official Gazette fresh proposals under Sec. 5 (1) (b) for fixing minimum wages for different categories of employees in residential hotels and eating houses in the State. The parties affected were called upon to submit their representations regarding those proposals. Various representations from the interested parties were received. Thereafter the Minister for Labour summoned a meeting of the interested parties on April 27, 1967 for consider-

ing those proposals. That meeting was attended by the representatives of the employers as well as the employees. It was also attended by the representatives of various hotel owners' associations in the State. At the meeting the employers' representatives pleaded that the minimum wages proposed to be fixed are excessive but the representatives of the employees asserted that the proposed rates are low and that they should be enhanced. After considering the written as well as the oral representations made by the concerned parties, the impugned notification was issued. The minimum wages fixed under that notification is somewhat higher than that proposed.

7. We have earlier referred to the circumstances under which the Act came to be enacted as well as the objectives intended to be achieved by the Act. In that context we may also refer to a passage in the report of the Committee on Fair Wages appointed by the Central Government. In paragraph 8 of that report, it is observed:

"The demand for the fixation of the minimum wage arose, in the first instance, out of the clamour for the eradication of the evils of "sweating". Thus in the early days, the operation of the minimum wage legislation was confined to employments which paid unduly low wages. There has since been increasing demand for the fixation of minimum wages so as to cover even non-sweated industries particularly those in which labour is unorganised or is only weakly organised. The International Convention of 1928 prescribes the setting up of minimum wage fixing machinery in industries in which "no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low". The Minimum Wages Act passed by the Indian Legislature last year was found necessary on both these grounds.

In foreign countries, particularly Australia, New Zealand, the United States of America and Canada, where the national wealth is high, the living wage forms the primary basis of the minimum wage. In these countries there is not much distinction between the two. The I.L.O. monograph on the Minimum Wage-Fixing Machinery contains the following passage on the subject:

"The basis specified in various laws include the living wage basis, and that of fixing minimum wages in any trade in relation to the wages paid to workers in the same trades in other districts or in relation to the wages paid to workers of similar grade in other trades. There is a third important basis, namely, the capacity of the individual industry or of Industry in general, which, though sometimes not expressly mentioned in minimum wage laws, must always be taken into account in practice.....A close relation exists between them. As a basis for wage-fixing it would be valueless to make an estimate of a living wage beyond the capacity of industry to pay. Here capacity of industry as a whole, and—not of each separate industry or branch is to be understood."

From this analysis of the bases of fixing of the minimum wage, it will be seen that, as a rule, though the living wage is the target, it has to be tempered, even in advanced countries, by other considerations, particularly the general level of wages in other industries and the capacity of industry to pay. This view has been accepted by the Bombay Textiles Labour Inquiry Committee which says that "the living wage basis affords an absolute external standard for the determination of the minimum" and that "where a living wage criterion has been used in the giving of an award or the fixing of a wage, the decision has always been tempered by other considerations of a practical character."

In India, however, the level of the national income is so low at present that it is generally accepted that the country cannot afford to prescribe by law a minimum wage which would correspond to the concept of the living wage as described in the preceding paragraphs. What then should be the level of minimum wages which can be sustained by the present stage of the country's economy? Most employers and some Provincial Governments consider that the minimum wage can at present be only a bare subsistence wage. In fact, even one important all-India organization of employees has suggested that "a minimum wage is that wage which is sufficient to cover the bare physical needs of a worker and his family." Many others, however, who have replied to our

questionnaire, consider that a minimum wage should also provide for some other essential requirements such as a minimum of education, medical facilities and other amenities. We consider that a minimum wage must provide not merely for the bare sustenance of life but for the preservation of the efficiency of the worker. For this purpose, the minimum wage must also provide for some measure of education, medical requirements and amenities."

8. It is now convenient to examine the various contentions advanced on behalf of the appellant and the petitioners. It was contended that Section 5 (1) of the Act is violative of Article 14 of the Constitution as it confers unguided and uncontrolled discretion to the Government to follow either of the two alternative procedures prescribed in that section in the matter of fixing minimum wages. It was urged that under clause (a) of Section 5 (1) the appropriate Government is required to appoint a committee representing all interests to hold a detailed enquiry regarding the concerned employment before advising the Government in the matter of fixing minimum wages but under clause (b) of Section 5 (1) all that the appropriate Government need do is to publish by notification in the Official Gazette its proposals for the information of the persons likely to be affected by those proposals and specify a date not less than two months from the date of the notification on which the proposals will be taken into consideration. It was urged that if the procedure prescribed in Section 5 (1) (a) is adopted it would be advantageous to the employers because in the committee to be appointed, there will be the representatives of the employers who know the difficulties of the employers and hence are in a position to acquaint their colleagues about the same but if the procedure prescribed in Section 5 (1) (b) is followed, the affected parties can only submit their written representations followed by some nominal oral representation in a crowded meeting. While dealing with that topic, assistance was sought from the rule laid down by this Court in *Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri*, 1955-1 SCR 448 = (AIR 1954 SC 545) and the other decisions of this Court reite-

rating that rule. It is true that this Court has firmly ruled that the procedural inequality, if real and substantial is also within the vice of Article 14. But then, before a power can be held to be bad the same should be an unguided and unregulated one. But if a power is given to an authority to have recourse to different procedures under different circumstances, that power cannot be considered as an arbitrary power. It must also be remembered that power under Section 5 (1) is given to the State Government and not to any petty official. The State Government can be trusted to exercise that power to further the purposes of the Act. It is not the law that the guidance for the exercise of a power should be gatherable from one of the provisions in the Act. It can be gathered from the circumstances that led to the enactment of the law in question i.e., the mischief that was intended to be remedied, the preamble to the Act or even from the scheme of the Act.

9. We have earlier noticed the circumstances under which the Act came to be enacted. Its main object is to prevent sweated labour as well as exploitation of unorganised labour. It proceeds on the basis that it is the duty of the State to see that at least minimum wages are paid to the employees irrespective of the capacity of the industry or unit to pay the same. The mandate of Article 43 of the Constitution is that the State should endeavour to secure by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. The fixing of minimum wages is just the first step in that direction. In course of time the State has to take many more steps to implement that mandate. As seen earlier that resolution of the Geneva Convention of 1928 which had been accepted by this country called upon the covenanting States to fix minimum wages for the employees in employments where the labour is unorganized or where the wages paid are low. Minimum wage does not mean wage just sufficient for bare sustenance. At present the conception of a minimum

wage is a wage which is somewhat intermediate to a wage which is just sufficient for bare sustenance and a fair wage. That concept includes not only the wage sufficient to meet the bare sustenance of an employee and his family. It also includes expenses necessary for his other primary needs such as medical expenses, expenses to meet some education for his children, and in some cases transport charges etc. — see *U. Unnichoyi v. State of Kerala*, 1962-1 SCR 946 = (AIR 1962 SC 12). The concept of minimum wage is likely to undergo a change with the growth of our economy and with the change in the standard of living. It is not a static concept. Its concomitants must necessarily increase with the progress of the society. It is likely to differ from place to place and from industry to industry. That is clear from the provisions of the Act itself and is inherent in the very concept. That being the case it is absolutely impossible for the legislature to undertake the task of fixing minimum wages in respect of any industry much less in respect of an employment. That process must necessarily be left to the Government. Before minimum wages in any employment can be fixed it will be necessary to collect considerable data. That cannot be done by the legislature. It can be best done by the Government. The legislature has determined the legislative policy and formulated the same as a binding rule of conduct. The legislative policy is enumerated with sufficient clearness. The Government is merely charged with the duty of implementing that policy. There is no basis for saying that the legislature had abdicated any of its legislative functions. The legislature has prescribed two different procedures for collecting the necessary data, one contained in Section 5 (1) (a) and the other in Section 5 (1) (b). In either case it is merely a procedure for gathering the necessary information. The Government is not bound by the advice given by the committee appointed under Section 5 (1) (a). Discretion to select one of the two procedures prescribed for collecting the data is advisedly left to the Government. In the case of a particular employment, the Government may have sufficient data in its possession to enable it to formulate proposals under

Section 5 (1) (b). Therefore it may not be necessary for it to constitute a committee to tender advice to it but in the case of another employment it may not be in possession of sufficient data. Therefore it might be necessary for it to constitute a committee to collect the data and tender its advice. If the Government is satisfied that it has enough material before it to enable it to proceed under Section 5 (1) (b) it can very well do so. Which procedure should be adopted in any particular employment depends on the nature of the employment and the information the Government has in its possession about that employment. Hence the powers conferred on the Government cannot be considered as either unguided or arbitrary. In the instant case as seen earlier the question of fixing wages for the various categories of employees in residential hotels and eating houses was before the Government from 1960 and the Government had taken various steps in that regard. It is reasonable to assume that by the time the Government published the proposals in pursuance of which the impugned notification was issued, it had before it adequate material on the basis of which it could formulate its proposals. Before publishing those proposals, the Government had consulted the advisory committee constituted under Section 7. Under those circumstances we are unable to accede to the contention that either the power conferred under Section 5 (1) is an arbitrary power or that the same had been arbitrarily exercised.

10. The validity of some of the provisions in the Act including S. 5 came up for consideration by this Court in *Edward Mills Co. Ltd., Beawar v. State of Ajmer*, 1955-1 SCR 752 = (AIR 1955 SC 33) and in *Bijay Cotton Mills Ltd. v. State of Ajmer*, 1955-1 SCR 735 = (AIR 1955 SC 25). In the former case, it was observed that the legislative policy is apparent on the face of the enactment. What it aims at is the statutory fixation of the minimum wages with a view to obviate the chances of exploitation of labour. It is to carry out the purpose of the enactment that power has been given to the appropriate Government to decide with reference to local conditions whether it is desirable that minimum wage should be fixed in re-

gard to a particular trade or industry. In the latter case, the validity of Section 5 was assailed on the ground that it is violative of Article 19 (1) (g). That challenge was negatived by this Court. Dealing with Section 5 (1) this is what the Court observed therein:

"As regards the procedure for the fixing of minimum wages, the "appropriate Government" has undoubtedly been given very large powers. But it has to take into consideration, before fixing wages, the advice of the committee if one is appointed, or the representations on his proposals made by persons who are likely to be affected thereby. Consultation with advisory bodies has been made obligatory on all occasions of revision of minimum wages, and Section 8 of the Act provides for the appointment of a Central Advisory Board for the purpose of advising the Central as well as the State Government both in the matter of fixing and revision of minimum wages. Such Central Advisory body is to act also as a co-ordinating agent for co-ordinating the work of the different advisory bodies. In the committees or the advisory bodies, the employers and the employees have an equal number of representatives and there are certain independent members besides them who are expected to take a fair and impartial view of the matter. These provisions, in our opinion constitute an adequate safeguard against any hasty or capricious decision by the "appropriate Government". In suitable cases the "appropriate Government" has also been given the power of granting exemptions from the operation of the provisions of this Act."

11. It is true that in those cases the validity of Section 5 was not challenged as being ultra vires Article 14 of the Constitution. But the observations quoted above afford an answer to the plea that the power granted to the Government is an arbitrary power.

12. It was complained that an examination of the various proposals made by the Government ever since 1960 would clearly show that the Government was out to fix fair wages and not minimum wages. From stage to stage it has gone on proposing higher and higher wages and under the impugned notification the wages

fixed are higher than those proposed. We were told that if the prescribed rates are sustained, the hotel industry would be crippled and the smaller units in that industry will be driven out of the trade.

13. Our attention was not drawn to any material on record to show that the minimum wages fixed are basically wrong. *Prima facie* they appear to be reasonable. We are not convinced that the rates prescribed would adversely affect the industry or even a small unit therein. If they do, then the industry or the unit as the case may be has no right to exist. Freedom of trade does not mean freedom to exploit. The provisions of the Constitution are not erected as the barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the preamble to the Constitution. They do not permit any kind of slavery, social economic or political. It is a fallacy to think that under our Constitution there are only rights and no duties. While rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other. The provisions of Part IV enable the legislatures and the Government to impose various duties on the citizens. The provisions therein are deliberately made elastic because the duties to be imposed on the citizens depend on the extent to which the directive principles are implemented. The mandate of the Constitution is to build a welfare society in which justice social, economic and political shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met.

14. It was urged on behalf of the hotel owners that the power conferred to fix the minimum wage on the appropriate Government under S. 5 (1) is a quasi-judicial power and in exercising that power, it was incumbent on the appropriate Government to observe the principles of natural justice. The Government having failed to observe those principles, the

fixation of wages made is liable to be struck down. It is unnecessary for our present purpose to go into the question whether the power given under the Act to fix minimum wages is a quasi-judicial power or an administrative power. As observed by this Court in *A. K. Karapik v. Union of India*, 1969-2 SCC 262 = (AIR 1970 SC 150), the dividing line between an administrative power and quasi-judicial power is quite thin and is being gradually obliterated. It is further observed therein that principles of natural justice apply to the exercise of the administrative powers as well. But those principles are not embodied rules. What particular rule of natural justice, if any, should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or body of persons appointed for the purpose.

15. Taking into consideration the provisions of the Act, the objective behind the Act, the purposes intended to be achieved and the high authority on whom the power is conferred, we have no doubt that the procedure adopted was adequate and effective. We have equally no doubt that reasonable opportunity had been given to all the concerned parties to represent their case. We are unable to agree that the impugned order is vitiated because of the Government's failure to constitute a committee under Section 5 (1) (a). We see no substance in the contention that the Government is not competent to enhance the rate of wages mentioned in the proposals published. If it has power to reduce those rates, as desired by the employers, it necessarily follows that it has power to enhance them. There is no merit in the contention that the Government must go on publishing proposals after proposals until a stage is reached where no change whatsoever is necessary to be made in the last proposal made.

16. The contention that the Government has no power to fix different minimum wages for different industries or in different localities is no more available in view of the decision of this Court in *M/s. Bhaikusa Yamasa Khatriya v. Sangamner Akola Taluka Bidi Kamgar Union*, (1963) Supp 1

SCR 524 = (AIR 1963 SC 806). The fixation of minimum wages depends on the prevailing economic conditions, the cost of living in a place, the nature of the work to be performed and the conditions in which the work is performed. The contention that it was impermissible for the Government to divide the State into several zones is opposed to Section 3 (3) as well as to the scheme of the Act.

17. On the basis of the material before us we are unable to say that the various zones had not been made on any rational basis. The Government has given good reasons in support of the steps taken by it. Bangalore is the capital of the State and Mangalore is a major port. Therefore they may stand on a different footing. In matter like the preparation of zones we have to trust the State Government unless it is shown that collateral considerations have influenced its decision. No such plea was taken. The argument based on cost of living index showing that cost of living index was higher in several other towns in the State than Bangalore or Mangalore is not a well-founded argument. The cost of living is one thing, cost of living index is another. What is relevant is the former and not the latter. The latter depends on the base year, which is not the same in all the towns and the prices of certain selected goods in each of the towns concerned in the base year and thereafter which again is likely to differ from town to town.

18. The contention relating to the value of the food that may be supplied to the employee is not merely petty, it is misconceived as well. For example the employers contend that a minimum wage of Rs. 80 per month in Bangalore and Mangalore for a cleaner is excessive; at the same time they assert that the computation of the value of the food to be supplied to him at Rs. 40 per month is not adequate. They fail to see the obvious contradictions in those pleas. In fixing minimum wages, a family of three members has to be taken into consideration. Further the food is not the only item taken into consideration. We have earlier referred to the other components of a minimum wage. Therefore if the value of the food supplied has to be increased, minimum wages also will have to be increased.

Further the impugned notification does not authorise under Section 11 (2) the payment of any portion of wages in kind. It merely says that if the employer supplies free meals to any employee, he may deduct the sum mentioned in the notification. It is only an option given and not a duty imposed. Therefore the procedure prescribed in Rule 21 of the Rules framed under the Act is inapplicable to the facts of the case before us. The relevant rule is Rule 22 (2) (v) i.e., the valuation of an amenity. We fail to see why the supplying of food is not an amenity.

19. In the result the appeal and the writ petition fail. They are dismissed with costs. Hearing fee one set. The owners of residential hotels and eating houses are permitted to pay the arrears of minimum wages accrued up till now within six months from this date subject to the condition they pay interest on those arrears from the due dates till payment at 6 per cent per annum.

Appeal dismissed.

AIR 1970 SUPREME COURT 2051 (V 57 C 436)

(From Kerala: 1966 Ker LT 881)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

V. Venugopala Varma Rajah, Appellant v. The Commissioner of Income-tax, Kerala, Respondent.

A. K. L. K. M. Vishnudatta Antharjanam, Intervener.

Civil Appeal No. 810 of 1967, D/- 13-2-1969 and 24-9-1969.

Income-tax Act (1922), Section 4 — Income — Revenue receipt — Sale of tree trunks — Trees so cut, capable of regeneration—Receipt from sale of trunks is in the nature of income and subject to special exemption under Section 4 (3) (viii) is liable to tax — By sale of trunks assessee does not realise part of his capital. (Para 19) Cases Referred: Chronological Paras (1964) 1964-51 ITR 129 = ILR (1964) 1 Ker 458, State of Kerala v. Karimtharuvi Tea Estate Ltd. 57 (1964) 1964-53 ITR 681 (Mys), Commr. of Income-tax, Mysore v. H. B. Van Ingen 18

- (1961) 1961-41 ITR 313 (Bom),
Commr. of Income-tax v. N. T.
Patwardhan 4, 16
- (1952) AIR 1952 Mad 47 (V 39)
= (1951) 20 ITR 385, Fring-
ford Estates Ltd. Calicut v.
Commr. of Income-tax, Madras 15
- (1947) AIR 1947 Pat 115 (V 34) =
(1946) 14 ITR 673, Kamakshya
Narain Singh v. Commr. of
Income-tax, Bihar and Orissa 14
- (1945) AIR 1945 Oudh 35 (V 32) =
(1945) 13 ITR 74, Maharaja
of Kapurthala v. Commr. of
Income-tax, C. P. and U. P. 13
- (1930) AIR 1930 All 389 (V 17) =
ILR 52 All 419, In re Ram
Prasad 12
- (1930) AIR 1930 Mad 764 (V 17) =
ILR 54 Mad 21 (FB), Commr.
of Income-tax, Madras v. Mana-
vedan Tirumalpad 11
- Mr. R. Thiagarajan, Advocate for
Appellant; Mr. S. T. Desai, Senior
Advocate, (M/s. R. H. Dhebar and
B. D. Sharma, Advocates, with him),
for Respondent; Mr. Sardar Bahadur,
Advocate for Intervener.

The following Judgment of the
Court was delivered by

SHAH, J.: (13-2-1969) In com-
puting the income of the appel-
lant's father to tax for the
assessment year 1959-60 the Income-
tax officer included Rs. 75,000 received
under an agreement for cutting
and removing trees from 500 acres of
Mangayam Katchihode forest. The
Appellate Assistant Commissioner after
calling for a report on certain facts
confirmed the order. But the Tribu-
nal held that the receipt was of a
capital nature and deleted it from the
taxable income.

2. At the instance of the Commis-
sioner of Income-tax, the Tribunal re-
ferred the following question to the
High Court of Kerala:

"Whether on the facts and in the
circumstances of the case, the Income-
tax Appellate Tribunal was correct in
holding that Rs. 75,000 being income
from felling of trees from forests is
not subject to income-tax?"
The High Court answered the ques-
tion in the negative.

3. We are of the view that the
facts found by the Tribunal are not
sufficient to enable us to record an
answer to the question referred. The
Income-tax officer held that the in-
come was taxable because 500 acres of

forest land was leased for "clear
felling" by the father of the appellant
and this fetched an income of Rupees
75,000. What the expression "clear
felling" meant was not investigated by
the Income-tax officer. The Appellate
Assistant Commissioner in dealing with
the contention raised by the appellant
that the receipt was of the nature of a
capital, observed:

"The claim is based on the reason-
ing that the clear felling of forest
trees amounts to sterilisation of a capi-
tal asset. In other words clear felling
is said to involve total destruction of
the forest. It is admitted that the
trees are of spontaneous growth and it
has not been established that removal
of trees has in any way affected the
value of the property. As a matter of
fact, clear felling is resorted to make
the land more productive and more
valuable. At any rate the claim has
not been substantiated beyond doubt
and hence there is no scope for any
relief."

4. The Tribunal relying upon the
observation of the Income-tax officer
"that the trees were not cut together
with the roots but only 6" above the
ground and that they were later on des-
troyed" held that there was "nothing
to show that there was a diminution
of capital assets. On the other hand,
the Income-tax officer had given a
clear finding that this was a case of
"clear felling." After making an exten-
sive quotation from the judgment of
the High Court of Bombay in Commr.
of Income-tax v. N. T. Patwardhan,
(1961) 41 ITR 313 (Bom), the Tribunal
stated that the observations applied to
the facts in the case before them, and
on that account they upheld the claim
of the appellant.

5. The High Court observed that
it was agreed that the Mangayam
Katchihode forest was within the
ambit of the Madras Preservation of
Private Forests Act, 1949, and the
statutory rules on the subject, and
that the expression "clear felling is an
expression with a definite and specific
meaning as far as such forests are
concerned". They then proceeded to
quote Rule 7 framed under the Madras
Preservation of Private Forests
Act, 1949, and after setting out
conditions (b) and (c) observed that
"the felling of the trees under the
"clear felling" method will not permit
a removal of the trees along with

their roots. On the other hand, the clear indications were that the felling of the trees under the clear felling method should be done in such a way as to permit the regeneration and future growth of the trees concerned. In other words, what is contemplated by the clear felling method is not sterilisation of an asset but the removal of a growth above a particular height leaving intact the roots and the stumps in such a manner as to ensure regeneration, future growth, further felling and subsequent income." On that view the Court held that the receipt of Rs. 75,000 was a revenue receipt and not a capital receipt as held by the Appellate Tribunal.

6. The departmental authorities, the Tribunal and the High Court have expressed different views on the import of the expression "clear felling" and about the true effect of the agreement. The Income-tax officer taxed the amount of Rs. 75,000 on the footing that the 500 acres of forest lands were leased for clear felling. The Appellate Assistant Commissioner held that the trees being of spontaneous growth and the felling of the trees not having affected the value of the property as a result of the clearance, the lands became more productive and the receipt was a revenue income. The Tribunal held that the case being one of "clear felling" and the trees having been cut 6" above the ground and that they were later on destroyed" it was a case of clear felling and the receipt was of a capital nature. The High Court was of the view that the "clear felling" of forest lands meant cutting trees and not removal of the roots so that there would be regeneration, future growth, of the roots and the stumps and on that account the receipt was of revenue nature.

7. It appears that before the Income-tax Officer the agreement dated September 11, 1957 was not produced. After the Appellate Assistant Commissioner remanded the case to the Income-tax Officer the latter submitted the "remand report" and at that time the agreement was produced. The Tribunal in support of its conclusion referred to the preamble of the document and the conditions thereof. The learned Judges of the High Court observed that they did not place any reliance on the extracts in the lease given in paragraph 2 of the statement

of the case for coming to the conclusion they had reached. Why the High Court thought it fit to discard the recitals is not clear from the record.

8. The facts found being not clear, it is difficult to record any conclusion whether the receipt was of a revenue nature or of a capital nature. We therefore call upon the Tribunal to submit to this Court a supplementary statement setting out the terms of the agreement between the father of the appellant relating to the rights conveyed to the lessees in the forest lands and especially about the import of the term relating to "clear felling". The Tribunal will submit the supplementary statement of the case only on the basis of the evidence on the record and will not take any additional evidence. The report to be submitted within three months from the date on which the papers reach the Tribunal.

(Judgment delivered on 24-9-1969 after the return of supplementary statement:)

9. By our order dated February 13, 1969, we called for a supplementary statement of the case setting out the terms of the agreement conveying the rights in the forest trees to the lessees, and the true import of the expression "clear felling". The Income-tax Appellate Tribunal has submitted a supplementary statement of the case. The Tribunal has set out the relevant terms of the agreement and has also observed that the import of the expression "clear felling" is that "all trees except casuarina are to be felled at a height not exceeding six inches from the ground, the barks being left intact on the stump and adhering to it all round the stump without being torn off or otherwise changed."

10. There is no suggestion that there were any casuarina trees in the forest lands let out to the lessees. It is common ground also that the trees in the forest were of spontaneous growth. The Tribunal has found that by the use of the expression "clear felling" it was stipulated that the trees are to be cut so that 6" of the trunk with the barks intact and adhering to it all round the stump is left. This is with a view to permit regeneration of the trees.

11. The question whether receipts from sale of trees by an owner of the

land who is not carrying on business in timber may be regarded as income liable to tax has given rise to some difference of opinion in the High Courts. In *Commr. of Income-tax, Madras v. T. Manavedan Tirumalpad*, ILR 54 Mad 21 = (AIR 1930 Mad 764) (FB), a Full Bench of the Madras High Court held that the receipts from sale of timber trees by the owner of un-assessed forest lands in Malabar were revenue and not capital. The Court observed that if income from the sale of coal from a coal-mine or stone won from a quarry or from the sale of paddy grown on land be regarded as income, but for the special exemption granted under the Income-tax Act, there is no logical reason for holding that income from sale of trees is not income liable to tax.

12. In *re, Ram Prasad*, ILR 52 All 419 = (AIR 1930 All 389), a Division Bench of the Allahabad High Court held that receipt from sale of timber is income liable to be taxed and is not a capital receipt. The case arose under the Government Trading Taxation Act 3 of 1926.

13. In *Maharaja of Kapurthala v. Commr. of Income-tax, C. P. & U. P.*, (1945) 13 ITR 74 = (AIR 1945 Oudh 35), the Oudh Chief Court held that net receipt from the sale of forest trees is income liable to income-tax, even though the forest may be gradually exhausted by fellings. The Court further observed that income from the sale of forest trees of spontaneous growth growing on land which is assessed to land revenue is not agricultural income within the meaning of Sec. 2 (1) (a) of the Income-tax Act and is not exempt from income-tax under Sec. 4 (3) (viii) of the Act.

14. In *Kamakshya Narain Singh v. Commr. of Income-tax, Bihar and Orissa*, (1946) 14 ITR 673 = (AIR 1947 Pat 115), a similar view was expressed by the Patna High Court.

15. In *Fringford Estates Ltd., Calicut v. Commr. of Income-tax, Madras*, (1951) 20 ITR 585 = (AIR 1952 Mad 47), it was held that profits realised from the sale of timber were trade profits and were liable to income-tax. In that case the assessee Company formed with the object of purchasing, clearing and improving of estates and the cultivation and sale of tea, coffee

etc., in such estates, purchased a tract of land part of which had already been cultivated with tea and the rest was a jungle capable of being cleared and made fit for plantation. The Company entered into an agreement with a timber merchant for clearing a part of the forest of all trees and for sale of the trees in the market. This was held to be a part of the business activity of the Company.

16. The cases on the other side of the line are to be found in (1961) 41 ITR 313 (Bom), in which a Division Bench of the Bombay High Court held that when old trees which stood on the land of the assessee were disposed of with their roots "once and for all", the receipts were capital. The Court observed (p. 318):

"The asset of the man was the land with the wild growth of trees on it. If the land with the trees had been sold, there could have been no doubt that the sale was a realisation of capital and it would not have been possible to argue that the transaction in so far as it involved a sale of the trees was a sale producing income and the remaining part of the transaction was a capital sale. In the present case the land is retained by the assessee but a part of the asset is disposed of in its entirety by selling the trees with roots once and for all."

17. In *State of Kerala v. Karimtharuvi Tea Estate Ltd.*, (1964) 51 ITR 129 (Ker) the Kerala High Court held in a case arising under the Kerala Agricultural Income-tax Act, 1950, that the amount realised by sale as firewood of old and useless gravelia trees grown and maintained in tea gardens for the purpose of affording shade to tea plants is capital receipt and not revenue receipt. The Court observed:

"The gravelia trees were grown and maintained for the sole purpose of providing shade to the tea bushes in the tea estates of the assessee. That such shade is essential for the proper cultivation of tea cannot be disputed and the trees should hence be considered to be as much a part of the capital assets of the company as the tea bushes themselves or the equipment in its factories. Some of the gravelia trees became old and useless with the efflux of time and they naturally had

to be cut down and sold. The sale proceeds of such trees cannot possibly amount to a revenue receipt."

18. In *Commr. of Income-tax, Mysore v. H. B. Van Ingen*, (1964) 53 ITR 681 (Mys), the Mysore High Court held that the assessee who had purchased a coffee estate of which a part had been planted with coffee plants and the rest was jungle, and had cleared the jungle for the purpose of planting coffee and had sold the trees felled, price realised by the sale of the trees was a capital and not a revenue receipt, because the trees had grown spontaneously, and the assessee had purchased the estate including the trees.

19. It is not necessary for the purpose of this case to enter upon a detailed analysis of the principle underlying the decisions and to resolve the conflict. On the finding in the present case it is clear that the trees were not removed with roots. The stumps of the trees were allowed to remain in the land so that the trees may regenerate. If a person sells merely leaves or fruits of the trees or even branches of the trees it would be difficult (subject to the special exemption under Section 4 (3) (viii) of the Income-tax Act, 1922) to hold that the realization is not of the nature of income. Where the trunks are cut so that the stumps remain intact and capable of regeneration, receipts from sale of the trunks would be in the nature of income. It is true that the tree is a part of the land. But by selling a part of the trunk, the assessee does not necessarily realise a part of his capital. We need not consider whether in case there is a sale of the trees with the roots so that there is no possibility of regeneration, it may be said that the realisation is in the nature of capital. That question does not arise in the present case.

20. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 2055
(V 57 C 437)

(From Kerala: ILR (1969) 1 Ker 329)
J. C. SHAH, K. S. HEGDE AND
A. N. GROVER JJ.

A. K. T. K. M. Vishnudatta Andharjanam represented by D. V. Nambudiripad Desamangalam, Appellant v. The Commissioner of Agricultural Income Tax, Trivandrum, Respondent.

Civil Appeals Nos. 2327 and 2328 of 1968, D/- 5-5-1970.

Kerala Agricultural Income Tax Act (22 of 1950) S. 2 (a) — Receipt from trees cut from roots and removed — Not income but capital and exempt from taxation. ILR (1969) 1 Ker 329, Reversed.

Profit motive is not decisive of the question whether a particular receipt is capital or income. An accretion to capital does not become taxable income merely because an asset is acquired in the hope that it may be sold at a profit. Trees so long as they are uncut form a part of the land. If they are cut with roots once and for all a part of the assets is disposed of. The sale proceeds on account of their disposal cannot constitute revenue because by removing the roots the source from which fresh growth of trees can take place is also removed. The sale of such trees thus affects capital structure and cannot give rise to a revenue receipt. Receipt from such sale is exempt from taxation. ILR (1969) 1 Ker 329, Reversed; (1961) 41 ITR 313 (Bom), Rel. on; AIR 1932 PC 138, Applied; AIR 1970 SC 2051, Ref. (Para 5)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 2051 (V 57) =

Civil Appeal No. 810 of 1967,
D/- 24-9-1969, V. Venugopala
Varma Rajah v. Commr. of In-
come-tax, Kerala 3

(1961) 41 ITR 313 (Bom), Commr.
of Income-tax, Bombay South
v. N. T. Patwardhan 4

(1932) AIR 1932 PC 138 (V 19) =
6 STC 178, Commr. of Income-
tax, Bengal v. M/s. Shaw
Wallace and Co. 4

The following Judgment of the
Court was delivered by

GROVER, J.—These appeals by special leave from a judgment of the Kerala High Court arise out of the assessment of agricultural income of the assessee made under the Kerala

Agricultural Income-tax Act, 1950, hereinafter called the "Act", in respect of the assessment years 1963-64 and 1964-65.

2. For the assessment year 1963-64 the assessee filed a return showing a net agricultural income of Rs. 12,558-76. When the matter came up for hearing before the Agricultural Income-tax Officer another statement showing an amount of Rs. 43,250-00 as income from teak trees was filed. The Agricultural Income-tax Officer disallowed certain expenses and assessed the income for the year 1963-64 at Rs. 62,021-00. For the assessment year 1964-65 a return was filed declaring a net agricultural income of Rs. 25,733-63. No income was shown from the sale of teak trees. The Agricultural Income-tax Officer found that teak trees had been sold for a lump sum of Rs. 76,500-00 out of which Rupees 43,250-00 had been received in the previous year (1963-64) and he included the said amount in that year's income. The balance amount of Rupees 33,250-00 was received in the previous year corresponding to the assessment year 1964-65. In determining the assessable income for that year this amount was added to the income which had been returned and after disallowing certain amount which had been claimed by way of expenses the net income was determined at Rupees 61,041-00. The assessee filed appeals before the Additional Appellate Assistant Commissioner who confirmed the assessment and dismissed the appeals. Further appeals were taken to the Agricultural Income-tax Tribunal. The Tribunal held that the amount in dispute was agricultural income and not capital. The expenses which were claimed were also disallowed. On an application made under Sec. 60 (1) of the Act the following two questions were referred to the High Court:

"1. Whether on the facts and in the circumstances of the case, the receipt from the sale of teak trees for the purpose of planting the area with rubber is capital in nature and exempt from Agricultural Income-tax Act.

2. If the answer to the above question is in the negative, whether the expenses incurred in the prior years for the purpose of obtaining the said agricultural income is allowable as a deduction from the sale proceeds of the trees."

The High Court did not agree with the contention of the assessee that the amounts received by sale of the teak trees constituted capital and were not agricultural income. Certain amounts were, however, allowed as deductions by way of expenses for the assessment year 1963-64.

3. The principal point that has to be determined is whether the sale proceeds of the teak trees constituted capital or revenue. It appears to have been common ground before the High Court that the assessee planted the teak trees sometime in the year 1946-47. The form of the question itself showed that the trees were cut and completely removed from the land together with their roots for the purpose of planting rubber. There was no question of any further regeneration or growth of the trees which had been cut and removed. In other words there was no possibility of recurring income from these trees. In *V. Venugopala Varma Rajah v. Commr. of Income-tax, Kerala, Civil Appeal No. 810 of 1967, D/- 24-9-1969* = (reported in AIR 1970 SC 2051) the question before this court was whether trees which had not been removed with the roots and the stumps of which had been allowed to remain in the land was in the nature of income. This is what was observed in that case:

"Where the trunks are cut so that the stumps remain intact and capable of regeneration, receipts from sale of the trunks would be in the nature of income. It is true that the tree is a part of the land. But by selling a part of the trunk, the assessee does not necessarily realise a part of his capital. We need not consider whether in case there is a sale of the trees with the roots so that there is no possibility of regeneration, it may be said that the realisation is in the nature of capital. That question does not arise in the present case."

The present question was apparently left open and was not decided as the point which arose there did not relate to sale of trees of which the roots had also been taken out for the purpose of planting some other kind of trees e.g., rubber as in the present case.

4. It seems to us that the well-known test laid down by the Privy Council in *Commr. of Income-tax, Bengal v. Messrs. Shaw, Wallace and Co.*, 6 STC 178 = (AIR 1932 PC 138)

to find out whether a particular receipt is income is not satisfied in the facts and circumstances of the present case. According to that test income connotes a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall. Once the teak trees were removed together with their roots and there was no prospect of regeneration or of any production of a return therefrom it could well be said that the source ceased to be one which could produce any income. The Bombay High Court in *Commr. of Income-tax, Bombay South v. N. T. Patwardhan*, (1961) 41 ITR 313 (Bom), said that from the point of view of a person engaging himself in the business of sale of trees the capital structure would be not only the land on which the trees stood but also the roots of the trees from which the wood yielded income. If the trees were sold off with the roots the capital structure would be affected.

5. The High Court in the judgment under appeal was particularly impressed with the profit motive of the assessee in planting teak trees although that was done several years ago. But it was overlooked that profit motive is not decisive of the question whether a particular receipt is capital or income. An accretion to capital does not become taxable income merely because an asset is acquired in the hope that it may be sold at a profit. It must also be remembered that trees so long as they are uncut form a part of the land. If they are cut with roots once and for all a part of the assets is disposed of. The sale proceeds on account of their disposal cannot constitute revenue because by removing the roots the source from which fresh growth of trees can take place is also removed. The sale of such trees thus affects capital structure and cannot give rise to a revenue receipt.

6. For the reasons given above the answer to the first question will be in the affirmative and in favour of the assessee. It is unnecessary to return any answer to the second question. The appeals are accordingly allowed

and the judgment of the High Court is set aside with costs. One hearing fee. Appeals allowed.

AIR 1970 SUPREME COURT 2057 (V 57 C 438)

(From Assam: AIR 1967 Assam 83)
J. C. SHAH, ACTG. C. J., V. RAMA-SWAMI AND A. N. GROVER, JJ.

The State of Assam and another (In all the Appeals), Appellants v. D. C. Choudhuri and another, Respondents.

Civil Appeals Nos. 1537 to 1545 of 1968, D/- 7-8-1969.

Assam Agricultural Income-tax Act (9 of 1939), Ss. 30, 19 (1), 19 (2) and 20 (4) — Best judgment assessment of escaped income cannot be made without notice under Section 19 (2) or a notice under Section 30.

In the absence of a return filed by the assessee pursuant to a general notice under Sec. 19 (1) of the Act assessment could be made only after due notice under Section 19 (2) or by initiating proceedings under Sec. 30 of the Act. Section 19 (2) requires that an individual notice is to be served in the financial year. If no notice is served under that section proceedings under Section 30 can be initiated by a notice in accordance with that section within three years of the end of that financial year. AIR 1964 SC 766, Rel. on. (Para 10)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 SC 831 (V 56) =
Civil Appeals Nos. 808 and 809
of 1967, D/- 14-8-1968, State
of Assam v. Deva Prasad
Barua | 8 |
| (1964) AIR 1964 SC 766 (V 51) =
(1964) 4 SCR 436, Ghanshyam-
das v. Regional Asst. Commr.
Sales Tax, Nagpur | 9 |
| (1960) 38 ITR 224 (PC), Gokuldas
Ratanji Mandavia v. Commr.
of Income-tax | 11 |
| (1959) AIR 1959 SC 1154 (V 46) =
(1960) 1 SCR 114, Commr. of
Income-tax, Bombay v. Ran-
chhoddas Karsondas, Bombay | 8 |
| (1951) 20 ITR 432 (Cal), Commr.
of Agricultural Income-tax v.
Sultan Ali | 5 |
| (1948) AIR 1948 Bom 401
(V 35) = (1948) 16 ITR 119, | |

Harakchand Makanji and Co.
v. Commr. of Income-tax 5, 7

M/s. Naunit Lal and S. N. Choudhuri, Advocates, for Appellants, (In all the Appeals); M. C. Chagla, Senior Advocate (Mr. Sukumar Ghose, Advocate with him), for Respondents, (In all the Appeals.)

The following Judgment of the Court was delivered by

GROVER, J.—These are nine connected appeals by certificate from a judgment of the High Court of Assam and Nagaland whereby nine petitions filed by the respondents under Art. 226 of the Constitution were allowed and the assessment orders made under the provisions of the Assam Agricultural Income-tax Act, 1939, hereinafter called the 'Act', were quashed.

2. The facts may be first stated. D. C. Choudhuri and S. C. Dutt petitioners in four of the writ petitions owned the Martycherra Tea Estate in the district of Cachar which they had purchased on January 1, 1948. They sold this Estate on July 9, 1953. From January 1, 1948 to July 9, 1953 they carried on the business of cultivation, manufacture and sale of black tea at the said Estate under a partnership of which they were the sole partners. The partnership firm was served with a notice under the Indian Income-tax Act, 1922 hereinafter called the Income-tax Act and was assessed to income-tax for the assessment year 1951-52. Appeals were filed against the assessment order before the Appellate Assistant Commissioner of Income-tax and the Income-tax Appellate Tribunal in which substantial reliefs were given to the assessee. After the sale of the Tea Estate these assessee ceased to have any agricultural income. The case of the assessee as laid in the writ petition was that on January 25, 1961 a letter was received by one of them from the Agricultural Income-tax Officer directing both the assessee to furnish returns of their agricultural income for the assessment years 1949-50 to 1953-54. Thereafter they received a notice of demand under Sec. 23 of the Act for payment of a certain amount as agricultural income-tax for the assessment year 1950-51. The assessment order was stated to have been made under Sec. 20 (4) of the Act. Similar orders were made and demands created with regard to the

subsequent years, namely, 1951-52, 1952-53 and 1953-54. All these assessment orders were challenged by means of four petitions under Art. 226 of the Constitution. Apart from other points which were raised the main objection taken was that no notice under Sec. 30 of the Act had been served at any time in respect of the assessment covered by the impugned orders. Such a notice could be served only within three years of the end of the financial year. In the absence of service of the aforesaid notice within the prescribed period the Income-tax Officer had no jurisdiction to make any assessment nor could such an assessment be made after the expiry of a period of three years from the end of each financial year.

3. The other set of petitions under Art. 226 of the Constitution was filed by the company — The Eastern Tea Estate Private Ltd. This company owned two tea estates, the Chandana Tea Estate and the Martycherra Tea Estate. The Chandana Tea Estate was purchased from the Indian Tea and Mill Industries Limited in 1950 and the Martycherra Tea Estate was purchased from M/s. D. C. Choudhuri and S. C. Dutt on July 9, 1953. The case of the company was that no notice had been received under Section 19 (2) of the Act for the assessment years 1951-52 to 1955-56 and therefore no returns were filed. On October 9, 1959 the company received a letter from the Agricultural Income-tax Officer, Shillong asking it to submit returns in respect of Martycherra Tea Estate for the assessment year 1950-51 onwards. The company addressed a communication to the Agricultural Income-tax Officer on November 18, 1959 saying, *inter alia*, that no notice had been served on it under the Act previously and as it also owned the Chandana Tea Estate it proposed to submit returns for the years in respect of which it was liable under the Act. On October 19, 1959, the company received a notice under Sec. 19 (2) of the Act directing it to submit the return in respect of the previous year for Martycherra Tea Estate. In response to the notice the company submitted the return for the year ending December 31, 1958 showing the agricultural income from tea estates. A number of notices were served subsequently and there was further exchange of

correspondence. It was alleged in the petitions filed by the company that a letter was received dated January 23, 1960 from the Agricultural Income-tax Officer in which it was stated that the company had failed to submit the returns for the years 1950-51 to 1958-59 and it was asked to show cause why the assessments for these years should not be completed summarily. After further exchange of correspondence the company received an assessment order dated June 19, 1961 in respect of the assessment year 1951-52 which was made under S. 20 (4) of the Act together with a notice of demand for payment of a certain amount of agricultural income-tax. Similar assessment orders were passed under Sec. 20 (4) and demands created in respect of the assessment years 1952-53, 1953-54, 1954-55 and 1955-56. All these assessments were challenged by means of five petitions under Art. 226 of the Constitution. The main point raised in all these petitions was that unless individual notices under Sec. 19 (2) of the Act had been served no assessment could be made under Section 20 (4) except by way of proceedings under Sec. 30 of the Act.

4. In the returns which were filed by the Agricultural Income-tax Officer to all the petitions filed in the High Court it was maintained that the assessee had refused to accept the service of the notices under Ss. 19 (2) and 30 of the Act. The notice under Sec. 19 (1) had been published in the Assam Gazette and the assessee was bound to make a return pursuant to that notice. It was denied that there was any necessity of serving notices under Section 19 (2) or 30 of the Act and that the assessments which had been made were barred by limitation.

5. A Division Bench of the Assam and Nagaland High Court consisting of Mehrotra C.J. and S. K. Dutta J. allowed all the petitions but delivered separate judgments. The learned Chief Justice held that where no return had been filed pursuant to a general notice under Sec. 19 (1), the Agricultural Income-tax Officer was bound to proceed under Sec. 30 and issue a notice under Sec. 19 (2) of the Act within the prescribed period, namely, three years of the end of the financial year. He further held that there was no service of notice on the respondent in respect of the assessment years in question

either under Section 19 (2) or Section 30 of the Act. S. K. Dutta J., came to the same conclusion as the learned Chief Justice but he relied on a judgment of the Calcutta High Court in *Commr. of Agricultural Income-tax v. Sultan Ali*, (1951) 20 ITR 432 (Cal) in which a dissent had been expressed from the Bombay judgment in *Harakchand Makanji and Co. v. Commr. of Income-tax, Bombay City*, (1948) 16 ITR 119 = (AIR 1948 Bom 401), on the question as to when proceedings relating to assessment could be regarded as having commenced. According to the learned Judge if no return is made in response to a public notice under Section 19 (1) of the Act and no individual notice is served under Section 19 (2) there would be no pending proceedings and it would be a case of escaped assessment. But this would be so only after the expiry of the financial year. In other words after the publication of the notice under Section 19 (1) there would be no escapement of income till the end of the financial year. Once the financial year is over and no return has been made in response to a notice under Section 19 (1) and no individual notice has been served under S. 19 (2) a case would arise of "escaped assessment for the financial year".

6. The relevant provisions in Chapter IV of the Act may now be noticed. Sections 19 and 20 contain provisions similar to Sections 22 and 23 of the Income-tax Act, 1922. Under S. 19 (1) of the Act the Agricultural Income-tax Officer before the specified date shall give notice by publication in the press, or otherwise, requiring every person whose agricultural income exceeds the limits of taxable income prescribed in Section 6 to furnish within such period not being less than 30 days as may be specified a return in the prescribed form setting forth his agricultural income during the previous year. Sub-section (2) provides that in the case of any person whose total agricultural income is, in the opinion of the Agricultural Income-tax Officer, of such amount as to render such person liable to payment of agricultural income-tax for any financial year, he may serve in that financial year a notice requiring him to furnish within the prescribed period a return. Sub-s. (3) enables a person who has not furnished a return with-

in the time allowed by or under sub-s. (1) or sub-s. (2) to furnish a return or a revised return at any time before the assessment is made. Thus sub-sections (1), (2) and (3) of S. 19 of the Act are identical with and correspond to sub-sections (1), (2) and (3) of Section 22 of the Income-tax Act.

7. Under Section 20 of the Act if the Agricultural Income-tax Officer is satisfied that a return made under Section 19 is correct and complete he has to assess total agricultural income of the assessee according to it. If he has reason to believe that such a return is incorrect or incomplete he has to serve a notice requiring the person who has made the return to produce any evidence on which he may rely in support of the return. After hearing such evidence as the person making the return may produce and such other evidence as the officer may require on specified points the assessment order is to be made. These are the provisions of sub-sections (1), (2) and (3). Sub-section (4) is in the following terms:

"If the principal officer of any company or other person fails to make a return under sub-section (1) or, sub-section (2) of Section 19, as the case may be or having made the return, fails to comply with all the terms of the notice issued under sub-section (2) of this section, or to produce any evidence required under sub-section (3) of this section, the Agricultural Income tax Officer shall make the assessment to the best of his judgment, and determine the sum payable by the assessee on the basis of such assessment:

Provided....."

Turning to Section 23 of the Income-tax Act, sub-sections (1), (2) and (3) thereof correspond to sub-sections (1), (2) and (3) of Section 20 of the Act. Sub-section (4) of Section 23 reads:

"If any person fails to make the return required by any notice given under sub-section (2) of Section 22 and has not made a return or a revised return under sub-section (3) of the same section or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section;

the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment and in the case of a firm may refuse to register it or may cancel its registration if it is already registered:

Provided....."

Section 30 of the Act which corresponds to Section 34 of the Income-tax Act which deals with income escaping assessment may now be reproduced:

"If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate or has been the subject of undue relief under this Act, the Agricultural Income-tax Officer may, at any time within three years of the end of that financial year serve on the person liable to pay agricultural income-tax on such agricultural income or, in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 19, and may proceed to assess or reassess such income, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided....."

The principal contention raised on behalf of the appellant is that for an assessment to be made under S. 20 (4) of the Act it is not necessary that any proceedings should have been taken under Section 30. The argument is that assessment proceedings commence with the publication of a general notice under Section 19 (1) and it is open to the Agricultural Income-tax Officer to make the best judgment assessment under Section 20 (4) without any limitation as to time. It is not necessary to issue any individual notice under Section 19 (2) or to initiate proceedings under Section 30 in such a situation. Reliance has been placed on the observations in (1948) 16 ITR 119 = (AIR 1948 Bom 401) that once a public notice is given under sub-section (1) of Section 22 of the Income-tax Act, 1922, which is similar in terms to Section 19 (1) of the Act, the assessment proceedings should be deemed to have commenced and there is no obligation on the Income-tax Officer to serve an assessee individual-

ly as well. But in the same case it was said that "a notice under S. 34 is only necessary if at the end of the assessment year no return has been made by the assessee and the Income-tax authorities wish to proceed under Section 22 (2) by serving a notice individually. It may then be said that as the assessment year had come to an end and as no return had been furnished and as the authorities wished to proceed under Section 22 (2) they should not do so without a notice under Section 34".

8. The above view was approved by this Court in *Commr. of Income-tax, Bombay v. Ranchhoddas Karsondas, Bombay*, (1960) 1 SCR 114 = (AIR 1959 SC 1154), but the portion which has been extracted does not support the contention which has been pressed on behalf of the appellant. Indeed it has been relied upon more firmly by the counsel for the respondents. If this view is accepted to be correct it follows that a notice under Section 30 of the Act, in the present case, would be necessary if at the end of the assessment year no return has been made by the assessee and the authorities wish to proceed under Section 19 (2). The case would be entirely different where he himself chooses voluntarily to make a return. This he can do after the publication of a general notice under Section 19 (1) of the Act. If the return is filed no question arises of any income having escaped assessment. The return under the provisions of Section 19 (3) of the Act can be furnished at any time before the assessment is made. This is what this Court held in *State of Assam v. Deva Prasad Barua*, Civil Appeals Nos. 808 and 809 of 1967, D/-14-8-1968 = (reported in AIR 1969 SC 831).

9. The position is altogether different if no return has been made by the assessee and where income has not been assessed at all because for one reason or the other no assessment proceedings were initiated. That would be a case of "escaped assessment" within Section 30 of the Act. The matter was examined at length by this Court in *Ghanshyam Das v. Regional Asst. Commr. of Sales Tax, Nagpur*, (1964) 4 SCR 436 = (AIR 1964 SC 766) with reference to the provisions of the Central Provinces

and Berar Sales Tax Act, 1947. The following principles were laid down in that case which are noteworthy:

(1) In the case of a registered dealer the proceedings before the Commissioner started factually when a return was made or when a notice was issued to him either under Section 10 (3) (under which the Commissioner has to issue a notice if no return is submitted) or under Section 11 (4) (which provides for the best judgment assessment) of the Sales Tax Act. The statutory obligation to file a return did not initiate the proceedings.

(2) Once a statutory return was filed pursuant to a notice under S. 10 (3) or Section 11 of the Sales Tax Act the proceedings did not come to an end until the final assessment was made.

(3) The expression "escaped assessment" in Section 11-A of the Sales Tax Act included that of a turnover which had not been assessed at all because for one reason or the other no assessment proceedings were initiated and no assessment was made in respect thereof.

10. Keeping in view the above principles it must be held that in the absence of a return having been filed by the assessee in the present case pursuant to a general notice under Section 19 (1) of the Act assessment could be made only after due notice under Section 19 (2) or by initiating proceedings under Section 30 of the Act. Section 19 (2) requires that an individual notice is to be served in the financial year. If no notice is served under that section proceedings under Section 30 can be initiated by a notice in accordance with that section within three years of the end of that financial year. In this connection it may also be remembered that Section 43 (2) (a) of the Act confers a valuable right on the assessee in the matter of choosing the forum for the assessment. According to that provision an assessee may on receipt of the first notice served on him under Section 19 (2) apply to the Agricultural Income-tax Officer by whom such notice is served, to be assessed at the usual place of residence or at the place where the accounts relating to his agricultural income are kept. The

Agricultural Income-tax Officer can then make an order that the assessee shall be assessed at the place specified in the application or he has to refer the matter to the Assistant Commissioner of Agricultural Income-tax whose decision shall be final. No such right is conferred on the assessee with reference to publication of a general notice under Section 19 (1). It shows, therefore, that the proceedings for assessment under the Act can be initiated only by service of a notice under Section 19 (2) or by having resort to the provisions of Section 30 of the Act.

11. Counsel for the appellant has sought to make a distinction between the decision given under the provisions of the Income-tax Act by pointing out that under Section 20 (4) of the Act best judgment assessment can be made on the failure to make a return under sub-section (1) or sub-section (2) of Section 19 whereas under S. 23 (4) of the Income-tax Act such an assessment can be made only where any person fails to make the return required by any notice given under sub-section (2) of Section 22 which is equivalent to Section 19 (2) of the Act. This distinction is hardly material when the principles which have been laid down by this Court are kept in view. In support of his contention counsel for the appellant has also called attention to a decision of the Privy Council in *Gokuldas Ratanji Mandavia v. Commr. of Income-tax*, (1960) 38 ITR 224 (PC) in which the provisions of the East African Income Tax (Management) Act, 1952, came up for consideration. Those provisions are altogether different and the decision rested on the wording of S. 71 of that enactment. It cannot, therefore, be of any assistance in the present case.

12. For the reasons given above the appeals fail and they are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1970 SUPREME COURT 2062 (V 57 C 439)

(From: Bombay)*

J. C. SHAH AND V. RAMA-SWAMI, JJ.

F. Hoffmann-La Roche and Co. Ltd., Appellant v. Geoffrey Manners and Co. Private Ltd., Respondent.

Civil Appeal No. 1330 of 1966, D/- 8-9-1969.

(A) Trade and Merchandise Marks Act (1958), Section 2 (1) (d) — Mark whether deceptively similar to another mark — Test.

The marks must be compared as whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark.

(Para 11)

Held on comparison of the trade marks "Dropovit" and "Protovit" that they are not deceptively similar. Appeal No. 65 of 1962, D/- 14/17-8-1964 (Bom), Affirmed. (Case Law discussed)

(Para 14)

(B) Trade and Merchandise Marks Act (1958), S. 9 (1) — Registration of trade mark — Plea that word used in trade mark is deceptive and not invented — Plea taken at delayed stage — Inference that it did not strike even the legal adviser of party etc., that trade mark is deceptive can be drawn — Finding by High Court also against plea — Plea rejected by Supreme Court.

(Para 17)

Cases Referred: Chronological Paras (1962) 1962 RPC 265, Parker

Knoll v. Knoll International Ltd.

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(1951) 68 RPC 103 = 95 SJ 316, De Cordova v. Vick Chemical Co.

17

(1945) 62 RPC 65 = 1945 AC 68, Aristoc Ltd. v. Rysta Ltd.

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(1915) 32 RPC 133, Lavroma Case, Tokalon Ltd. v. Davidson & Co.

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*Appeal No. 65 of 1962, D/- 14/17-8-1964, — Bom.)

(1908) 25 RPC 565, Diabolo case 16
 (1906) 23 RPC 774, Pianotist Co., Ltd.'s application 11
 M/s. Shavaksha and R. A. Shah, Advocates, Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. and Miss Bhuvanesh Kumari, Advocate, for Appellant; Mr. M. C. Chagla, Senior Advocate (M/s. I. M. Chagla and Anoop Singh, Advocates, and Mr. M. N. Shroff, Advocate for Mr. I. N. Shroff, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.—This appeal is brought by certificate from the judgment of the Bombay High Court dated August 17, 1964 in application No. 65 of 1962 upholding in part the judgment of Mr. Justice Tarkunde dated December 7, 1962 in Miscellaneous Petition No. 358 of 1961.

2. The appellant is a limited liability company incorporated under the laws of Switzerland and carries on business in the manufacture and sale of pharmaceutical and chemical products. The respondent is a company incorporated under the Companies Act in India and also carries on business in the manufacture and sale of pharmaceutical products.

3. On December 2, 1946 the appellant applied for registration of its trade mark "PROTOVIT". The application was granted and the appellant's mark was registered in Class V in respect of "Pharmaceutical preparations for human use and for veterinary use, infants' and invalids' foods." The appellant thereafter used that mark on multi-vitamin preparations in liquid and tablet forms and its goods are being sold under that mark at least since the year 1951.

4. On January 28, 1957 the respondent applied for registration of its mark "DROPOVIT" in respect of "medicinal and pharmaceutical preparations and substances". The application was registered but the advertisement of the respondent's application escaped the notice of the appellant who did not hence oppose the registration. By a letter dated March 4, 1958 Messrs. Voltas Limited, the appellant's agents, drew the attention of the appellant to the respondent's mark "DROPOVIT". There was

negotiation between the parties but on March 19, 1958 the respondent wrote to the appellant refusing to alter its trade mark. On January 21, 1959 the appellant applied for rectification of the Register by removal therefrom of the respondent's trade mark. The ground urged in support of the application was that the respondent's mark so nearly resembled the appellant's mark as to be likely to deceive or cause confusion. On March 9, 1960 the appellant applied for amendment of the application and an additional ground was taken that "DROPOVIT" was not an invented word. The application for amendment was allowed by the Registrar. The amended application was opposed by the respondent. By his judgment dated August 5, 1961 the Joint Registrar rejected the application for rectification holding that "DROPOVIT" was not deceptively similar to "PROTOVIT" and that the word "DROPOVIT" considered as a whole was not descriptive. The appellant took the matter in appeal to the Bombay High Court. On December 7, 1962 Mr. Justice Tarkunde dismissed the appeal. The appellant preferred an appeal under Letters Patent but the appeal was dismissed by a Division Bench consisting of Chief Justice Chainani and Mody, J. on August 17, 1964. During the hearing of the appeal the respondent restricted the designation of goods to "medicinal and pharmaceutical preparations and substances containing principally vitamins."

5. The application for rectification was made on January 21, 1959 before the Trade and Merchandise Marks Act, 1958 (Act No. 43 of 1958) came into operation. But it is not disputed that under Section 136 (3) of this Act, the decision of this case is governed by the provisions of Act No. 43 of 1958 (hereinafter called the Act).

6. Section 11 of the Act states:

"A mark—

(a) the use of which would be likely to deceive or cause confusion; or

(b) the use of which would be contrary to any law for the time being in force; or

(c) which comprises or contains scandalous or obscene matter; or

(d) which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or

(e) which would otherwise be dis-entitled to protection in a court; shall not be registered as a trade mark."

7. Section 12 (1) provides:

"Save as provided in sub-section (3), no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or descriptive of goods."

8. Section 56 (1) reads:

"On application made in the prescribed manner to a High Court or to the Registrar by any person aggrieved, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention, or failure to observe a condition entered on the register in relation thereto."

9. Section 2 (1) (d) defines the phrase "deceptively similar" as follows:

"A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion."

10. The first question to be considered in this appeal is whether the word "DROPOVIT" is deceptively similar to the word "PROTOVIT" and offends the provision of Sec. 12 (1) of the Act. In other words, the question is whether the respondent's mark so nearly resembles the registered mark as to be "likely to deceive or cause confusion". It is not necessary that it should be intended to deceive or intended to cause confusion. It is its probable effect on the ordinary kind of customers that one has to consider.

11. In *Parker Knoll Ltd. v. Knoll International Ltd.*, 1962 RPC 265 at p. 274, Lord Denning explained the words "to deceive" and the phrase "to cause confusion" as follows:

"Secondly, 'to deceive' is one thing. To 'cause confusion' is another. The difference is this: When you deceive a man, you tell him a lie. You make a false representation to him and thereby cause him to believe a thing to be true which is false. You may not do it knowingly, or intentionally, but still you do it, and so you deceive him. But you may cause confusion without telling him a lie at all, and

without making any false representation to him. You may indeed tell him the truth, the whole truth and nothing but the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so."

The tests for comparison of the two word-marks were formulated by Lord Parker in *Pianotist Co., Ltd.*'s application (1906) 23 RPC 774 at p. 777 as follows:

"You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case."

It is necessary to apply both the visual and phonetic tests. In *Aristoc Ltd. v. Rysta Ltd.*, 1945 RPC 65 at p. 72, the House of Lords was considering the resemblance between the two words "Aristoc" and "Rysta". The view taken was that considering the way the words were pronounced in English, the one was likely to be mistaken for the other. Viscount Maugham cited the following passage of Lord Justice Luxmoore in the Court of Appeal, which passage, he said, he completely accepted as the correct exposition of the law:

"The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of Section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words

will neither be deceived nor confused. It is the person who only knows the one word and has perhaps an imperfect recollection of it who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution. The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant, ministering to that person's wants".

It is also important that the marks must be compared as whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark. Thus in *Lavroma case*, *Tokalon Ltd. v. Davidson and Co.*, 32 RPC 133 at p. 136, Lord Johnston said :

".....we are not bound to scan the words as we would in a question of comparatio literarum. It is not a matter for microscopic inspection, but to be taken from the general and even casual point of view of a customer walking into a shop."

12. In order to decide whether the word "DROPOVIT" is deceptively similar to the word "PROTOVIT" each of the two words must, therefore, be taken as a whole word. Each of the two words consists of eight letters, the last three letters are common, and in the uncommon part the first two are consonants, the next is the same vowel 'o', the next is a consonant and the fifth is again a common vowel 'o'. The combined effect is to produce an alliteration. The affidavits of the appellant indicate that the last three letters "VIT" is a well-known common abbreviation used in the pharmaceutical trade to denote Vitamin preparations. In his affidavit dated January 11, 1961 Frank Murdoch, has referred to the existence on the Register of about 57 trade marks which have the

common suffix "VIT" indicating that the goods are vitamin preparations. It is apparent that the terminal syllable "VIT" in the two marks is both descriptive and common to the trade. If greater regard is paid to the uncommon element in these two words, it is difficult to hold that one will be mistaken for or confused with the other. The letters 'D' and 'P' in "DROPOVIT" and the corresponding letters 'P' and 'T' in "PROTOVIT" cannot possibly be slurred over in pronunciation and the words are so dissimilar that there is no reasonable probability of confusion between the words either from the visual or phonetic point of view.

13. In the High Court, counsel for the respondent made a statement that the respondent was willing that the Court should direct in exercise of its powers under Section 56 (2) that the Registrar should limit the respondent's trade mark "DROPOVIT" to medicinal and pharmaceutical preparations and substances containing principally vitamins and that the appeal should be decided on this basis. The question of deceptive similarity must therefore be decided on the basis of the class of goods to which the two trade marks apply subject to the limitation agreed to by the respondent. From the nature of the goods it is likely that most of the customers would obtain a prescription from a doctor and show it to the chemist before the purchase. In such a case, except in the event of the handwriting of the doctor being very bad or illegible the chance of confusion is remote. As we have already observed the evidence shows that there are as many as 57 trade marks in the Register of Trade Marks with the suffix "VIT". Therefore, even an average customer would know that in respect of Vitamin preparations the word "VIT" occurs in large number of trade marks and because of this he would naturally be on his guard and take special care against making a mistake. In this connection the provisions of the Drug Rules, 1945 are also relevant. Under Rule 61 (2) vitamin preparations would be covered by Item 5 in Schedule C (1) to the Rules and a licence would be required to stock such vitamin preparations and to sell them retail. The question of confusion must hence be determined on the basis that the goods with one of the two rival trade marks would be

sold only by such a licensed dealer and would not be available in any other shop. The fact that the vendor would be a licensed dealer also reduces the possibility of confusion to a considerable extent.

14. Having taken into account all circumstances of the present case we are of the opinion that the High Court and the Joint Registrar of Trade Marks were right in holding that there was no real tangible danger of confusion if respondent's trade mark was allowed to continue to remain on the Register and the application for rectification made by the appellant should be dismissed.

15. The question was also argued in the appeal whether the word "DROPOVIT" was not an invented word and whether it was a descriptive word. Section 9 (1) of the Act states—

"A trade mark shall not be registered in Part A of the register unless it contains or consists of at least one of the following essential particulars, namely:—

(c) one or more invented words;

(d) one or more words having no direct reference to the character or quality of the goods and not being according to its ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India."

16. It is contended on behalf of the appellant that "DROPOVIT" meant only "DROP OF VITAMIN" with the word 'of' being misspelled as 'o', 'VIT' being used to denote "Vitamins", and the three separate words are joined together to make "DROPOVIT" as one word. It was said that the word "DROPOVIT" was simply a combination of three common words in English language and cannot, therefore, be said to be an invented word. In *Diabolo* case, (1908) 25 RPC 265 Parker J., has explained the meaning of "invented word" as follows:

"To be an invented word within the meaning of the Act a word must not only be newly coined, in the sense of not being already current in the English language, but must be such as not to convey any meaning, or, at any rate, any obvious meaning to ordinary

Englishmen. It must be a word having no meaning or no obvious meaning until one has been assigned to it."

17. In the case of *De Cordova v. Vick Chemical Co.*, (1951) 68 RPC 103, the Privy Council referred to that interpretation of Parker J., as "the best standing interpretation". The question arising in this case is whether the word "DROPOVIT" would strike an ordinary person knowing English as meaning "DROP OF VITAMIN". In this connection the High Court has pointed out that the original application for rectification did not contain the ground that the word "DROPOVIT" was descriptive. It was, therefore legitimate to draw the inference that the word "DROPOVIT" did not strike even Messrs. Depenning and Depenning the legal advisers of the appellant as being descriptive. It was also pointed out that in his judgment Mr. Justice Tarkunde has remarked that when the case was opened before him he did not understand that the word "DROPOVIT" meant "DROP OF VITAMIN" till the explanation of that word was given to him. We see no reason, therefore, to differ from the reasoning of the High Court on this aspect of the case. If the word "DROPOVIT" is not a descriptive word it must be held to be an invented word. It is true that the word "DROPOVIT" is coined out of words commonly used by and known to ordinary persons knowing English. But the resulting combination produces a new word, a newly coined word which does not remind an ordinary person knowing English of the original words out of which it is coined unless he is so told or unless at least he devotes some thought to it. It follows that the word "DROPOVIT" being an invented word was entitled to be registered as a trade mark and is not liable to be removed from the Register on which it already exists.

18. For the reasons expressed we hold that this appeal fails and must be dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 2067
(V 57 C 440)

(From : Calcutta)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Commissioner of Income-tax, West Bengal, Appellant v. Indian Molasses (Private) Ltd., Respondent.

Civil Appeal No. 2555 of 1966, D/- 12-8-1970.

(A) Income Tax Act (1922), S. 66 (1) — "Question of law arising out of such order" — Question raised before Tribunal — Aspect of it not raised can be urged before High Court — Decision of High Court at Calcutta, Reversed.

The expression "question of law arising out of such order" in Sec. 66 (1) is not restricted to take in only those questions which have been expressly argued and decided by the Tribunal. If a question of law is raised before the Tribunal, even if an aspect of that question is not raised that aspect may be urged before the High Court. Thus the question whether certain amount expended effectively during the accounting year within the meaning of Section 10 (2) (xv) represented revenue expenditure did not exclude an enquiry as to whether it was laid out or expended wholly and exclusively for the purpose of the business of the assessee. AIR 1961 SC 1633, Rel. on. Decision of Calcutta High Court, Reversed.

(Paras 11, 12)

(B) Income Tax Act (1922), Sec. 10 (2) (xv) — Amount set apart to provide pension on retirement of or death of Director — Amount becomes expended only on retirement or death of Director and not before that event — For applicability of S. 10 (2) (xv) other requirements of the section and of Sec. 10 (4A) must be complied with.

A company arranged to provide a pension to its managing director on his retirement or to his wife in the event of his death before age of retirement. The company delivered to the trustees a certain sum to take out a deferred annuity policy to secure certain amount as annuity payable to the director who however died before he was due to retire.

Held that the amount set apart became subject to the obligation to pay the pension only when the director died and not before that when the

amount was set apart and must be deemed expended only on death within the meaning of Sec. 10 (2) (xv). But to attract the exemption under Sec. 10 (2) (xv) it had still to be established that the amount set apart was laid out or expended wholly and exclusively for the purpose of the business of the Company, and that it was authorised under Sec. 10 (4-A). AIR 1959 SC 1049, Rel. on. (Paras 6, 10)

(C) Income Tax Act (1922), S. 66 (4), (5) — Supreme Court directing Tribunal to submit supplementary statement — Tribunal is restricted to evidence on record and is not entitled to take additional evidence — Not taking such evidence may result in injustice — Tribunal left to dispose of case under Section 66 (5) in the light of observations of Supreme Court. AIR 1959 SC 1177 and AIR 1963 SC 1484 and AIR 1965 SC 1636, Rel. on. (Para 14)

Cases Referred: Chronological Paras

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| (1965) AIR 1965 SC 1636 (V 52) = | |
| (1965) 56 ITR 365, Keshav Mills Co., Ltd. v. Commr. of Income-tax, Bombay North, Ahmedabad | 14 |
| (1963) AIR 1963 SC 1484 (V 50) = | |
| (1963) 48 ILR (SC) 92, Petlad Turkey Red Dye Works Co., Ltd. v. Commr. of Income-tax | 14 |
| (1961) AIR 1961 SC 1633 (V 48) = | |
| (1961) 42 ITR 589, Commr. of Income-tax, Bombay v. Scindia Steam Navigation Co., Ltd. | 11 |
| (1959) AIR 1959 SC 1177 (V 46) = | |
| (1959) 37 ITR 11, New Jehangir Vakil Mills Ltd. v. Commr. of Income-tax, Bombay North, Kutch and Saurashtra | 14 |
| (1959) AIR 1959 SC 1049 (V 46) = | |
| (1959) 37 ITR 66, Indian Molasses Co. (P.) Ltd. v. Commr. of Income-tax, West Bengal | 2, 6 |

The following Judgment of the Court was delivered by:

SHAH, J.: The respondent Company appointed one Harvey its Managing Director. Under the terms of agreement, Harvey was to retire on attaining the age of 55 years. The company arranged to provide a pension to Harvey on retirement, and executed a deed of trust on September 16, 1948 appointing three trustees to carry out that object. The respondent Company set apart in 1948 Rs. 1,09,643/- and in each of the six

subsequent years Rs. 4,364/- and delivered the various amounts to the trustees who were authorised to take out a deferred annuity policy to secure an annuity of £720 per annum payable to Harvey for life from the date he attained the age of 55 years, and in the event of his death before that date an annuity of £ 611.12 annually to his widow.

2. In its return for the assessment year 1949-50 the Company claimed that in the computation of its taxable income Rs. 1,09,643/- paid in 1948 to the trustees under the deed of trust were allowable as an amount wholly and exclusively expended for the purpose of its business. In the subsequent years of assessment the Company claimed allowance of the annual payment of Rs. 4,364/-. The Income-tax Officer disallowed the claim. The Company disputed the decision and carried it to the Income-tax Appellate Tribunal. The Tribunal submitted a statement of case to the High Court of Calcutta on the question whether the payments "constituted 'expenditure' within the meaning of that word in Section 10 (2) (xv) of the Indian Income-tax Act, 1922, in respect of which a claim for deduction can be made subject to the other conditions mentioned in that clause being satisfied". The High Court answered the question in the negative. The view taken by the High Court was confirmed by this Court in appeal: *Indian Molasses Co. (P.) Ltd v. Commr. of Income-tax, West Bengal*, (1959) 37 ITR 66 = (AIR 1959 SC 1049). This Court held that the expenditure deductible for income-tax purposes is one towards a liability actually existing at the time, but a sum of money set apart which may be deemed appropriated to a purpose for which it was intended on the happening of a future event was not expended within the meaning of Section 10 (2) (xv) of the Act, until the event occurs, and since the Company had dominion through the trustees over the funds and there was a possibility of a trust resulting in its favour, by setting apart the funds no "expenditure" within the meaning of Section 10 (2) (xv) of the Indian Income-tax Act, 1922, may be deemed incurred.

3. During the pendency of those proceedings the Company arranged to give an "enhanced pension" to Harvey

and executed a supplementary deed of trust on October 29, 1954 and set apart an additional sum of Rs. 47,607 to enable the trustees to take out an annuity policy in the names of the trustees in favour of Harvey and his wife to cover the "enhanced pension." The terms of the original trust deed were made applicable to the supplementary deed.

4. Harvey died in May 1955 (before he was due to retire) and in the return of its taxable income for the assessment year 1956-57 the Company claimed that Rs. 1,83,434/- being the total amount paid by the Company to the trustees in terms of the original trust deed dated September 16, 1948 and the supplementary deed dated October 29, 1954 be allowed as a permissible expenditure in the computation of the Company's business profits in the previous year ending December 31, 1955. The Income-tax Officer disallowed the claim without assigning any reasons. In appeal the Appellate Assistant Commissioner confirmed the order observing that the amounts paid long before the commencement of the previous year were not admissible under Section 10 (2) (xv) of the Income-tax Act, 1922. The Income-tax Appellate Tribunal in appeal reversed the order and allowed the claim of the Company holding that the amount of Rs. 1,83,434/- was "effectively disbursed during the accounting year" and was on that account an admissible allowance in the computation of the Company's business profits.

5. At the instance of the Commissioner of Income-tax, the Tribunal submitted a statement of the case to the High Court of Calcutta on the following two questions:

"(1) Whether on the facts and in the circumstances of the case, the sum of Rs. 1,83,434/- was an expenditure effectively laid out or expended during the accounting year 1955 within the meaning of Section 10 (2) (xv) of the Income-tax Act?

(2) If the answer to question No. (1) is in the affirmative, then whether the said expenditure of Rs. 1,83,434/- represented a revenue expenditure?"

The High Court of Calcutta recorded answers in the affirmative on both the questions. With certificate granted by the High Court under Section 66A (2) of the Indian Income-tax Act, 1922,

this appeal is preferred by the Commissioner of Income-tax.

6. Answer recorded by the High Court on the first question was, in our judgment, correct. This Court had in the earlier decision (1959) 37 ITR 66 = (AIR 1959 SC 1049), held that the Company had not parted with control over the amounts set apart between the years 1948 and 1954 for securing the pension benefit to Harvey, and on that account no amount was appropriated to make it expenditure within the meaning of Section 10 (2) (xv) of the Act when Harvey died. At the date when different sums of money were set apart there was no existing liability and the sums of money set apart to meet an obligation which may or may not arise on the happening of a future event, the Company did not lay out or expend the sums within the meaning of Sec. 10 (2) (xv). The amounts set apart became subject to the obligation to pay the pension arranged to be given only when Harvey died, and must be deemed expended then within the meaning of Section 10 (2) (xv) of the Indian Income-tax Act, 1922.

7. But on the materials before us we are unable to answer the second question, for the Tribunal has found no facts on which the admissibility of the allowance may be determined, and the High Court has declined to allow the argument to be raised by the Commissioner that in the circumstances of the case the amounts expended were not admissible under Section 10 (2) (xv) of the Act.

8. Secs. 10 (1) and 10 (2) (xv) of the Act, in so far as they are relevant, provide:

S. 10 (1) — "The tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profits or gains of any business, profession or vocation carried on by him."

S. 10 (2) — "Such profits or gains shall be computed after making the following allowances, namely:—

x x x x x

(xv) any expenditure (not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or ex-

pended wholly and exclusively for the purpose of such business, profession or vocation."

Sub-section (4-A) of Section 10 which was added by the Finance Act of 1956 with effect from April 1, 1956, may also be read:

"Nothing in sub-section (2) shall, in the computation of the profits and gains of a company be deemed to authorise the making of—

(a) any allowance in respect of any expenditure which results directly or indirectly in the provision of any remuneration or benefit or amenity to a director or a person who has a substantial interest in the company within the meaning of sub-clause (iii) of clause (6-C) of Section 2, or

(b) any allowance in respect of any assets of the company used by any person referred to in clause (a) either wholly or partly for his own purposes or benefit,

if in the opinion of the Income-tax Officer any such allowance is excessive or unreasonable having regard to the legitimate business needs of the company and the benefit derived by or accruing to it therefrom.

Explanation.—The provisions of this sub-section shall apply notwithstanding that any amount disallowed under this sub-section is included in the total income of any person referred to in clause (a)."

9. An amount proved to be expended by a tax-payer carrying on business is (subject to sub-section (4A) of Section 10) a permissible allowance in the computation of taxable income of the business, if it be established that the allowance claimed is (a) expenditure which is not of the nature described in clauses (i) to (xiv) of Section 10 (2); (b) that it is not of the nature of capital expenditure or personal expenses of the assessee; and (c) that the expenditure was laid out or expended wholly and exclusively for the purpose of such business, profession or vocation. The expenditure incurred by the Company is not allowance of the nature described in any of the clauses (i) to (xiv) inclusive of Sec. 10 (2), nor is it of the nature of capital expenditure or personal expenses of the assessee. In our judgment, the argument advanced before the High Court that the expenditure resulting from the setting apart of the money for securing an annuity to

provide pensionary benefit to Harvey and his wife was of a capital expenditure was rightly negatived by the High Court.

10. To attract the exemption under Sec. 10 (2) (xv) it had still to be established that the amount set apart was laid out or expended wholly and exclusively for the purpose of the business of the Company. On this part of the case there is no discussion in the orders of the taxing authorities and the Tribunal. To recall, the Income-tax Officer recorded no reasons for disallowing the expenditure. The Appellate Assistant Commissioner disallowed it on the ground that it was not debited in the profit and loss account of the Company in the previous year. The Tribunal, assumed, and in our judgment erroneously, that this Court had in the earlier judgment pronounced upon the applicability of all the conditions of Section 10 (2) (xv) of the Act to the amount set apart when it became expenditure. This Court did not express any opinion on that question. The language in which the question was framed in the earlier case clearly indicated that the enquiry contemplated was only whether the amounts set apart were expended and no other. The judgment of this Court also does not imply that in the view of the Court if the setting apart of the amount was expenditure, the other conditions for the expenditure to be a permissible allowance under Sec. 10 (2) (xv) were satisfied. It cannot be assumed that because on the death of Harvey the amounts previously set apart were deemed expended, the outgoing was admissible as expenditure under Section 10 (2) (xv) read with Section 10 (4A). The Tribunal considered two questions only: (1) whether the setting apart of the amounts amounted to expenditure within the meaning of Section 10 (2) (xv); and (2) if it was expenditure, whether it could be regarded as capital expenditure and not revenue expenditure. On both the contentions the Tribunal decided in favour of the Company. But before Sec. 10 (2) (xv) could be called in aid to support the claim of the company it had to be established that it represented expenditure laid out or expended wholly and exclusively for the purpose of the business, and that it was authorised under Section 10 (4A).

11. The High Court was of the view that because before the Tribunal the question was not expressly raised that "the other conditions inviting the application of Section 10 (2) (xv) were not satisfied, the allowance was not admissible", the Commissioner was incompetent to urge that plea before the High Court. In support of that view they relied upon the judgment of this Court in Commr. of Income-tax, Bombay v. Scindia Steam Navigation Co., Ltd., (1961) 42 ITR 589 = (AIR 1961 SC 1633). The High Court observed that before the Tribunal the plea that the expenditure was not laid out or expended wholly and exclusively for the purpose of business of the Company was not argued, and since the question raised and referred "was not wide enough to include that submission", the Commissioner could not urge it before them. We are unable to hold that the decision in Scindia Steam Navigation Company's case, (1961) 42 ITR 589 = (AIR 1961 SC 1633), supports the opinion of the High Court. The plea that the amount claimed to have been expended was not admissible as an allowance was raised by the Department. The Appellate Assistant Commissioner had decided in favour of the Department and the order was sought to be supported before the Tribunal by the departmental representative. Granting that an aspect of the question was not argued before the Tribunal, the question was on that account not one which did not arise out of the order of the Tribunal. In our judgment, the expression "question of law arising out of such order" in Section 66 (1) is not restricted to take in only those questions which have been expressly argued and decided by the Tribunal. If a question of law is raised before the Tribunal, even if an aspect of that question is not raised, in our judgment, that aspect may be urged before the High Court. The judgment of this Court in Scindia Steam Navigation Co. Ltd.'s case (1961) 42 ITR 589 = (AIR 1961 SC 1633), does not only not lend any assistance to the view taken by the High Court, but negatives that view. In that case certain steamships belonging to the assessee Company were lost during the World War II by enemy action. The Government of India paid to the Company compensation which exceeded the written down value of the

steamships. The Department sought to charge the excess amount to tax under the fourth proviso of Section 10 (2) (vii) of the Income-tax Act, 1922, inserted by the Income-tax (Amendment) Act, 1946, which came into force in the year of assessment. The Income-tax Officer held that the material date for the purpose of the fourth proviso to Section 10 (2) (vii) was the date when the compensation was in fact received and therefore, the amount was assessable in the assessment year 1946-47. At the instance of the Company the Tribunal referred the question whether the difference between the written down value and compensation was properly included in the total income for the assessment year 1946-47. Before the High Court the Company for the first time raised the contention that the fourth proviso to Section 10 (2) (vii) did not apply to the assessment as it was not in force on April 1, 1946 and the liability of the Company had to be determined as on April 1, 1946, when the Finance Act, 1946, was brought into force. The Commissioner of Income-tax contended that the question did not arise out of the order of the Tribunal within the meaning of Sec. 66 as it was not raised before nor dealt with by the Tribunal, and it was not referred to the Court. The High Court overruled the objection. This Court held that the High Court had jurisdiction to entertain the Company's contention raised for the first time before it, that the fourth proviso to Section 10 (2) (vii) did not apply to the assessment as the contention was within the scope of the question as framed by Appellate Tribunal and was really implicit therein. The Court in that case held that the question as framed was comprehensive enough to cover the question of the applicability of the fourth proviso to Section 10 (2) (vii) of the Income-tax Act. Venkatarama Aiyar, J., observed at page 612 (of ITR) = (at 1645 of AIR):

"Section 66 (1) speaks of a question of law that arises out of the order of the Tribunal. Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that Sec-

tion 66 (1) requires is that the question of law which is referred to the Court for decision and which the Court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of Section 66 (1) of the Act."

12. The second question raised in the present case, in our judgment, permits an enquiry whether the amount claimed is an admissible allowance under Section 10 (2) (xv). We are unable to hold that it is restricted to an enquiry whether the expenditure is of capital nature. The Tribunal did not consider whether the amount was laid out or expended wholly and exclusively for the purpose of the business of the Company. Expenditure is admissible as an allowance under Section 10 (2) (xv) if all the conditions prescribed thereby are satisfied and is authorised by Section 10 (4-A). We are unable to hold that the question framed and referred excluded an enquiry whether the expenditure was wholly and exclusively laid out or expended for the purpose of the business of the Company. Nor are we able to hold that because before the Tribunal stress was not pointedly laid upon the ingredients which enable an expenditure to be claimed and allowed, the question does not arise out of the order of the Tribunal. The matter in dispute before the Tribunal was whether the Company was entitled to the allowance under Section 10 (2) (xv) of the Indian Income-tax Act, 1922. The Tribunal considered whether the amount claimed to have been laid out or expended became expenditure within the meaning of Section 10 (2) (xv) on the death of Harvey, and whether it was capital expenditure. They did not consider whether the expenditure was laid out or expended wholly and exclusively for the purpose of the business of the Company. Since the Tribunal gave no finding on this part of the case, we are unable to answer the question on the materials placed before us.

13. The High Court was, in our judgment, in error in refusing to allow the argument to be raised that the requirements of Section 10 (2) (xv) were not satisfied, and the expenditure on that account was inadmissible.

14. Two courses are now open to us: to call for a supplementary statement of the case from the Tribunal; or to decline to answer the question raised by the Tribunal and to leave the Tribunal to take appropriate steps to adjust its decision under Section 66 (5) in the light of the answer of this Court. If we direct the Tribunal to submit a supplementary statement of the case, the Tribunal will, according to the decisions of this Court, (*New Jehangir Vakil Mills Ltd. v. Commr. of Income-tax, Bombay North, Kutch and Saurashtra*, (1959) 37 ITR 11 = (AIR 1959 SC 1177); *Petlad Turkey Red Dye Works Co., Ltd. v. Commr. of Income-tax*, (1963) 48 ITR (SC) 92 = (AIR 1963 SC 1484) and *Keshav Mills Co., Ltd. v. Commr. of Income-tax, Bombay North, Ahmedabad*, (1965) 56 ITR 365 = (AIR 1965 SC 1336)) be restricted to the evidence on the record and may not be entitled to take additional evidence. That may result in injustice. In the circumstances we think it appropriate to decline to answer the question on the ground that the Tribunal has failed to consider and decide the question whether the expenditure was laid out or expended wholly and exclusively for the purpose of the business of the Company and has not considered all appropriate provisions of the statute applicable thereto. It will be open to the Tribunal to dispose of the appeal under Section 66 (5) of the Income-tax Act, 1922, in the light of the observations made by this Court after determining the questions which ought to have been decided.

15. There will be no order as to costs in this appeal.

Order accordingly.

AIR 1970 SUPREME COURT 2072

(V 57 C 441)

(From: Assam)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

State of Assam, Appellant v. The Amalgamated Tea Estates Co. Ltd. and others, Respondents.

Civil Appeal No. 2052 of 1969, D/- 21-8-1970.

(A) Municipalities — Assam Municipal Act, 1956 (15 of 1957), Section 334 (1) and (4) — Constitution of notified area — Conclusion of Government that improved arrangements are required not conclusive — Notification can be challenged on ground of absence of authority or that it was made for collateral purpose. Decision of Assam High Court, Reversed.

In issuing a notification under S. 334 (1) the Government has to consider whether the area specified requires to be provided with improved arrangements in respect of matters upon which a municipal fund may be expended. The conclusion of the State Government that improved arrangements are so needed is not conclusive but the validity of the notification can only be challenged on ground of absence of authority or on clear proof that it was issued for a collateral purpose. From the mere circumstance that in respect of some pockets in the specified area there already exist arrangements at private expense, it does not follow that in signifying its intention to declare the specified area the State Government acted for a collateral purpose. Decision of High Court of Assam, Reversed.

(Para 6)

(B) Constitution of India, Article 226 — "Speculative petition" — Objection not raised to preliminary notification under Section 334 (1) of Assam Municipal Act signifying intention to provide improved arrangements in a specified area — Petition challenging validity of notification filed after years of constitution of Notified Town Committee and only after tax was demanded — Held, that it was a speculative petition and the High Court was in error in allowing it and declaring the notification as illegal. Decision of High Court of Assam, Reversed.

(Para 7)

The following Judgment of the Court was delivered by

SHAH, J.:— This appeal is filed with special leave granted by this Court against the judgment of the High Court of Assam "declaring ultra vires" a notification dated December 4, 1959 issued under Section 334 (4) of the Assam Municipal Act, 1956 (No. 15 of 1957).

2. By notification dated May 22, 1958 issued in exercise of the powers conferred by Section 334 (1) of the Assam Municipal Act, 1956, the Government of Assam signified its intention to declare that with respect to a specified area (including a part of the Naharkatia Tea Estate) "improved arrangements" were required, and invited objections against that proposal from interested parties. The owners of the Naharkatia Tea Estate did not file any objection. On December 4, 1959 a notification was issued under Section 334 (4) declaring the specified area as the Naharkatia Town Committee. In consequence of that declaration holders of land and buildings, within the specified area became liable to pay certain municipal taxes. On receiving a demand from the Town Committee for license fee and municipal taxes the respondent Company (owner of the Naharkatia Tea Estate) filed a petition in the High Court of Assam challenging the validity of the notification dated December 4, 1959 and for an order restraining the Town Committee from taking any action in pursuance of the notification and the notices levying tax, on the plea that the notification was issued "as a colourable device for taxing the assets of the Company with the sole motive of augmenting the income of the Town Committee without any obligation or necessity to expend funds for providing municipal amenities". It was asserted that the Naharkatia Tea Estate was a "fully developed private property"; that it had arranged to provide all amenities required by law for the welfare of its employees and residents within the plantation, and on that account inclusion of the part of the plantation within the Town Committee was "illegal and in excess of the powers conferred by the Assam Municipal Act, 1956."

3. The High Court accepted the contention of the Company. They observed that it could not have been the

intention of the Legislature to provide for setting up a Town Committee in an area where adequate arrangements of lighting, maintenance of roads, conservancy, water-supply, hospital amenities and other "welfare arrangements" had previously been made by the owner. In the view of the High Court the demands for licence fee and tax were made by the Town Committee with the "ulterior motive to get money from the tea estate without reference to any service of providing facilities and amenities and that the inclusion of the tea garden within the Town Committee area must be held to be mala fide and contrary to Section 334 of the Act". The High Court accordingly declared invalid the notification dated December 4, 1959 constituting the Naharkatia Town Committee insofar as it related to the area of the Naharakatia Tea Estate. The State of Assam has appealed to this Court with special leave.

4. Chapter XII of the Assam Municipal Act, 1956, deals with "Small Towns". Section 334 deals with constitution of notified area, which insofar as it is relevant provides:

"(1) The State Government may, by notification, signify its intention to declare that with respect to some or all of the matters upon which a municipal fund may be expended under Section 60, improved arrangements are required within a specified area, which, nevertheless, it is not expedient to constitute as a municipality.

(2)	x	x	x
(3)	x	x	x

(4) When six weeks from the date of publication have expired, and the State Government has considered and passed orders on such objections as may have been submitted to it, the State Government may, by notification, declare the specified area aforesaid or any portion thereof to be a notified area to be termed as Small Town."

Section 335 provides for establishment of a Town Committee for each notified area consisting of such number of members as may be fixed by the State Government. Section 336 authorises the State Government to impose in a notified area any tax which could have been imposed therein if such areas were a municipality and to apply or to adapt to the notified area provisions

for the assessment and recovery of any tax imposed under the Assam Municipal Act or rules for the time being in force with respect to assessment and recovery of any tax imposed under the Act, and to extend to any notified area the provisions of any section of the Assam Municipal Act subject to such restrictions and modifications, if any, as the State Government may think fit.

5. In paragraph 14 of the petition it is averred by the Amalgamated Tea Company Ltd., that "the inclusion of the plantation area of the petitioner within the jurisdiction of the Naharkatia Town Committee is not at all bona fide, inasmuch as it was made not with a view to provide improved arrangements or amenities to the inhabitants of the said plantation, but solely with the motive of augmenting the income of the said Town Committee without the obligation or necessity of any expenditure of municipal funds for providing anything in return as contemplated by law." The State of Assam it was claimed by the Company, had in issuing the notification, which included the plantation area of the Naharkatia Tea Estate, not acted bona fide. But no particulars were given of that plea. The plea raised on behalf of the Company was denied by the State of Assam. The Company tendered no evidence in support of the plea that the notification dated December 4, 1959, was issued for a collateral purpose.

6. By Section 334 (1) the State Government is authorised to issue for a specified area a notification signifying its intention to provide improved arrangements. In issuing a notification under Section 334 (1) the State Government has to consider whether the area specified requires to be provided with improved arrangements in respect of matters upon which a municipal fund may be expended and if the State Government has come to the conclusion that improved arrangements are so needed the validity of the notification could only be challenged on proof of absence of authority, or on clear proof that the notification was issued for a collateral purpose. From the mere circumstance that in respect of some pockets in the specified area there may already exist arrangements made at private expense municipal facilities and amenities

which after the constitution of the notified area, obligation to provide which may lie upon the Town Committee, it does not follow that in signifying its intention to declare the specified area, the State Government acted for a collateral purpose. The High Court was of the view that the Amalgamated Tea Company Ltd. had made arrangements for lighting, maintenance of roads, conservancy, water-supply, hospital amenities and other welfare arrangements, and since improved arrangements were not necessary the notification of the State Government must be regarded as "mala fide". The notification of the State Government signifying its intention to declare a specified area as one in which improved arrangements may be made is undoubtedly not conclusive: in appropriate cases the validity of the notification may be challenged. But in the present case no ground has been made out on which such a challenge may be sustained.

7. The Company raised no objection to the preliminary notification dated May 22, 1958, issued under subsection (1) of Section 334 of the Assam Municipal Act, 1956. The writ petition was filed years after the constitution of the notified Town Committee and only after the demands for tax were made. Prima facie, such a petition was, as characterised by counsel for the State of Assam, a "speculative petition". In our judgment, the High Court was in error in allowing the petition and declaring the notification under Section 334 (1) of the Act as illegal.

8. We are here dealing with the validity of the notifications issued by the State Government under subsections (1) and (4) of Section 334. We are not called upon to pronounce upon the validity of the demands for licence fee and other taxes levied by the Notified Town Committee. The Company may, if so advised, challenge the validity of the demands for the licence fee and the municipal taxes in appropriate proceedings.

9. The appeal is allowed and the order passed by the High Court is set aside. The petition is dismissed with costs throughout in favour of the State of Assam.

Appeal allowed.

AIR 1970 SUPREME COURT 2075
(V 57 C 442)

(From : Delhi)*

J. C. SHAH AND K. S. HEGDE, JJ.

Ramji Lal, Appellant v. Ram Babu Maheshwari and another, Respondents.

Civil Appeal No. 2392 of 1968, D/- 21-8-1970.

(A) Representation of the People Act (1951), Sections 116-A and 123 — Jurisdiction of Supreme Court under Section 116-A — Charge of commission of corrupt practice — Finding as to, is one of fact — No interference with finding of High Court merely on ground that different view on evidence is reasonable.

Supreme Court under Sec. 116-A does not ordinarily interfere with the finding of fact reached by the High Court in an election petition particularly when the High Court comes to the conclusion that the corrupt practices pleaded are not established. A charge of commission of corrupt practice is akin to a charge of commission of an offence. The trial Court has the advantage of seeing the witnesses examined before him and that circumstance aids it in the appreciation of the evidence adduced.

(Para 5)

Where it is not said that the High Court had ignored any material piece of evidence or its conclusions are unsupported by evidence and all that is said is that the conclusions reached by the Court on the basis of evidence are not correct and that a different view of the evidence is reasonable, there is not a sufficient ground for Supreme Court to interfere with the findings reached by the High Court.

(Para 5)

(B) Representation of the People Act (1951), Section 116-A — Election petition, alleging commission of corrupt practice by returned candidate, rejected — Dismissal of appeal to Supreme Court — Court however disallowed cost of returned candidate in appeal in view of the fact that he had raised several false pleas.

(Para 16)

*Ele. Petn. No. 2 of 1967, D/- 29-3-1968, Delhi.

The following Judgment of the Court was delivered by

HEGDE, J.:— This is an appeal under Section 116-A of the Representation of the People Act (1951) (to be hereinafter referred to as the Act) from the judgment and order of the Delhi High Court dated the 29th March 1968 in Election Petition No. 2 of 1967 on its file. The petition was brought by two electors. It was dismissed by the High Court. As against that order only one of the petitioners has come up in appeal.

2. The election petition arose from the election held for a seat to the Delhi Metropolitan Council from the Kalan Masjid constituency. The polling for the said constituency was held on February 19, 1967 and the result of the election was declared on February 22, 1967. In that constituency three persons contested; one Rajesh Sharma was the Congress nominee, the respondent Ram Babu Maheshwari was the Jan Sangh candidate and Z. R. Abbas was the Republican candidate. The respondent secured 7490 votes, Rajesh Sharma 5277 votes and Abbas 3203.

3. The defeated candidates have not come forward to challenge the validity of the election. On the other hand two electors from the constituency in question have challenged the election of the respondent primarily on two grounds. Those grounds are; that the returned candidate or his agents with his consent had distributed calendars like Annexure 'A' which amounted to a contravention of Section 123 (2) and (3) of the Act inasmuch as it was an exercise of an undue influence over the Muslim voters and further it amounted to an appeal to Muslim Voters for votes on the basis of a religious symbol. So far as the contravention of Section 123 (2) namely exercise of undue influence is concerned it was not pressed before the trial court nor in this Court. Therefore we shall not consider that part of the case. The second ground urged against the respondent's election was that he or/and his agents or/and other persons with his consent published leaflets similar to Annexure 'C' containing statements of fact which are false and which were either believed to be false or were not believed to be true in relation to the personal character and conduct of Rajesh Sharma.

4. The High Court has come to the conclusion that there is no satisfactory evidence to show that the publication of calendars similar to Annexure 'A' was done either by the respondent or with his consent. So far as leaflets similar to Annexure 'C' is concerned, it has held that there is no satisfactory proof of its publication much less that the same was published with the consent of the returned candidate.

5. The questions arising for decision in this case are essentially questions of fact. Their proof depends on oral evidence. Voluminous evidence has been adduced by the parties in this case in support of their respective contentions. The trial court after carefully examining their evidence has come to the conclusion that the petitioners have failed to establish the corrupt practices pleaded by them. This is essentially a finding of fact. This Court ordinarily does not interfere with the findings of fact reached by the High Court in an election petition particularly when the High Court comes to the conclusion that the corrupt practices pleaded are not established. A charge of commission of corrupt practice is akin to a charge of commission of an offence. No satisfactory ground is made out to persuade us to reopen the findings of fact reached by the High Court. The learned trial Judge had the advantage of seeing the witnesses examined before him. That circumstance must have aided him in the appreciation of the evidence adduced. It is not said that he had ignored any material piece of evidence or his conclusions are unsupported by evidence. All that is said on behalf of the appellants is that the conclusions reached by the trial Judge on the basis of the evidence on record are not correct and that a different view of the evidence is reasonable. That is not a sufficient ground to interfere with the findings reached by the trial Court.

Having laid down the general line of approach in election cases, we shall now proceed to examine the material on record relating to the two corrupt practices alleged. It is needless to say that the respondent vehemently denied the allegations made against him.

6. Now coming to 'A' it is a calendar depicting (1) Mee Sharif and the Minaret in Madina

(2) Crescent; (3) the Holy Quran with the words 'Al Hasin Va Allai Haib' (the quotation from the Holy Quran) and along with the Rosary; (4) the words in Arabic 'Allah' and another quotation (Aiyat) from the Holy Quran 'Laili Illah Mohammad Rasool Ill-Ilah). In that calendar there was an appeal to vote for the Jan Sangh candidates. The trial court held that this calendar was published during the election. It also came to the conclusion that in that calendar there is an appeal to religious symbols. It is not necessary to go into the correctness of those findings. We shall assume that those findings are correct. But the question is whether there is any satisfactory proof to show that those calendars were published by the returned candidate? It may be remembered that the election with which we are concerned is a part of the general election held in 1967. At Delhi it was a combined election for the Lok Sabha, Metropolitan Council and for the Corporation. The Kalan Masjid constituency of the Metropolitan Council was a part of the parliamentary constituency of Chandni Chowk. Included in the Kalan Masjid constituency, there were some Corporation constituencies. It is also in evidence that Jan Sangh had put up candidates for the Chandni Chowk parliamentary constituency, Kalan Masjid Metropolitan Council constituency as well as the Corporation constituencies that formed part of that constituency. Therefore unless there is satisfactory evidence to show that the calendars in question were published by or with the consent of the respondent, the election of the respondent cannot be invalidated. Hence we have to see whether there is satisfactory evidence to show that they were published by the respondent or with his consent.

7. The appellant's case is that on February 4, 1967, there was a meeting in the house of Shyam Kishore and at that meeting a decision was taken that calendars similar to Annexure 'A' should be distributed on the next day. The principal witness who speaks to this meeting is Jugal Kishore, P. W. 45. He is also the main witness to speak to the fact that leaflets similar to Annexure 'C' were distributed with the consent of the returned candidate. Therefore it is necessary to examine his evidence in some detail. Accord-

ing to P. W. 45, he was an active worker of the respondent during the election and he was also his counting agent. The respondent denied that he was either his worker or his counting agent. The trial court has found that this witness was the counting agent of the respondent. There is conclusive evidence to show that he was one of the counting agents of the respondent. But the question still remains whether we can rely on the testimony of this witness. According to his own showing he had known the contents of calendars and leaflets similar to Annexures 'A' and 'C' and yet took a prominent part in distributing them. The strangest part of his behaviour is that while before the election he actively worked for the respondent and did not hesitate to be an accomplice to the commission of election offences, immediately after the election he became a star witness for the petitioners who are seeking to get set aside the election of the respondent. His is a case of running with hare and hunting with the hound. It is clear that his loyalty was easily transferable. It was suggested during his cross-examination that he was siding Rajesh Sharma because he wants Rajesh Sharma to put back his brother in service from which he had been thrown out. P. W. 45's new-found enthusiasm for Rajesh Sharma's cause cannot be altruistic. It is quite clear that he can desert from camp to camp if it becomes worthwhile for him to do so. He appears to have a convenient memory as could be gathered from his cross-examination. The next witness who spoke about the publication of calendars similar to Annexure 'A' is P. W. 48, Munna Lal Gupta. He also tried to connect the respondent with the publication of those calendars. Admittedly he is a Congress worker and a close associate of Rajesh Sharma. The trial court was unable to place reliance on his testimony.

8. Some witnesses have been examined to show that the calendars in question had been distributed during the meeting held on February 15, 1967 and that meeting was addressed by several members including the respondent. The witnesses who speak to this are P. W. 4, Abdul Reshid; P. W. 6, Hansraj; P. W. 11, Haji Likhman; P. W. 12 Karim-uddin; P. W. 13 Qamar-uddin; P. W. 14 Abdul Majid;

P. W. 15 Ahmad; P. W. 18 Mohmad Yusuf and some others. Their evidence has been carefully analysed by the trial court. They are shown to be interested witnesses. Many of them are the workers of Rajesh Sharma. Some of them are staunch supporters of the Congress party. There is material contradiction between the evidence of some of these witnesses which are detailed in the judgment of the trial court. It is true that some of these witnesses are seemingly disinterested. We come across such witnesses in election cases. An election generates bitter party feelings and the factious spirit continues even after the election. Therefore in evaluating the evidence adduced in election cases, a Judge has to be extremely careful. After taking an overall view of the evidence, the trial Judge has come to the conclusion that it is unsafe to rely on the evidence of the witnesses who seek to connect the respondent with the publication of Annexure 'A'.

9. We also agree with the trial court that there is no satisfactory evidence to show that Annexure 'B', a poster wherein there is a reference to Annexure 'A' was either published or at any rate published with the consent of the respondent.

10. This takes us to Annexure 'C'. In this Court, learned Counsel for the appellant strenuously pressed for our acceptance the petitioner's evidence relating to the publication of leaflets similar to Annexure 'C'. Undoubtedly there are scurrilous statements in those leaflets. There is hardly any doubt that the facts mentioned there amount to an attack on the personal character and conduct of Rajesh Sharma. It was not contended before us that that document does not come within the scope of Sec. 123 (4) of the Act. If we believe that such a document was published during the election either by the respondent or by someone with his consent, the election of the respondent will have to be necessarily set aside. But the question for our consideration is whether such a document was published during the election or if it was published whether it was published by the respondent or alternatively with his consent.

11. Now coming to those leaflets, there is no satisfactory evidence as to their printing. It is not proved in

which press the same was printed nor is there any evidence to show as to who got it printed. It is shown in those leaflets that they were printed at "Kailash Printers, Delhi-6". The proprietor of that press has been examined on behalf of the petitioners. He denied that those leaflets were printed at his press or that they were got printed by the respondent. The petitioner's Counsel did not seek the permission of the Court to cross-examine that witness to show that he had turned hostile to the petitioners. There is no reason why we should reject the testimony of this witness. The respondent has denied that he got those leaflets printed. No doubt not much reliance can be placed on the testimony of the respondent because he has given false evidence on several aspects of the case but the fact remains that the petitioners have not been able to prove that leaflets similar to Annexure 'C' were got printed at Kailash Printers and further that they were printed at the instance of the respondent.

12. The leaflets in question were issued under the signature of one Rishi Ram. One Rishi Ram was examined as R. W. 26. He denied that he got those leaflets printed or published. But there is evidence to show that there was bitter enmity between Rajesh Sharma and R. W. 26. Therefore there was a possibility of his getting those leaflets printed and he may even have distributed some of those leaflets. As R. W. 26 had serious enmity with Rajesh Sharma, he needed no prodding from the respondent for getting those leaflets printed or even for publishing them. If he had got those leaflets printed and published, on his own, as it appears to be likely, the respondent cannot be held responsible for the same.

13. The witnesses who speak to the fact that the leaflets in question were published with the consent of the respondent are P. W. 45 Jugal Kishore, P. W. 21 Manmohan Sharma and P. W. 33 R. B. Gupta. We have already considered the evidence of P. W. 45 and come to the conclusion that it is unsafe to place reliance on his testimony. That was also the conclusion reached by the learned trial Judge. P. W. 33, Ram Babu Gupta was a worker of Rajesh Sharma during the election. It is not likely that he would

have gone to the office of the respondent on being invited by the respondent and that the respondent would have committed serious election offences in his presence or to his knowledge. He wanted to show that from his childhood he was a member of the R. S. S. and lately he disassociated himself from that organization. This version of his appears to be wholly false. From the facts elicited in his cross-examination, it is clear that he does not know anything about R. S. S. organization in Delhi. He does not know who is its Sanchalak at Delhi or its General Secretary or the Chief Organizer in Delhi State. In our opinion the evidence of this witness has been rightly rejected by the trial court. So far as P. W. 21 is concerned he admits that he was intimate with Rajesh Sharma. His evidence appears to be quite artificial. His story that the respondent was accompanying his workers when they were distributing the leaflets is difficult to accept. We agree with the learned trial Judge that his evidence also is not reliable.

14. Large number of witnesses have been examined to show that the leaflets in question were distributed by the Jan Sangh workers P. Ws. 17, 21, 33, 36, 41, 42, 43, 45, 49 and some others. The learned trial Judge after examining their evidence has rejected the same as unreliable. We agree with his conclusion. It is not necessary to examine their evidence in details as their evidence does not show that distribution was made at the instance of the respondent.

15. A tame attempt was made to show that even if we hold that there is no satisfactory proof to show that calendars similar to Annexure 'A' and leaflets similar to Annexure 'C' were not proved to have been distributed with the consent of the respondent the very proof of their distribution is sufficient to set aside the election as the distribution of those calendars and leaflets must have vitiated the result of the election. We have earlier come to the conclusion that there is no satisfactory evidence as regards their distribution. Further from the evidence on record it is not possible to hold that they were widely distributed. From the evidence before us it is not possible to come to a positive finding that their distribution is likely to have vitiated the result of the election.

16. In the result this appeal fails and the same is dismissed. Now coming to the question of costs, we think that we must disallow respondent's costs. The evidence adduced by the respondent has not been accepted by the trial Court. There is hardly any doubt that he has come forward with several false pleas. His plea that P. W. 45 was not his counting agent is proved to be wholly false. In several other material aspects, he has tried to support his case by false evidence. Under these circumstances we think that we should disallow his costs of this appeal. We accordingly make no order as to costs in this appeal.

Appeal dismissed.

AIR 1970 SUPREME COURT 2079

(V 57 C 443)

(From: Kerala)

MR. Hidayatullah, C.J., J. C. SHAH, K. S. Hegde, A. N. Grover, A. N. Ray and I. D. Dua, JJ.

State of Kerala, etc., Appellants v. Very Rev. Mother Provincial, etc., Respondents.

Civil Appeals Nos. 2598-2600 of 1969, 21-53, 155-190, 199, 200-203, 273 and 324 of 1970, D/-10-8-1970.

(A) Constitution of India, Art. 30 (1) — Kerala University Act (9 of 1969) — Validity — S. 48 (2), (4) and (6), S. 49 (2), (4) and (6), S. 53 (1), (2), (3) and (9), S. 56 (2) and (4), S. 58 and S. 63 are ultra vires Art. 30 (1) in respect of minority institutions.

Article 30 (1) contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of minority's choice. It is irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. The next part of the right relates to the administration of such institutions which means 'management of the affairs' of the institutions. This management must be free of control so that the founders or their nominees can mould the institutions as they think fit, and in accordance with their ideas of how the interests of

the community in general and the institution in particular will be best served. There is, however, an exception that the standards of education are not a part of management as such. The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. Case-law, Relied on.

(Paras 8, 9, 10)

By the force of sub-sections (2), (4) and (6) of Ss. 48 and 49 the minority community loses the right to administer the institution it has founded. Section 53, sub-sections (1), (2) and (3) confer on the Syndicate of the University the power to veto even the action of the governing body or the managing council in the selection of the principal. Indeed, sub-section (9) gives a right of appeal to the Syndicate to any person aggrieved by the action of governing body or the managing council thus making the Syndicate the final and absolute authority in these matters. Coupled with this is the power of Vice-Chancellor and the Syndicate in sub-sections (2) and (4) of Section 56. These provisions clearly take away the disciplinary action from the governing body and the managing council and confer it upon the University. Section 58 enables political parties to come into the picture of the administration of minority institutions which may not like this interference. To crown all, there is the provision of S. 63 which provides for the power to regulate the management of private colleges in which the governing body or the managing council have no say. Hence, all these provisions are ultra vires Art. 30 (1) in respect of the minority institutions. (Paras 15, 16, 17, 20)

(B) Constitution of India, Arts. 31 (2), (2A), 31-A (1) (b) — Kerala University Act (9 of 1969), S. 63 (1) — Is ultra vires Art. 31.

Section 63 (1) involves the transfer of right to possession of the properties to the University. This section provides for compulsory requisition of the properties within Art. 31 (2) and (2A). To be effective, the section required the assent of the President under clause (3) and it was not obtained. Therefore, the saving in

Art. 31-A (1) (b) is not available.

(Para 18)

(C) Constitution of India, Art. 19 (1) (f) — Kerala University Act (9 of 1969), S. 63 — Provisions of S. 63 which affect both minority institutions and majority institutions are ultra vires Art. 19 (1) (f) in respect of both.

(Para 20)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 465 (V 56) =

(1969) 2 SCR 73, Rev. Father W. Proost v. State of Bihar 10

(1966) AIR 1966 SC 1307 (V 53) =

(1966) 3 SCR 328, Katra Education Society v State of U P. 10

(1963) AIR 1963 SC 703 (V 50) =

1963 Supp (1) SCR 112, Gujarat University, Ahmedabad v. Krishna Rangnath Mudholkar 10

(1963) AIR 1963 SC 540 (V 50) =

(1963) 3 SCR 837, Sidhrajibhai v. State of Gujarat 10

(1958) AIR 1958 SC 956 (V 45) =

1959 SCR 995, In re, Kerala Education Bill, 1957 10

(1954) AIR 1954 SC 561 (V 41) =

(1955) 1 SCR 568, State of Bombay v. Bombay Education Society 10

(1951) AIR 1951 SC 226 (V 38) =

1951 SCR 525, State of Madras v. Sm. Champakam Dorairajan 10

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: These appeals by certificates granted by the High Court of Kerala under Arts. 132 (1) and 133 (1) (c) of the Constitution are directed against a common judgment, September 19, 1969, declaring certain provisions of the Kerala University Act, 1969 (Act 9 of 1969), to be ultra vires the Constitution of India while upholding the remaining Act as valid. They were heard together. This judgment will dispose of all of them. The validity of the Act was challenged in the High Court by diverse petitioners in 36 petitions under Art. 226 of the Constitution. Some parts of the Act were declared ultra vires the Constitution. As a result there are cross-appeals. 36 appeals have been filed against the several petitioners by the State of Kerala. Another 36 appeals have been filed by the University of Kerala which made common cause with the Government of Kerala. 7 appeals have been preferred by seven original petitioners, who seek a declaration that some

other provisions of the Act, upheld by the High Court as valid, are also void.

2. The Kerala University Act, 1969 (which repealed and replaced the Kerala University Act, 1957 (Act 14 of 1957)), was passed to reorganise the University of Kerala with a view to establishing a teaching, residential and affiliating University for the southern districts of the State of Kerala. Some of its provisions affected private colleges, particularly those founded by minority communities in the State. They were consequently challenged on various grounds. The petitions were consolidated in the High Court and were decided by the judgment and order under appeal.

3. Before we begin to discuss these appeals we may say a few words about them. 33 petitioners belong to different denominations of the Christian community; 8 are Superiors of different Catholic Religious Congregations; 8 are Catholic Bishops representing their dioceses; 3 are Vicars of Catholic parishes; 5 are Boards of Associations constituted by different Catholic denominations for establishing colleges and other educational institutions and 3 are Bishops of the Malankara Orthodox Church. 4 petitions have been filed by the Metropolitan of the Marthoma Syrian Church and 2 by the Madhya Kerala Diocese of the Church of South India. The remaining 3 petitions are respectively by private colleges founded and administered by Sri Sankara College Association Kalady, Sree Narayana Trusts, Quilon and the Nair Service Society, Changannacherry. The petitioners in the 33 petitions specially invoke the provisions of Art. 30 of the Constitution which protects the right of the minorities to establish and administer educational institutions of their choice. All the 36 petitions invoke Arts. 19 (1) (f), 31 and 14 of the Constitution.

4. The impugned Act consists of 78 sections divided into 9 chapters. The main attack in the petitions is against Chapter VIII headed 'private colleges' consisting of Ss. 47 to 61 and some provisions of Chapter IX, particularly Section 63. The High Court has declared that sub-sections (2) and (4) of Section 48, sub-sections (2) and (4) of Section 49, sub-sections (1), (2), (3) and (9) of Section 53, sub-sections (2) and (4) of Section 56, Section 58 (ex-

cept to some extent) are offensive to Art. 19 (1) (f) in so far as citizen petitioners are concerned and additionally, in so far as the minority institutions are concerned, offensive to Art. 30 (1), and therefore void. The petitions were, therefore, allowed except two petitions (O.P.S. No. 2339 and 2796 of 1969) filed by Sree Sankara College Association and the Nair Service Society since the petitioners were companies and were not entitled to the benefit of Art. 30 (1) not being minority institutions and not entitled to Art. 19 (1) (f) not being citizens. Section 63 was, however, held to offend Art. 31 (2) and not saved by Art. 31A (1) (b) and this declaration was in favour of all the petitioners. It was also declared void as offending Art. 30 (1) in so far as the minority institutions were concerned. The rest of the Act was declared to be valid and the challenge to it was rejected. There was no order about costs.

5. The State of Kerala and the University challenge the judgment in so far as it declares the provisions of the Act to be void and the petitioners in the 7 counter-appeals challenge the judgment in so far as it has rejected the attack on some other provisions. We shall deal first with the contentions urged on behalf of the State of Kerala and the University of Kerala and then deal with the contentions of the majority institutions and the challenge to the surviving portions of the impugned Act by the appealing original petitioners.

6. In the matter of the minorities the main attack comes from Art. 30 (1) of the Constitution. This clause reads: "30. Right of minorities to establish and administer educational institutions.

(1) All minorities, whether based on religions or language, shall have the right to establish and administer educational institutions of their choice.

x x x x x"

It declares it to be a fundamental right of the minorities, whether based on religion or language, to establish and administer educational institutions of their choice. It is conceded by the petitioners representing minority communities before us (and indeed they could not gainsay this in the face of authorities of this Court) that the State or the University to which these insti-

tutions are affiliated may prescribe standards of teaching and the scholastic efficiency expected from colleges. They concede also that to a certain extent conditions of employment of teachers, hygiene and physical training of students can be regulated. What they contended is that here there is an attempt to interfere with the administration of these institutions and this is an invasion of the fundamental right. The minority communities further claim protection for their property rights in institutions under Articles 31 and 19 (1) (f) and the right to practise any profession or to carry on any occupation, trade or business guaranteed by sub-clause (g) of the latter article. The majority community which is also the founder of private colleges (of which three instances are before us) do not claim the right stemming from Art. 30 (1) but they claim the other rights mentioned above and further seek protection of equality in law with the minority institutions and thus freedom in the establishment and administration of their institutions.

7. The claim of the majority community institutions to equality with minority communities in the matter of the establishment and administration of their institutions leads to the consideration whether the equality clause can at all give protection, when the Constitution itself classifies the minority communities into a separate entity for special protection which is denied to the majority community. This is not a case of giving some benefits to minority communities which in reason must also go to the majority community institutions but a special kind of protection for which the Constitution singles out the minority communities. This question, however, does not fall within our purview as the State, at the hearing announced that it was not intended to enforce the provisions of the law relating to administration against the majority institutions only, if they could not be enforced against the minority institutions. Therefore, we have to consider the disputed provisions primarily under Art. 30 (1) and secondarily under Articles 31 and 19 where applicable.

8. Article 30 (1) has been construed before by this Court. Without referring to those cases it is sufficient to say that the clause contemplates two

rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection.

9. The next part of the right relates to the administration of such institutions. Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right.

10. There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if Universities establish the syllabi for examinations, they must be followed subject, however, to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied. The minority institutions cannot be allowed to fall below the standards of excellence

expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others. These propositions have been firmly established in the State of Bombay v. Bombay Education Society, (1955) 1 SCR 568 = (AIR 1954 SC 561); State of Madras v. S. C. Dorairajan, 1951 SCR 525 = (AIR 1951 SC 226); In re the Kerala Education Bill, 1957, 1959 SCR 995 = (AIR 1958 SC 956); Sidharajbhai v. State of Gujarat, 1963-3 SCR 837 = (AIR 1963 SC 540); Katra Education Society v. State of U.P., 1966-3 SCR 328 = (AIR 1966 SC 1307); Gujarat University, Ahmedabad v. Krishna Ranganath Mudholkar, 1963 Supp (1) SCR 112 = (AIR 1963 SC 703); and Rev. Father W. Proost v. State of Bihar, 1969-2 SCR 73 = (AIR 1969 SC 465). In the last case it was said that the right need not be enlarged nor whittled down. The Constitution speaks of administration and that must fairly be left to the minority institutions and no more. Applying these principles we now consider the provisions of the Act.

11. The Act as stated already consists of 78 sections arranged under 9 Chapters. Chapter VIII is headed 'Private Colleges' and Chapter IX 'Miscellaneous'. Chapter I contains the short title and commencement (Section 1) and definitions (Section 2). We are concerned with some definitions in Section 2 and Chapters VIII and IX. The other chapters lay down the constitution of University and contain matters relating thereto. They are not in dispute. The High Court in its judgment has carefully summarized the impugned provisions and it is not necessary for us to cover the same ground. We shall content ourselves by mentioning the important aspects briefly. "College" in the Act means an institution maintained by, or affiliated to, the University, in which instruction is provided in accordance with the provisions of the Statutes, Ordinances and Regulations. These are framed by the University. 'Educational Agency' means any person or body of persons who or which establishes and maintains a private college. 'Private College' means a college maintained by an agency other than the Government or the University and

affiliated to the University. 'Principal' means the head of a college. By 'teacher' as used in the Act is meant a Principal, Professor, Assistant Professor, Reader, Lecturer, Instructor or such other person imparting instruction or supervising research and whose appointment has been approved by the University in any of the colleges or recognised institutions. 'Recognised teacher' means a person employed as a teacher in an affiliated institution and whose appointment has been approved by the University. There is much overlap between 'college', 'teacher' and 'recognised teacher' but there is no antinomical confusion which might have otherwise resulted. These definitions by themselves are not questionable but in the context of the provisions of Chapters VIII and IX, about to be referred to, the insistence on the recognition by the University is claimed to be interference with the freedom of management. Chapter VIII embraces Sections 47 to 61. It begins with the definition of 'corporate management' which means a person or body of persons who or which manages more than one private college. Sections 48 and 49 deal respectively with (a) the governing body for private colleges not under corporate management and (b) with managing council for private colleges under corporate management. In either case, the education agency (by which term we denote the educational agency of a private college as also corporate management, that is to say, the person or body of persons who or which manages more than one private college) is required to set up a governing body for private college or a managing council for private colleges under one corporate management. The two sections embody the same principles and differ only because in one case there is but one institution and in the other more than one. Both consist of 7 sub-sections. Under these provisions the educational agency or the corporate management has to establish a governing body or a managing council respectively. The sections give the compositions of the two bodies. The governing body set up by the educational agency is to consist of 11 members and the managing council of 21 members. The 11 members of the governing body are: (i) the principal of the private college; (ii) the

manager of the private college; (iii) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes; (iv) a person nominated by the Government; (v) a person elected in accordance with such procedure as may be prescribed by the Statutes of the University from among themselves by the permanent teachers of the private college; and (vi-xi) not more than six persons nominated by the educational agency. The composition of the managing council consists of a principal in rotation from the private colleges, manager of the private colleges, the nominees of the University and the Government as above described, two elected representatives of the teachers and not more than 15 members nominated by the educational agency. The Act ought to have used the expression 'corporate management' instead of 'educational agency' but the meaning is clear.

12. It will thus be seen that a body quite apart from the educational agency or the corporate management is set up. Sub-section (2) in either section makes these bodies into bodies corporate having perpetual succession and a common seal. The manager of the college or colleges, as the case may be, is the Chairman in either case (sub-section (3)). Sub-section (4) then says that the members shall hold office for a period of 4 years from the date of its constitution. Sub-section (5) then says as follows:

"It shall be the duty of the Governing Body/(Managing Council) to administer the private college (all the private colleges under the corporate management) in accordance with the provisions of this Act and the Statutes, Ordinances, Regulations, Bye-laws and Orders made thereunder." (We have attempted to combine the two provisions here. In the case of governing body, the sub-section is to be read omitting the words in brackets and in the case of managing council the underlined words are to be omitted and the sub-section read with the words in brackets.)

13. Sub-section (6) then lays down that the powers and functions of the governing body (the managing council), the removal of members thereof and the procedure to be followed by it, including the delegation of its

powers, shall be prescribed by the Statutes. Sub-section (7) lays down that decisions in either of the two bodies shall be taken at meetings on the basis of simple majority of the members present and voting.

14. These sections were partly declared ultra vires of Art. 30 (1) by the High Court as they took away from the founders the right to administer their own institution. It is obvious that after the election of the governing body or the managing council the founders or even the community has no hand in the administration. The two bodies are vested with the complete administration of the institutions. These bodies have a legal personality distinct from the educational agency or the corporate management. They are not answerable to the founders in the matter of administration. Their powers and functions are determined by the University laws and even the removal of the members is to be governed by the Statutes of the University. Sub-sections (2), (4), (5) and (6) clearly vest the management and administration in the hands of the two bodies with mandates from the University.

15. In attempting to save these provisions Mr. Mohan Kumaramangalam drew attention to two facts only. The first is that the nominees of the educational agencies or the corporate management have the controlling voice and that the defect, if any, must be found in the Statutes, Ordinances, Regulations, Bye-laws and Orders of the University and not in the provisions of the Act. Both these arguments are not acceptable to us. The Constitution contemplates the administration to be in the hands of the particular community. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council nominees, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they may have a preponderating voice. In any event, the administration goes to a distinct corporate body which is in no way answerable to the educational agency or the corporate management. The founders have no say in the selection of the members nominated or selected except those to be nomi-

nated by them. It is, therefore, clear that by the force of sub-sections (2), (4) and (6) of Sections 48 and 49, the minority community loses the right to administer the institution it has founded. Sub-section (5) also compels the governing body or the managing council to follow the mandates of the University in the administration of the institution. No doubt the Statutes, Ordinances, Regulations, Rules, Bye-laws and Orders can also be examined in the light of Art. 30 (1) but the blanket power so given to the University bears adversely upon the right of administration. This position is further heightened by the other provisions of the Act to which a reference is now needed.

16. Section 53, sub-sections (1), (2) and (3) confer on the Syndicate of the University the power to veto even the action of the governing body or the managing council in the selection of the principal. Similarly, sub-section (4) takes away from the educational agency or the corporate management the right to select the teachers. The insistence on merit in sub-section (4) or on seniority-cum-fitness in sub-s. (7) does not save the situation. The power is exercised not by the educational agency or the corporate management but by a distinct and autonomous body under the control of the Syndicate of the University. Indeed, sub-section (9) gives a right of appeal to the Syndicate to any person aggrieved by the action of governing body or the managing council thus making the Syndicate the final and absolute authority in these matters. Coupled with this is the power of Vice-Chancellor and the Syndicate in sub-sections (2) and (4) of Section 56. These sub-sections read:

"56. Conditions of service of teachers of private colleges.—(1) x x x x

(2) No teacher of a private college shall be dismissed, removed, or reduced in rank by the governing body or managing council without the previous sanction of the Vice-Chancellor or placed under suspension by the governing body or managing council for a continuous period exceeding fifteen days without such previous sanction.

(3) x x x x x x

(4) A teacher against whom disciplinary action is taken shall have a right of appeal to the Syndicate, and

the Syndicate shall have power to order reinstatement of the teacher in cases of wrongful removal or dismissal and to order such other remedial measures as it deems fit, and the governing body or managing council, as the case may be, shall comply with the order."

These provisions clearly take away the disciplinary action from the governing body and the managing council and confer it upon the University. Then comes Section 58 which reads:

"58. Membership of the Legislative Assembly, etc., not to disqualify teachers.—A teacher of a private college shall not be disqualified for continuing as such teacher merely on the ground that he has been elected as a member of the Legislative Assembly of the State or of Parliament or of a local authority:

Provided that a teacher who is a member of the Legislative Assembly of the State or of Parliament shall be on leave during the period in which the Legislative Assembly or Parliament, as the case may be, is in session."

This enables political parties to come into the picture of the administration of minority institutions which may not like this interference. When this is coupled with the choice of nominated members left to Government and the University by sub-section (1) (d) of Sections 48 and 49, it is clear that there is much room for interference by persons other than those in whom the founding community would have confidence.

17. To crown all, there is the provision of Section 63 (1) which reads:

"63. Power to regulate the management of private colleges.—(1) Whenever Government are satisfied on receipt of a report from the University or upon other information that a grave situation has arisen in which the working of a private college cannot be carried on for all or any of the following reasons, namely:—

(a) default in the payment of the salary of the members of the staff of the college for a period of not less than three months;

(b) wilful closing down of the college for a period of not less than one month except in the case of the closure of the college during a vacation;

(c) persistent default or refusal to carry out all or any of the duties im-

posed on any of the authorities of the college by this Act or the Statutes or Ordinances or Regulations or Rules or Bye-laws or lawful orders passed thereunder;

and that in the interest of private college it is necessary so to do, the Government may, after giving the governing body or managing council, as the case may be, the manager appointed under sub-section (1) of Section 50 and the education agency, if any, of the college a reasonable opportunity of showing cause against the proposed action and after considering the cause, if any, shown, by order, appoint the University to manage the affairs of such private college temporarily for a period not exceeding two years:

Provided that in cases where action is taken under this sub-section otherwise than on a report from the University, it shall be consulted before taking such action.

x x x x x."

18. The remaining provisions of this section lay down an elaborate procedure for management in which even the governing body or the managing council have no say. Sub-section 63 (1) involves the transfer of right to possession of the properties to the University. The High Court rightly pointed out that this section provides for compulsory requisition of the properties within Art. 31 (2) and (2A). To be effective the section required the assent of the President under clause (3) and it was not obtained. Therefore the saving in Art. 31A (1) (b) is not available.

19. Mr. Mohan Kumarmangalam brought to our notice passages from the Report of the Education Commission in which the Commission had made suggestions regarding the conditions of service of the teaching staff in the universities and the colleges and standards of teaching. He also referred to the Report of the Education Commission on the status of teachers, suggestions for improving the teaching methods and standards. He argued that what has been done by the Kerala University Act is to implement these suggestions in Chapters VIII and IX and particularly the impugned sections. We have no doubt that the provisions of the Act were made bona fide and in the interest of education but unfortunately they do affect the

administration of these institutions and rob the founders of that right which the Constitution desires should be theirs. The provisions, even if salutary cannot stand in the face of the constitutional guarantee. We do not, therefore, find it necessary to refer to the two reports.

20. The result of the above analysis of the provisions which have been successfully challenged discloses that the High Court was right in its appreciation of the true position in the light of the Constitution. We agree with the High Court that sub-sections (2) and (4) of Sections 48 and 49 are ultra vires Art. 30 (1). Indeed we think that sub-section (6) of these two sections is also ultra vires. They offend more than the other two of which they are a part and parcel. We also agree that sub-sections (1), (2), (3) and (9) of Sec. 53, sub-sections (2) and (4) of Sec. 56, Sec. 58 (in so far as it removes disqualification which the founders may not like to agree to), and Sec. 63 are ultra vires Article 30 (1) in respect of the minority institutions. The High Court has held that the provisions (except Sec. 63) are also offensive to Art. 19 (1) (f) in so far as the petitioners are citizens of India both in respect of majority as well as minority institutions. This was at first debated at least in so far as majority institutions were concerned. The majority institutions invoked Art. 14 and complained of discrimination. However at a later stage of proceedings Mr. Mohan Kumarmangalam stated that he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority institutions also. Hence it relieves us of the task of considering the matter under Art. 19 (1) (f) not only in respect of minority institutions but in respect of majority institutions also. The provisions of Sec. 63 affect both kinds of institutions alike and must be declared ultra vires in respect of both.

21. The result is that the judgment under appeal is upheld. The appeals of the State Government of Kerala and of the University are dismissed with costs. One set of hearing fees. For the reasons given by the High Court we do not accept the contentions of the seven appellants who have challenged some of the other provisions of the Act except Sections 48 (6)

and 49 (6) and do not consider it necessary to repeat what is said by the High Court. These appeals are dismissed except as to those sections but without costs.

Appeals dismissed.

AIR 1970 SUPREME COURT 2086 (V 57 C 444)

(From Punjab: AIR 1963 Punj 503)

J. M. SHELAT AND
G. K. MITTER, JJ.

The State of Punjab, Appellant v.
Dewan Chuni Lal, Respondent.

Civil Appeal No. 2348 of 1966, D/-
16-2-1970.

(A) Constitution of India, Art. 311
(2) — Departmental enquiry — Dismissal of Police Sub-Inspector — Charges of inefficiency and dishonesty based on adverse reports of superior Officers — Such Officers, though available, not examined to enable Police Sub-Inspector to cross-examine them — Refusal of the right to examine such witnesses amounted to denial of reasonable opportunity of showing cause against the action of dismissal — Dismissal not legal. AIR 1963 Punj 503, Affirmed. (Paras 19, 25)

(B) Constitution of India, Art. 311 — Departmental enquiry against Police Sub-Inspector who was allowed to cross efficiency bar — Charges of inefficiency and dishonesty — Charges based on adverse confidential reports of superior Officers — Reports relating to period earlier than the year in which he was allowed to cross efficiency bar should not be considered in enquiry. (Para 14)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 122 (V 54) =
1966 (Supp) SCR 401, State of
Jammu and Kashmir v. Bakshi
Ghulam Mohammad 24
(1967) AIR 1967 Orissa 49 (V 54) =
ILR (1965) Cut 147, Sadananda
Mahapatra v. State 20
(1963) AIR 1963 Orissa 73 (V 50) =
ILR (1962) Cut 125, State of
Orissa v. Sailabehari 22

Mr. V. C. Mahajan, Advocate, for
Appellant; Mr. N. S. Bindra, Senior
Advocate (Mr. B. Datta Advocate and
M/s J. B. Dadachanji and Co., Advoca-
tes, with him), for Respondent.

IN/IN/B35/70/MLD/T

The following Judgment of the Court was delivered by

MITTER, J.—By this appeal the State of Punjab challenges the judgment and order of the Punjab High Court upholding the decree of the Subordinate Judge, Gurgaon declaring that the dismissal of the respondent from service was illegal and inoperative. The respondent, a Sub-Inspector of Police was called upon to answer a charge framed on October 12, 1949 setting forth extracts from his confidential character roll showing his inefficiency and lack of probity while in service from 1941 to 1948 and to submit his answer to the prima facie charge of inefficiency as envisaged in paragraph 16.25 (2) of the Punjab Police Rules.

2. The respondent had joined the police service and had served as a Sub-Inspector in various places which are now in Pakistan before he was posted to Gurgaon in the year 1948. It appears that the view taken of his conduct and reputation by his superior officers over the years was not consistent. In some years he got what is known as a 'B' certificate and in others an 'A' certificate. According to rule 13.17 of the Punjab Police Rules, Superintendents of Police had to prepare personally and submit annually to the Deputy Inspector-General of Police confidential reports in the form prescribed on the working of all Assistant Sub Inspectors and Sub Inspectors serving under them. The reports were to be of two kinds 'A' and 'B', and to be marked as such. An 'A' report was for recommending that incremental promotions should not be withheld while a 'B' report was to contain a recommendation, for reasons to be fully stated, that incremental promotions should be withheld. The rule further shows that the purport of all 'B' reports was to be formally communicated to the officer concerned and his written acknowledgment to be taken. It also prescribed that the submission of two successive 'B' reports regarding an officer would result, automatically in the institution of departmental proceedings against him with a view to stoppage of increment.

3. The punishments which could be awarded departmentally are set out in rule 16.1 and under rule 16.2 (1) dismissal is to be awarded only for

the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service. Rule 16.24 sets out the procedure to be followed in departmental enquiries. The sum and substance of rule 16.24 is that in case the police officer did not admit the misconduct:

"the officer conducting the enquiry shall proceed to record such evidence, oral and documentary, in proof of the accusation as is available and necessary to support the charge. Whenever possible, witnesses shall be examined direct, and in the presence of the accused, who shall be given opportunity to take notes of their statements and cross-examine them. The officer conducting the enquiry is empowered, however, to bring on to the record the statement of any witness whose presence cannot, in the opinion of such officer, be procured without undue delay and expense or inconvenience, if he considers such statement necessary, and provided that it has been recorded and attested by a police officer superior in rank to the accused officer or by a Magistrate, and is signed by the person making it."

Further the accused officer was required to state the defence witnesses whom he wished to call together with a summary of the facts as to which they would testify. The enquiring officer was empowered to refuse to hear any witnesses whose evidence he considered would be irrelevant or unnecessary in regard to the specific charge framed.

4. Under rule 16.25 (1) a police officer called upon to answer a charge of misconduct must be given every opportunity of proving his innocence. Under sub-rule (2) of this rule, charges need not be framed in relation only to a specific incident or act of misconduct and when reports received against an officer or a preliminary enquiry show that his general behaviour has been such as to be unfitting his position or that he has failed to reach or maintain a reasonable standard of efficiency he may and should be charged accordingly, and a finding of guilty on such a charge would be a valid ground for the infliction of any authorised departmental punishment which might be considered suitable in the circumstances of the case.

5. The confidential reports extracts whereof were contained in the charge sheet make it clear that the respondent was being accused of laziness and ineffectiveness and as having a doubtful reputation as to his honesty. Excepting for the year 1948 wherein a specific instance of corruption was charged against him the other reports only contained generally adverse remarks. For instance the remarks against him for the year 1941 were to the effect that he was "lazy and ineffective and that he had been warned for dishonesty, laziness and lack of control." In the year 1942 when he was posted at Dera Gazi Khan his annual confidential report showed that although there were no definite complaints he had not shown any outstanding ability or energy. The Superintendent of Police was not certain about his honesty but had no special complaints against him. The respondent was not allowed to cross the efficiency bar in that year in view of his past reports.

6. It is the common case of the parties that the respondent was allowed to cross the efficiency bar in 1944. In 1945 he was transferred to Montgomery and got a 'B' report and his honesty was characterised as doubtful. He got another warning in that year. In 1946 the Superintendent of Police remarked that he was a failure as a Station House Officer and was slow to carry out orders and had no grip on his staff. The Deputy Inspector General of Police Multan Range summed up his 16 years' service with the note:

"From all accounts he is one of the worst Sub Inspectors in the Range and the department will be well rid of him, if action under rule 16.25 (2) can be successfully taken against him. Action under rule 16.25 cannot succeed at present but his past record is such that any further complaint should warrant his dismissal."

In the confidential reports of the year 1946, the Superintendent of Police Muzaffargarh stated that he was not honest and was very poor on parade. The Deputy Inspector General Multan Range gave him a third warning. The Superintendent of Police Muzaffargarh however remarked that although his previous record was unsatisfactory he appeared to be trying to mend himself. In the year 1948 he got a 'C' report and the Superintendent of Police

described him as "thoroughly corrupt". The S. P. further remarked that:

"This officer fell to unheard of depths of moral degradation in corrupt practices while posted to City Rewari inasmuch as he changed the opium recovered by him earlier with Rasaunt for Rs. 1,000/- bribe and then made over the opium for sale in the black market. He was known to have mixed up with bad characters, gamblers and Rishawat-dalals.

According to the charge sheet the attested copies of these reports were to be used as evidence against him.

7. In regard to the year 1948 and the charge above mentioned it is enough to say that an enquiry was held against him and he was held entitled to an honourable acquittal.

8. The respondent pleaded not guilty to the charge and filed a list of 86 witnesses whom he sought to examine in his defence. He also gave a summary of the facts about which each of the witnesses was to depose. The enquiry officer allowed him to examine 21 witnesses in defence. No witness was examined on behalf of the department. On 25th May, 1950 Bishambar Das, Superintendent of Police made a report that the charge had been fully brought home to the respondent and it was suggested that he should be dismissed. The Deputy Inspector General asked him to show cause why he should not be dismissed from service. After receipt of a written representation made by the respondent and recording his statement the Deputy Inspector General passed an order dismissing the respondent from service.

9. The respondent then filed his suit in the court of the Subordinate Judge Gurgaon wherein his main complaint was that the enquiring officer did not record any evidence in support of the charge nor were the persons making the reports examined direct and in his presence with opportunity to him to cross-examine the persons who had made those reports: he also averred that good reports earned by him during his long period of service had not been taken into account. He also pleaded that he had been allowed to cross the efficiency bar in December 1944 and had been given a selection grade in 1945.

10. It was urged before us that the crossing of the efficiency bar must be

regarded as giving him a clean bill up to that date and in view of this the reports of 1941 and 1942 should not have been taken into consideration against him.

11. As regards the reports for the years 1945 and 1946 the respondent's complaint was that the Superintendent of Police Montgomery was for certain communal reasons biased against him. As regards the reports for the period May 27, 1946 to 30th June 1946 and the rest of the year the same had been made by Shamsheer Singh and Sadat Ali, Superintendents of Police of Muzaffargarh. Shamsheer Singh had given him no adverse remark and had left the column of honesty in the report "blank". Sadat Ali who was biased against the respondent got the word "no" typed opposite the column of honesty. The report for the year 1948 was based mainly on the opium case and as he had been cleared of the charge in respect of that case, there was no foundation for the report for that year. Further the order of dismissal was in violation of rule 16.2 as this punishment was to be awarded for the gravest acts of misconduct or as the cumulative effect of continued misconduct proving incorrigibility and complete unfitness for police service which facts did not exist in his case. A further complaint was made that the enquiry officer did not care to summon A. L. Chopra, the Rehabilitation Inspector and Captain Chuni Lal, Ex-military man although they had been allowed to be examined previously. The deposition of Ram Chander, Assistant Surgeon, a defence witness was not typed out and made a part of the record although his deposition was noted by the stenotypist in the note book. The order of dismissal was passed by the Deputy Inspector General without considering this evidence. Besides the above, the evidence of well placed officers like Deputy Commissioners, Superintendents of Police, Sub Divisional Magistrates and others who had testified to the respondent's efficiency, honesty and reliability were totally ignored.

12. The Subordinate Judge held that the charge framed against the respondent was vague and indefinite and the enquiry was unfair and inadequate because some of the authors of the reports adverse to the respon-

dent, though available, were not produced to enable the respondent to cross-examine them, that oral and documentary evidence sought by the respondent was withheld and as such no reasonable opportunity of defence was afforded to him. In the result he held that the requirements of Art. 311 of the Constitution had been violated and the order of dismissal was inoperative.

13. The High Court did not agree that the charge was vague but focussed its attention mainly on the question as to whether there had been a substantial compliance with the requirements of Art. 311 and whether the enquiry conformed to the principles of fairplay and natural justice. Considering the Service Rules already mentioned the High Court observed that there was no dispute that reports till 1940 were generally favourable to the plaintiff.

14. In our view reports earlier than 1944 should not have been considered at all inasmuch as he was allowed to cross the efficiency bar in that year. It is unthinkable that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944. It will be noted that there was no specific complaint in either of the two years and at best there was only room for suspicion regarding his behaviour.

15. It further appears from the judgment of the High Court based mainly on the lengthy finding of the Superintendent of Police, Bishambar Das dated 25th May 1950 that from 1942 to April 1945 the respondent got 'A' class reports though his superior officers were not certain as regards his honesty. His integrity was considered to be doubtful in the succeeding reports up to 31st December 1946. As regards the first half of 1947 the Superintendent of Police had noted that he was not in a position to make any remark about his honesty as he had not seen the respondent's work at any police station. The Deputy Commissioner however remarked that his work was quite satisfactory and he was honest. For the remaining part of 1947 he received an 'A' report from

the District Superintendent of Police who also stated that the respondent seemed to be honest and competent.

16. There can be no doubt that the 1948 report was a very damaging one and if the allegations contained therein had any substratum of truth the respondent could be dismissed from service on the strength of the charges based on those allegations alone. But, as already noted, the respondent was cleared of this charge.

17. The High Court opined that the enquiry officer, Bishambar Das, should not have neglected to summon five officers who made reports about the respondent and were available for examination at the enquiry. They were Chunilal Malhotra, Choudhry Roshan Lal, Deputy Commissioner, Shri Ismail, Shri Holiday and Shri Sant Prakash Singh. According to the High Court the defence of the respondent in the enquiry being that the reports against him were based upon no sufficient data and/or were made partly because of the poisoning of the mind of the District Superintendent of Police by the Deputy Superintendent of Police on communal considerations the only way the respondent could have substantiated his defence version would be by putting questions to the reporting officers if made available during the enquiry. One of the above officers Shamsher Singh was actually examined as the respondent's witness in the suit and his evidence showed that he had left the column for honesty in the report for 1946 blank as he had not seen the respondent at his work. This evidence went to show that if he had been examined by the enquiry officer a portion of the report taken in consideration against the respondent would have been found to be without substance. Another officer, Chunilal Malhotra though not examined before the enquiry officer was called in defence in the suit. All that he could say was that he had received complaints against the respondent but he did not remember whether they were oral or in writing. The High Court justifiably commented that there was no sufficient reason for the enquiry officer refusing to summon Chunilal Malhotra. On an overall consideration of the facts, the High Court took the view that:

"The approach of the enquiry officer was such that whatever be the testi-

mony of other witnesses, it could not undo the effect of the reports made by the superior officers about the plaintiff."

In other words the enquiry officer shut his mind to the testimony afforded by a large number of witnesses including a Deputy Commissioner, Under Secretary, two Superintendents of Police, a few Magistrates and some Deputy Superintendents of Police who had given evidence about the respondent's reputation and work.

18. Further the High Court took the view that the remarks of the Deputy Inspector General of Police against the respondent in the year 1948 that he was not worth being retained in service had influenced the entire approach of the enquiry officer who was a subordinate to the Deputy Inspector General of Police. The Deputy Superintendent of Police Lekhraj examined at the hearing of the suit by the respondent and to whom another enquiry against the respondent had been entrusted earlier by Bishambar Das, the inquiry officer, told the Court that when he (Lekhraj) exonerated the respondent in the other enquiry, Bishambar Das had sent for him and told him that the higher authorities wanted to take serious action to the extent of dismissal of the respondent.

19. In our view the High Court arrived at the correct conclusion and on the facts of this case it is impossible to hold that the respondent had been given reasonable opportunity of conducting his defence before the enquiry officer. From what we have stated it is clear that if the enquiry officer had summoned at least those witnesses who were available and who could have thrown some light on the reports made against the respondent the report might well have been different. We cannot also lose sight of the fact that charges based on the reports for the years 1941 and 1942 should not have been levelled against the respondent.

20. Learned counsel for the appellant relied on two decisions of the Orissa High Court in support of his contention that it was not necessary to examine the authors of the confidential reports against the respondent. In *Sadananda Mohapatra v. State*, AIR 1967 Orissa 49, the Court considered

the question as to whether reasonable opportunity had in fact been given to the petitioner before the punishing authority had made use of the adverse remarks in the confidential character roll. According to the High Court the petitioner in his explanation to the second show cause notice had referred to the good services that he had rendered to the department. The High Court observed that the fact that the petitioner had done good work led the punishing authority to impose a lesser punishment and thus the confidential roll had helped the petitioner. It also appears from the judgment that the punishing authority in that case had during the personal hearing discussed the confidential character with the petitioner and accordingly the High Court was of opinion that even though the adverse remarks in the petitioner's confidential character roll were not included in the second show cause notice inasmuch as the same had been discussed at the personal hearing it could not be said that no reasonable opportunity had been given to the petitioner.

21. In our view the facts in this case are entirely different. The respondent before us wanted an opportunity by examining the witnesses mentioned by him to explain away the circumstances which had led to the making of the adverse remarks and he was given no such chance.

22. The second authority relied on for the appellant was State of Orissa v. Sailabehari, AIR 1963 Orissa 73. In this case the entry in the diary of Deputy Collector went to show that the Special Assistant Agent i.e. the respondent, had no reputation for honesty. The diary mentioned the source of information on which the remarks were based and although none of the informants figured as witnesses in the departmental enquiry the touring officer was examined as a witness and his tour diary proved at the inquiry and the respondent had been given an opportunity to cross-examine him. On those facts the High Court of Orissa, after discussing this position, took the view that although insufficient for the establishment of a criminal charge the position was different in the case of departmental enquiries where punishment could be based merely on general reputation for corrupt conduct.

23. In our view there was no flaw in the enquiry which the Orissa High Court was called upon to examine in that case and the above dictum of the High Court was not really called for.

24. Learned counsel also wanted to rely on a decision of this Court in State of Jammu and Kashmir v. Bakshi Ghulam Mohammed, 1966 (Supp) SCR 401 = (AIR 1967 SC 122), where the Court was dealing with the proceedings of a Commission of Inquiry under the Commissions of Inquiry Act. Section 10 of that Act gave the delinquent a right to be heard but only a restricted right of cross-examination i.e. it was confined only to the witnesses called to depose against the person demanding the right. It was further observed that as "the Act did not contemplate a right of hearing to include a right to cross-examine" "it will be natural to think that the statute did not intend that in other cases a party appearing before the Commission should have any further right of cross-examination". On the facts before it the Court came to the conclusion that no case had been made by Bakshi Ghulam Mohammad that rules of natural justice required that he should have a right to cross-examine all the persons who had sworn affidavits supporting the allegations made against him.

25. In our opinion the above observation regarding the limit of the right to cross-examine dissociated from the context in which it was made cannot help the appellant. Although the case is governed by Article 311 as it stood prior to its amendment in 1963 the respondent could not be deprived of an effective right to make representation against the action of dismissal. In our opinion refusal of the right to examine witnesses who had made general remarks against his character and were available for examination at the inquiry amounted to denial of a reasonable opportunity of showing cause against the action.

26. In the result we hold that the High Court came to the correct conclusion and the appeal should be dismissed with costs.

Appeal dismissed.

AIR 1970 SUPREME COURT 2092
(V 57 C 445)

(From: Gujarat)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Union of India, Appellant v. Vasant Jayaram Karnik and others, Respondents.

Civil Appeal No. 1585 of 1969, D/- 7-9-1970.

Constitution of India, Article 16 (1)
— Equality of opportunity in matters of employment — Seniority list — Selection for promotion on the basis of seniority-cum-merit — List contrary to the rules governing seniority — Public servant in that list entitled to claim relief on footing that he is denied equality of opportunity.

A public servant placed in the list of seniority in a cadre or grade where selection for promotion is on the "basis of seniority-cum-merit" is entitled, on the plea that the list is contrary to the rules governing seniority, to claim relief that he is denied equality of opportunity. (Para 2)

Where the rules governing seniority provided that seniority of Income-tax Officers promoted to higher grade be fixed according to the date of promotion to a regular vacancy and for officers whose promotion was deferred on for not having completed a specific minimum length of gazetted service, to have their seniority in higher grade fixed as if they had been promoted in accordance with the seniority in the grade of Income-tax Officers unless any such officer was found unfit on merit; then the seniority list of Assistant Commissioners is liable to be quashed where Senior Officer in grade of Income-tax Officers is placed below Officers who were junior to him in that grade and was promoted many years after. The rule regarding officers whose promotion to the grade of Assistant Commissioners was deferred on the sole ground of their not having completed a specified minimum length of gazetted service, is not intended and cannot be interpreted contrary to all notions of justice and fair-play, to confer upon an officer, who was junior in the list of Income-tax Officers and who could not be considered for pro-

motion on an earlier occasion, a right to be placed in the list of Assistant Commissioners above an officer senior to him in the list of Income-tax Officers and who was promoted before him. Special Civil Appln. No. 365 of 1967, D/- 6-2-1969 (Guj), Affirmed. (Paras 14, 15, 16)

Dr. V. A. Seyid Muhammad, Senior Advocate, (M/s. B. Datta and R. N. Sachtheye, Advocates, with him), for Appellant; Mr. V. M. Tarkunde, Senior Advocate, (Mr. Jnanendra Lal, Advocate and Mr. B. R. Agarwala, Advocate of M/s. Gagrati and Co. with him) (for No. 1), M/s. B. P. Maheshwari and A. N. Parekh, Advocates (for Nos. 7 and 21) and Mr. A. J. Rana, Advocate and Mr. B. R. Agarwala, Advocate of M/s. Gagrati and Co. (for No. 35), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.—Vasant Jayaram Karnik—hereinafter called 'Karnik'—moved before the High Court of Gujarat a petition praying for an order quashing the "list of seniority" of Assistant Commissioners of Income-tax framed by the Government of India "as of August 1, 1965, in which he was placed below twenty-nine named Officers (who will hereinafter be referred to collectively as respondents 6 to 34). He claimed that thereby he was denied the guarantee of equality of employment or employment to an office under the Union under Article 16 (1) of the Constitution. The High Court of Gujarat upheld his contention and issued a direction requiring the Union of India to determine the seniority of Karnik and other officers in the cadre of Assistant Commissioners of Income-tax in accordance with the law.

2. A public servant placed in the list of seniority in a cadre or grade where selection for promotion to the next higher grade is on the "basis of seniority-cum-merit" is entitled, on the plea that the list is contrary to the rules governing seniority, to claim relief on the footing that he is denied equality of opportunity in matters relating to employment.

3. Prior to September 1944, officers of the Income-tax Department were placed in two classes. In Class I were placed Commissioners of Income-tax and Assistant Commissioners of In-

* Special Civil Appln. No. 365 of 1967, D/- 6-2-1969—Guj.

come-tax; in Class II were placed Income-tax Officers Grade I, Grade II and Grade III. In September 1944 the service was reorganised and the Commissioners of Income-tax, Assistant Commissioners of Income-tax and Income-tax Officers Grade I and II were placed in a new Class I; and the Income-tax Officers Grade III were placed in a new Class II. On reorganisation of the service some Income-tax Officers of the former Class II service were promoted to the new Class I. Those promotions were not strictly based on seniority, but on their performance in the former Class II service.

4. This appeal primarily concerns four sets of officers: they are—

(1) B. S. Nadkarni (hereinafter called Nadkarni) who was on reorganisation of the service promoted on August 1, 1946 as Income-tax Officer Grade II Class I and was confirmed in that grade with effect from August 15, 1947. He was promoted as Income-tax Officer Grade I Class I on January 4, 1950 and was confirmed in that grade from that date.

(2) V. J. Karnik (hereinafter called Karnik) who was on June 1, 1947 promoted as Income-tax Officer Grade II Class I and was confirmed in that Class on August 1, 1948. He was promoted as Income-tax Officer Grade I Class I on January 4, 1950 and was confirmed in that Grade with effect from the same date.

(3) Respondents 6 to 34. Out of these Respondents 6 to 21 were directly recruited as Income-tax Officers. Respondents 29 to 34 were promoted as Income-tax Officers from Class II. All these officers were promoted to Class I Grade I after Nadkarni and Karnik were promoted.

(4) Hansraj Chopra, Sham Singh and B. D. Kapoor. These Officers were promoted as Income-tax Officers Grade I Class I after Karnik, Nadkarni and respondents 6 to 34 were promoted.

5. In the "seniority list" of Income-tax Officers Class I Grade I prepared "as of August 1, 1953," Nadkarni was placed at No. 55; Karnik at No. 69; respondents 6 to 21 were placed at Nos. 82, 83, 84, 89, 87, 90, 85, 88 and 93 to 100 respectively (some other officers who are not before us occupying intervening places); respondents 22 to 34 were placed at Nos. 106 to 118; and

Hansraj Chopra, Sham Singh and B. D. Kapoor at Nos. 119, 120 and 121 respectively.

6. Under the rules framed by the Central Board of Revenue promotion of Income-tax Officers Grade I Class I to the grade of Assistant Commissioners of Income-tax was to be made on the recommendation of a Committee called the Departmental Promotion Committee. Selection for promotion was to be made on merit, i.e. "giving greatest weightage to outstanding qualifications, record of work and ability rather than to mere seniority." The Committee after considering the cases of the Income-tax Officers Grade I Class I eligible for promotion made recommendations to the Central Government, and the Central Government promoted officers recommended as Assistant Commissioners of Income-tax.

7. At a meeting held in August 1949 the Committee resolved that "in the interest of efficiency of administration the cadre of Assistant Commissioners should be manned by officers who were mature and experienced", and recommended that no officer should be promoted as Assistant Commissioner until he had worked for not less than ten years as Income-tax Officer. The Central Government agreed with that recommendation and in consultation with the Federal Public Service Commission declared that no Income-tax Officer should ordinarily be considered for promotion as Assistant Commissioner unless he had completed at least ten years as Income-tax Officer. It was, however, found that an adequate number of officers with standing for ten years were not available for selection. By letter dated July 21, 1950, the Committee decided that all Income-tax Officers with more than gazetted service for nine years may be considered for selection. At a meeting of the Committee held in November 1951 the cases of officers who had completed gazetted service for nine years as Income-tax Officers were considered, and the Committee selected for promotion fifteen out of those officers as "fit for promotion" to the cadre of Assistant Commissioners. There were several vacancies likely to arise in the near future and to meet that emergency the Committee decided to consider for promotion officers who had

not yet completed nine years' service as Income-tax Officers but had completed eight years' service on or before December 31, 1951. Nadkarni and Karnik who fell in this category were accordingly considered with other officers. Respondents 6 to 34 were not then considered as they had not completed the qualifying period of eight years. The Committee found that Nadkarni and Karnik were "not yet fit". Among the officers promoted as Assistant Commissioners on the recommendations made by the Committee at that meeting were Chopra, Sham Singh and Kapoor. At the next meeting of the Committee held in September 1952, Nadkarni was found fit for promotion, but Karnik was again found "not yet fit". It is not clear from the record whether at that meeting the rule relating to minimum service of nine years as Income-tax Officer was relaxed. It is however not disputed that respondents 6 to 34 were not then considered for promotion. Pursuant to the recommendation of the Committee, Nadkarni was posted as Assistant Commissioner in December 1952 and was confirmed as such with effect from December 18, 1955.

8. At the meeting of the Committee held in November 1953, Karnik was found fit and was selected for promotion. At this meeting again the rule requiring minimum service as Income-tax Officer for nine years was relaxed and Income-tax Officers who had completed service for eight years' as Income-tax Officers were considered for promotion. Karnik was promoted on February 22, 1954 and was confirmed in that post with effect from May 4, 1956. Respondents 6 to 34 were promoted on recommendations made in meetings of the Committee held in June 1954 and subsequent thereto.

9. Accordingly Nadkarni was promoted as Assistant Commissioner of Income-tax on December 22, 1952; Karnik was promoted on February 22, 1954; respondents 6 to 34 were promoted in and after 1955. Chopra, Sham Singh and Kapoor do not figure in this contest. It is said that they have long ago been superannuated.

10. All the officers who were promoted from the grade of Income-tax Officers on the basis of the recommendations of the Committee were

posted initially as Officiating Assistant Commissioners. They were considered for confirmation only after they had put in service for two years as Assistant Commissioners. The first to be confirmed was Nadkarni on December 18, 1955. Karnik was next confirmed on May 4, 1956. Respondents 6 to 34 were confirmed later. At a meeting held some time in September 1959 three posts of Assistant Commissioners of Income-tax which were previously reserved for officers of "the Finance and Commerce Pool" were released with retrospective effect and those posts became available from May 1, 1956, for utilization for confirmation. Respondents 6, 7 and 8 were confirmed in those three posts with effect from May 1, 1956. But in the seniority list of Assistant Commissioners "as of August 1, 1954", published by the Central Board of Revenue, Karnik was shown below Chopra, Sham Singh and Kapoor. In the next list fixing seniority in the cadre of Assistant Commissioners "as of January 1, 1958" Nadkarni and Karnik were placed below Chopra, Sham Singh and Kapoor and also below respondents 6 to 34.

11. Representations made by Karnik to the Central Board of Revenue and the Central Government protesting against the determination of his seniority in the list as of January 1, 1958 were unsuccessful. A memorial submitted to the President was also unsuccessful. A fresh seniority list was thereafter issued by the Board of Direct Taxes (which had replaced the Central Board of Revenue) determining seniority "as of August 1, 1965." In that list Nadkarni and Karnik were placed below respondents 6 to 34. Representations made by Nadkarni in March 1966 requesting the Board of Direct Taxes to revise the seniority list were rejected.

12. A petition was then filed by Karnik in the High Court of Gujarat challenging "the legality and propriety of the list of seniority". Karnik prayed for a writ quashing the list determining seniority of Assistant Commissioners as of August 1, 1965. Nadkarni who was impleaded as a party to the petition supported the case set up by Karnik. In the view of the High Court, on a true interpretation of the appropriate rules, Nadkarni and Karnik were entitled to be ranked above respondents 6 to 34 and the

interpretation on which the Union of India proceeded to give seniority to respondents 6 to 34 in the cadre of Assistant Commissioners was violative of the guarantee under Article 16 of the Constitution. The High Court accordingly declared that respondents 6 to 34 could not be placed above Nadkarni and Karnik in the grade of Assistant Commissioners, and directed that the "impugned seniority list as of August 1, 1965 must be quashed and set aside"; that the earlier confirmation of respondents 6, 7 and 8 with effect from May 1, 1956 be set aside; and that the Union Government do fix the seniority of Karnik, respondents 6 to 34 and Nadkarni in accordance with law. With certificate granted by the High Court this appeal has been preferred.

13. The relevant rules which governed seniority in the cadre of Assistant Commissioners may now be set out with modifications made from time to time. On January 16, 1950, the rules for determination of seniority of Assistant Commissioners were first made by the Government of India in consultation with the Federal Public Service Commission. The rules were—

"(i) Confirmed Assistant Commissioners should take seniority according to the date of their confirmation in the grade.

(ii) Officiating Assistant Commissioners should take seniority according to the length of continuous service in the grade of Assistant Commissioner, subject to the condition

x x x x x.

(iii) The seniority of officers promoted to the grade of Assistant Commissioner after the date of publication of the final seniority list of Income-tax Officers should be fixed according to the date of promotion to a regular vacancy (not being a promotion as a matter of purely local arrangement) in the grade of Assistant Commissioner, subject, however, to the condition that where two or more officers have been simultaneously selected for promotion to the grade, their relative seniority will be based on their seniority as Income-tax Officers, Class I, Grade I....."

By letter dated September 9, 1952, the Government of India in consultation with the Union Public Service Commission modified rule (iii). The modified rule read as follows:

"The seniority of officers promoted to the grade of Assistant Commissioner after the date of publication of the final seniority list of Income-tax Officers should be fixed according to the date of promotion to a regular vacancy (not being a promotion as a matter of purely local arrangement) in the grade of Assistant Commissioner, provided, however, that—

(a) Where two or more officers have been simultaneously selected for promotion to the grade, their relative seniority will be based on their seniority as Income-tax Officers, Class I, Grade I, and that—

(b) Officers whose promotion to the grade of Assistant Commissioner was deferred on the sole ground of their not having completed a specified minimum length of gazetted service will, on their subsequent promotion to that grade, have their seniority in the grade of Assistant Commissioner fixed as if they had been promoted in accordance with the seniority in the grade of Income-tax Officer, Class I, Grade I, unless any such officer had been passed over for promotion to the Assistant Commissioner's grade on grounds of merit."

Another modification was made by amendment of proviso (b) to rule (iii) on August 31, 1957. The amended proviso (b) read as follows:—

"Officers whose promotion to the grade of Assistant Commissioner was deferred on the sole ground of their not having completed a specified minimum length of gazetted service will, on their subsequent promotion to and confirmation in that grade, have their seniority in the grade of Assistant Commissioner of Income-tax fixed as if they had been promoted in accordance with the seniority in the grade of Income-tax Officers Class I, Grade I, unless any such officer had been passed over for promotion to the Assistant Commissioner's grade on grounds of merit."

Rule (i) applied to Assistant Commissioners confirmed before January 16, 1950 and rule (ii) applied to the cases of Assistant Commissioners who were officiating at that date; and rule (iii) dealt with officers promoted after that date.

14. The interpretation placed by the Government of India was plainly inconsistent with the true intent of

the rules. The Government of India determined the seniority inter se of the four sets of officers in the following sequence: Respondents 6 to 34, Chopra, Sham Singh, Kapoor, Nadkarni and Karnik. In the opinion of the Government of India since Chopra, Sham Singh and Kapoor were selected for promotion at a meeting at which Nadkarni and Karnik were not found fit, the former were entitled to be placed in the list of seniority above Nadkarni and Karnik. No fault may be found with that view. They further held that when Chopra, Sham Singh, Kapoor, Nadkarni and Karnik were considered for promotion, respondents 6 to 34 had not completed the minimum length of service and on that account had not been considered for promotion the latter "fell within the opening part of the proviso (b) to rule (iii)" and were entitled to be placed in the list of seniority above Chopra, Sham Singh and Kapoor and also above Nadkarni and Karnik, and they must be fitted in the cadre of Assistant Commissioners above Nadkarni and Karnik. This resulted in demoting Nadkarni and Karnik below respondents 6 to 34 — a consequence which could never have been envisaged. In the list of Income-tax Officers Respondents 6 to 34 were placed below Nadkarni and Karnik; they were promoted as Assistant Commissioners many years after Nadkarni and Karnik were promoted and confirmed. It could not however have been intended by the rule that because Nadkarni and Karnik could not claim seniority above Chopra, Sham Singh and Kapoor, they must in the list of Assistant Commissioners be placed below all Income-tax Officers who could not be considered at the meeting when Chopra, Sham Singh and Kapoor were promoted. In the seniority list of Income-tax Officers Class I, Grade I, Nadkarni and Karnik were placed above respondents 6 to 34. If under the proviso (b) to rule (iii) respondents 6 to 34 could not be placed below Chopra, Sham Singh and Kapoor even though those three latter officers were promoted earlier, Nadkarni and Karnik who were graded as senior to respondents 6 to 34 in the list of Income-tax Officers could not be relegated to ranks in the cadre of Assistant Commissioners below respondents 6 to 34. It is clear that different stan-

dards have been applied in determining the seniority of respondents 6 to 34 in the cadre of Assistant Commissioners vis-a-vis Chopra, Sham Singh and Kapoor on the one hand, and Nadkarni and Karnik on the other.

15. On a true interpretation of rule (iii) proviso (b) in the cadre of Assistant Commissioners, seniority should have been fixed in the order of Chopra, Sham Singh, Kapoor, Nadkarni, Karnik and respondents 6 to 34. The expression "officers whose promotion to the grade of Assistant Commissioners was deferred on the sole ground of their not having completed a specified minimum length of gazetted service" used in proviso (b) to rule (iii) refers to those Income-tax Officers who could not at a given meeting be considered for promotion, only because they did not satisfy the condition of minimum period of qualifying service for promotion. In our judgment, the following rules emerge. Between Income-tax Officers promoted at the same meeting, their seniority inter se will be reflected in the list of Assistant Commissioners; between an officer promoted earlier and another officer senior to him, but who was not considered in the meeting when the former was promoted, seniority in the list of Income-tax Officers will be reflected in the higher cadre where the senior officer was considered and not promoted, and the junior officer was promoted at that meeting, the order of promotion will govern seniority in the higher grade where a senior officer is promoted and confirmed and at a later meeting a junior officer is promoted, the latter cannot claim to be placed above the senior officer in the higher cadre relying upon the circumstance that he could not be considered for promotion at the earlier meetings, because he had not to his credit the qualifying minimum service. The High Court was, in our judgment right in observing that the proviso was intended to neutralise the effect of the minimum service rule in determining seniority in the grade of Assistant Commissioners. Rule (iii) is not intended, contrary to all notions of justice and fair-play, to confer upon an Officer, who was junior in the list of Income-tax Officers and who could not be considered for promotion on an earlier occasion, a right to be placed in the list of Assistant Commis-

sioners above an officer senior to him in the list of Income-tax Officers and who was promoted before him.

16. If respondents 6 to 34 had been considered and selected for promotion when Nadkarni and Karnik were promoted after their officiation period was over, they could not have been placed in the list of Assistant Commissioners above Nadkarni and Karnik. The circumstance that respondents 6 to 34 were not considered because they had not completed the specified minimum period of gazetted service and were considered and promoted later did not, when they were promoted, confer upon them the privilege of being placed in the list of Assistant Commissioners above Nadkarni and Karnik.

17. We accordingly agree with the High Court that the seniority list must be quashed.

18. Kalwant Rai respondent No. 36 in this appeal has claimed that he is entitled to the benefit of the interpretation placed by us. His case has apparently not been investigated by the High Court and we do not think that at this stage we would be justified in making an order in his favour. We have set out the principles governing the seniority in the cadre of Assistant Commissioners. The Central Government will, we have no doubt, readjust the seniority of all officers including Kalwant Rai in the cadre of Assistant Commissioners in the light of the principles explained by us.

19. The appeal fails and is dismissed with costs in favour of Karnik and Nadkarni.

Appeal dismissed.

AIR 1970 SUPREME COURT 2097 (V 57 C 446)

S. M. SIKRI, J. M. SHELAT,
V. BHARGAVA, G. K. MITTER
AND C. A. VAIDIALINGAM JJ.

(1) Shiv Kirpal Singh (in E. P. No. 1 of 1969), (2) Phul Singh (in E. P. No. 3 of 1969), (3) N. Sri Rama Reddi and others (in E. P. No. 4 of 1969), (4) Abdul Ghani Dar and others (in E. P. No. 5 of 1969), Petitioners v. (1) V. V. Giri (in E. Ps. Nos. 1, 4 and 5 of 1969); (2) Union of India and another (in E. P. No. 3 of 1969), Respondents.

JN/JN/E257/70/DHZ/M

1970 S. C./132 XII G—7

Attorney-General for India, Election Commission of India and Returning Officer, Presidential Election (in all the Petns.) (By notice.)

Election Petns. Nos. 1 and 3 to 5 of 1969, D/- 14-9-1970.

(A) Penal Code (1860), S. 171-A — Electoral right — Interference with — Electors threatened with serious consequences with object of unduly influencing them for changing their decision to nominate certain person as their candidate — This does not constitute any interference with the right to vote or refrain from voting at an election. (Para 10)

(B) Penal Code (1860), S. 171-C — Undue influence at election — Threat to members of Legislative Assembly of Bengal that if certain candidate was elected he would enforce President's rule in Bengal — Held this did not amount to undue influence. (Para 21)

(C) Penal Code (1860), S. 171-C (2) — Expression "Without prejudice to the generality of the provisions of sub-section (1)" — Meaning.

When the expression "without prejudice to the generality of the provisions of sub-section (1)" is used anything contained in the provisions following this expression is not intended to cut down the generality of the meaning of the preceding provision. The Court has to look at sub-sec. (1) as it is without restricting its provisions by what is contained in sub-section (2). AIR 1945 PC 156, Relied on. (Paras 41, 42)

(D) Penal Code (1860), Sec. 171-C — Undue influence — What constitutes — There can be undue influence even at the stage when elector goes through mental process of weighing merits and demerits of candidates and makes his choice — (Presidential and Vice-Presidential Elections Act (1952), Section 18). (Per majority, Bhargava and Mitter, J. Contra).

(Per Majority, Bhargava and Mitter, JJ. Contra): The scope of S. 171-C is very wide. There can be undue influence even at the stage when the elector goes through the mental process of weighing the merits and demerits of the candidates and makes his choice.

A pamphlet which after giving various fictitious incidents of sexual immorality, describes a candidate as debauch without any sense of shame

or morality and asks the electors whether the name of the Congress be lowered to such depths that such moral leper, such depraved man should be set up as the Congress candidate for the highest post of President and further adds that if such candidate becomes President he will turn Rashtrapati Bhavan into a harem, a centre of vice and immorality comes under Sec. 171-C, even if it may be covered under Section 171-G.

If distribution of the pamphlet by post to electors or in the Central Hall of the Parliament is proved it would constitute 'undue influence' within Sec. 18 of Presidential and Vice-Presidential Elections Act and it is not necessary for the election petitioners to go further and prove that statements contained in the pamphlet were made the subject of a verbal appeal or persuasion by one member of the electoral college to another and particularly to those in the Congress fold.

It is the degree of gravity of the allegation which will be the determining factor in deciding whether it falls under Section 171-C or Section 171-G. If the allegation, though false and relating to a candidate's personal character or conduct, made with the intent to affect the result of an election does not amount to interference or attempt at such interference the offence would be the lesser one. If, on the other hand, it amounts to interference or an attempt to interfere it would be the graver offence under Section 171-F read with Sec. 171-C. (1953) 7 Ele LR 457 (Ele. Tri., Kotah) and (1958) 19 Ele LR 203 (Orissa) and AIR 1968 SC 904, Relied on.

(Paras 36, 40, 42, 46, 53, 54, 56)

This pamphlet came under Section 171-C even though it was issued anonymously. If a member of Parliament distributed a pamphlet, he was identifying himself with it unless he expressly dissociated himself from the pamphlet. The distribution in the Central Hall by members of Parliament had the same effect as if they had endorsed the pamphlet in writing.

(Para 55)

Per Bhargava, J.—The offence of undue influence comes in at the stage when the offender interferes or attempts to interfere with the free exercise of the choice of voting in accordance with the decision already taken by the voter. If any

acts are done which merely influence the voter in making his choice between one candidate or another, they will not amount to interference with the free exercise of the electoral right. In fact, all canvassing that is carried on and which is considered legitimate is intended to influence the choice of a voter at the first stage when the elector goes through the mental process of taking a decision that he will vote in favour of a particular candidate and that is quite permissible. Mere false propaganda as to the personal character of a candidate or even relating to the party sponsoring the candidate cannot amount to the corrupt practice of undue influence. False statements about the personal character or conduct of the candidate may, of course, be scurrilous and foul; but, even then, the offence committed would fall under Section 171-G, Penal Code. Case law discussed.

(Paras 255, 256, 258A, 265)

Per Mitter, J.—Before any publication of a defamatory matter relating to a candidate can be treated as commission of the offence of undue influence there must be some overt act in addition to the mere publication — some attempt or persuasion of a voter to restrain the free choice of a candidate. If anonymous posters containing defamatory matter about a candidate's personal conduct or character were to be displayed in prominent places in the constituency so as to attract the notice of electors, it would come within the mischief of Section 171-G of the Penal Code but would fall short of exercise of undue influence under Sec. 171-C. But if an unsigned pamphlet containing matter defamatory of the personal conduct or character of a candidate be pressed personally upon an elector by another with an attempt to make the receiver believe that there was some basis for the charges levelled against the candidate, the person receiving the pamphlet would be likely to give credence to the imputations made therein and would thus be subject to a restraint on his franchise. The publication of a false statement of fact relating to the conduct and character of a person coupled with an attempt to persuade electors by such publication would attract the operation of Sec. 171-C (1) of the Penal Code. Case law discussed.

(Paras 304, 305, 314)

(E) Evidence — Appreciation of — Particulars regarding distribution of pamphlet and evidence of witnesses — Conflict between — Field witnesses could not be disbelieved only because particulars were at variance with the evidence — But fact could be taken into consideration while appreciating evidence of witnesses. (Para 63)

(F) Presidential and Vice-Presidential Elections Act (1952), S. 18 (1) (b) — Undue influence by stranger — Effect — It should materially affect election — Burden of proof is on petitioner.

Section 18 includes undue influence committed even by a stranger, having nothing to do with the returned candidate, as a ground for declaring the election to be void, the only condition in respect of such an act being that it should have materially affected the election. The burden of proving that the result of the election has been materially affected is on the election petitioners. Case law discussed.

(Paras 38, 152)

(Held it was not proved that the result of the election had been materially affected by distribution by strangers of a certain pamphlet containing filthy allegations about the opposite candidate.) (Para 218)

Per Mitter, J.—A charge of undue influence is in the nature of criminal charge and must be proved by cogent and reliable evidence not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence on the strength of evidence which leaves no scope for doubt as to whether they had or had not done so. Even if there be no provision in the Act of 1952 of giving notice to the persons who are charged with having committed undue influence or of impleading them as parties it is the duty of the election petitioners to lead direct evidence on the point and the respondent cannot take shelter behind the plea that he owes no duty to call them or to disprove the allegations made against them if he is to have his election maintained by the Court. However onerous the task of the Court may be because of the partisan nature of the witnesses, it cannot reject the oral evidence adduced merely on that ground, but it has to examine the same carefully and

come to a conclusion whether the evidence establishes the corrupt practice beyond reasonable doubt.

(Para 321)

(G) Constitution of India, Article 71 — Presidential and Vice-Presidential Elections Act (1952), Part III — Validity — Not ultra vires Article 71 (1) of the Constitution.

Even if it is taken that Article 71 (1) defines the jurisdiction of the Supreme Court, the manner in which that jurisdiction is to be exercised can only be regulated by an Act of Parliament passed in exercise of its power under Article 71 (3). In the case of Art. 71 no need was felt of making a provision similar to Art. 329 (b) when Art. 71 (1) itself laid down the limitation that all doubts and disputes arising out of or in connection with the election of a President or Vice-President are to be enquired into and decided by the Supreme Court whose decision shall be final. This limitation does not affect or limit the power of Parliament to regulate matters relating to filing of election petitions in the Supreme Court and of the grounds on which the elections can be challenged when the Supreme Court exercises its jurisdiction under Art. 71 (1). Hence Part III of Act of 1952 cannot be held to be ultra vires Art. 71 (1). AIR 1958 SC 139, Relied on. (Paras 226, 227)

(H) Constitution of India, Arts. 71, 245 — Presidential and Vice-Presidential Elections Act (1952), Sec. 21 — Validity — Not ultra vires on ground that rule-making power suffers from vice of excessive delegation of legislative powers.

Section 21 of the Presidential and Vice-Presidential Elections Act does not suffer from the vice of excessive delegation of legislative powers. Parliament laid down the essential matters of policy relating to elections, including election petitions, in the Act itself and, thereafter, in Section 21, delegated the power of making rules to the Central Government, subject to two principles of guidance. One is that the Rules are to be made after consulting the Election Commission, and the second is that the Rules must be such as are needed for carrying out the purposes of the Act. This second limitation clearly requires that the Government, in making rules, has to ensure that the Rules are all required for carrying out the purposes of the

Act; and that itself is a sufficient limitation on the exercise of that power arbitrarily by the Government. In fact, Parliament all the time has the power of altering the Rules by amending the Act itself in case it disapproves of any of the Rules made by the Government, while any Rule, which is shown to have been made in contravention of the provisions of the Act or for any reason other than to give effect to the purposes of the Act, would be declared void by the Court not on the ground that there was excessive delegation of legislative power, but that it goes beyond the scope of the power conferred on the Government under Sec. 21.

(Para 228)

(I) Presidential and Vice-Presidential Election Rules (1952), R. 4 (1), (2) — Validity — Is intra vires Sec. 21 of Presidential and Vice-Presidential Elections Act (1952).

The requirement in Rule 4 (1) that a certified copy of the entry showing that the candidate is an elector in a Parliamentary constituency is necessary in order to enable the Returning Officer to check whether the candidate is eligible for nomination and election. The requirement relates to the manner of proving that the candidate is an elector in a Parliamentary constituency under Sec. 21 (2) (d). In any case, this provision in Rule 4 (1) would be fully covered by Section 21 (1) of the Act inasmuch as the requirement is for no other purpose except of ensuring a smooth and proper election to the office of the President or Vice-President which object can be achieved by enabling the Returning Officer to ensure that candidates, whose nominations are accepted by him, are eligible for election. Consequently, Rule 4 (1) is within the scope of the power conferred on the Central Government to make rules for giving effect to the purposes of the Act. AIR 1966 SC 1626, Relied on.

(Para 229)

The published electoral roll may be misleading if it is allowed to be filed before the Returning Officer to show eligibility in the case of a Presidential or Vice-Presidential election. That seems to be the reason why Rule 4 (1) lays down that a certified copy of the entry alone will be the proper manner of satisfying the Returning Officer of the eligibility of the candidate. Rule 4

(2), which prescribes the consequence for non-compliance with the requirement of Rule 4 (1) must also be held to be valid as it is intended merely to make the valid Rule 4 (1) effective.

(Para 230)

(J) Presidential and Vice-Presidential Election Rules (1952), Rules 4 (3) and 6 (3) (e) — Validity — Rule 4 (3) is validly made under Sec. 21 of Presidential and Vice-Presidential Elections Act (1952) — Is not in derogation of Sec. 5 (2) of the Act — Rule 6 (3) (e) which is consequential is also valid.

Rule 4 (3) is not in derogation of the rights conferred by Sec. 5 (2) of Presidential and Vice-Presidential Elections Act (1952). Section 5 (2) cannot be read as conferring any right either on the candidate or on the electors in respect of signing of nomination papers. Section 5 only lays down the essential ingredients of the process of nomination, leaving the details of the manner of nomination to be filled up by Rules made by the Government under Sec. 21 of the Act. Rule 4 (3), which requires that no elector shall subscribe, whether as proposer or seconder, more than one nomination paper at any election, is supplementary to Sec. 5 (2) as containing a more detailed direction in respect of filing of nomination papers. The fact that there is no ban in Section 5 (2) of the Act on an elector signing more than one nomination paper as a proposer or a seconder does not mean that Rule 4 (3) of the Rules could not have been competently made by the Government. Hence Rule 4 (3) was validly made by the Government in exercise of its rule-making power under Section 21 of the Act. That Rule being valid, Rule 6 (3) (e) which is consequential, must also be held to be valid. AIR 1968 SC 1203, Distinguished.

(Paras 232, 233, 234, 235)

(K) Presidential and Vice-Presidential Election Rules (1952), R. 4 (1) — Requirement of certified copy — Every Government servant having custody of document can issue copy.

There is nothing in the Rules framed under the Presidential and Vice-Presidential Elections Act, or under the Representation of the People Act, 1950 and Rules framed thereunder, requiring that a certified copy of the

electoral roll must necessarily be issued by either an Electoral Registration Officer or an Assistant Electoral Registration Officer. Every Government servant, who has custody of a document, is competent to issue certified copies of that document.

(Para 240)

(L) Presidential and Vice-Presidential Elections Act (1952), Sec. 5 (2) — Nomination paper signed by proposer and seconder after candidate had done so — Candidate subsequently presenting nomination paper before Returning Officer — Held by such step candidate indicated his assent to being nominated by the particular proposer and seconder — Nomination not invalid — The Legislature, when enacting the Act, must be presumed to know that this was the law as interpreted in India and, consequently, when the language incorporated in Section 5 (2) of the Act was used, it must have been intended that nomination papers would not be invalid by reason of the candidate making his signature before the proposer and the seconder. Case law discussed.

(Paras 241, 244)

(M) Constitution of India, Article 54 (b) — 'Legislative Assemblies of the States' — Union territories are not States — Legislatures created under Art. 239A are not legislative assemblies of States.

The new definition of "State" in Section 3 (58) of the General Clauses Act as a result of modifications and adaptations under Article 372A introduced in 1956 would, no doubt, apply to the interpretation of all laws of Parliament but it cannot apply to the interpretation of the Constitution, because Article 367 was not amended and it was not laid down that the General Clauses Act, as adapted or modified under any Article other than Art. 372, will also apply to the interpretation of the Constitution. Since, until its amendment in 1956, Sec. 3 (58) of the General Clauses Act did not define "State" as including Union Territories for purposes of interpretation of Art. 54, the Union Territories cannot be treated as included in the word "State". A Legislature created by Parliament under Article 239A of the Constitution is not a Legislative Assembly as contemplated by Article 168 or Article 54. Members of Legislatures created for Union Terri-

tories under Art. 239A cannot, therefore, be held to be members of Legislative Assemblies of States.

(Paras 247, 248)

(N) Constitution of India, Art. 58 — Presidential and Vice-Presidential Elections Act (1952), S. 5 (2) — Validity — Cannot be considered as curtailing rights under Article 58.

Section 5 (2) of the Presidential and Vice-Presidential Elections Act was enacted by Parliament in exercise of its power of regulating all matters relating to or connected with the election of a President or Vice-President. The requirement that every person must be nominated by two electors as proposer and seconder is a reasonable requirement relating to regulation of election to the office of a President and cannot be held to be a curtailment of the right of a qualified candidate to stand as a candidate under Art. 58.

(Para 249)

(O) Constitution of India, Article 71 (1) — Part III of Presidential and Vice-Presidential Elections Act (1952) containing S. 18 not being ultra vires Art. 71 (1), petitioners cannot challenge election of President on grounds other than those mentioned in S. 18.

(Para 250)

(P) Presidential and Vice-Presidential Elections Act (1952), Sec. 18 (1) (a) — Bribery — Proof — A general allegation that bribery was rampant in the elections could not be made the subject-matter of a specific charge of commission of offence of bribery.

(Para 252)

(Q) Presidential and Vice-Presidential Elections Act (1952), Sec. 18 (1) (a) — Bribery — Licence granted to a private limited company with specific purpose of obtaining vote of an elector and a Member of Parliament, for a candidate — That would constitute bribery.

(Para 253)

(R) Presidential and Vice-Presidential Elections Act (1952), Sec. 17 (2) — Election petition — Respondent succeeding — However both sides being responsible for putting into witness box large number of persons deliberately giving evidence which was not true — Held proper course was not to award costs even to successful party.

(Para 357)

Cases Referred: Chronological	Paras	
(1970) Civil Appeal No. 1540 of 1969, D/- 20-1-1970 (SC), G. K. Samal v. R. V. Rao	152	(1958) 18 Ele LR 209, (Ele Tri Delhi), Amir Chand v. Sucheta Kripalani 271, 308
(1969) AIR 1969 SC 663 (V 56) = Civil Appeal No. 683 of 1968, D/- 12-8-1968, Paokai Haokip v. Rishang	152	(1958) 18 Ele LR 403 (Ele Tri Surat), Kataria Takandas Hemraj v. Pinto Frederick Michael 272, 309
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(1969) Civil App. No. 1315 of 1968, D/- 9-1-1969 (SC), Lalroukung v. Hoakholal Thangjom	263	(1957-1958) 13 Ele LR 1 (SC), Yamuna Prasad v. Jagdish Prasad Khare 244
(1968) AIR 1968 SC 904 (V 55) = (1968) 2 SCR 133, Baburao Patel v. Dr. Zakir Hussain	51, 260, 313	(1956) 12 Ele LR 378 (Ele Tri Lucknow), Radha Krishna v. Tara Chand 270, 307
(1968) AIR 1968 SC 1203 (V 55) = (1968) 3 SCR 246, Amolak Chand v. Raghuveer Singh	233	(1954) AIR 1954 SC 513 (V 41) = (1955) 1 SCR 509, Vashist Narain Sharma v. Dev Chandra 152, 153
(1966) AIR 1966 SC 824 (V 53) = (1966) 2 SCR 564, Mahadeo v. Babu Udai Pratap Singh	152	(1953) 6 Ele LR 316 (Election Tribunal Patiala), Sardul Singh v. Hukam Singh 265, 268
(1966) AIR 1966 SC 1626 (V 53) = (1966) 3 SCR 543, Ranjit Singh v. Pritam Singh	229	(1953) 7 Ele LR 457 (Ele Tri Kotah), Jujhar Singh v. Bhairon Lall 48, 265, 269, 306
(1965) AIR 1965 SC 183 (V 52) = (1964) 6 SCR 750, Jagdev Singh v. Pratap Singh	319	(1945) AIR 1945 PC 156 (V 32) = 1945 FCR 195, King Emperor v. Sibnath Banerji 41
(1964) AIR 1964 SC 1366 (V 51) = (1964) 5 SCR 12, Mohan Singh v. Bhanwarlal	318	(1935-1950) 2 Doabia's EC 150, Amritsar City (Mohammadan) Constituency Case No. 2 47, 306
(1962) AIR 1962 SC 1156 (V 49) = 1962 Supp (3) SCR 114, Inder Lal v. Lal Singh	262, 313	(1935-1950) 2 Doabia's EC 368, Surendra Narayan Sinha v. Babu Amulyadhane Roy 153
(1961) AIR 1961 Punj 383 (V 48) = 63 Pun LR 212, Amir Chand Totaram v. Sucheta Kripalani	267	(1935-51) Election Cases at p. 147 Case No. 24 (by Sen & Poddar) Mahant Digvijai Nath v. Sri Prakash 244
(1959) AIR 1959 SC 855 (V 46) = 1959 Supp (2) SCR 748, Ram Dial v. Sant Lal	261, 312A	(1898) 1898-2 QBD 202 = 67 LJ QB 925, Cox v. Davies 243
(1959) AIR 1959 Madh Pra 58 (V 46) = 15 ELR 219, Inayatullah v. Diwanchand Mahajan	153	(1881) 7 QBD 369 = 50 LJ QB 775, Harmon v. Park 241 242, 243
(1959) AIR 1959 Orissa 183 (V 46) = 19 ELR 278, Abdul Rahiman Khan v. Radha Krishna Biswas	266, 312	(1869) 1 O' M & H 22 = 20 LT 11, In re Lich Field Case 296
(1958) AIR 1958 SC 139 (V 45) = 1958 SCR 648, Dr. N. B. Khare v. Election Commission of India	226	(1869) 1 O' M & H 236 = 21 LT 264, Norfolk (Northern Case) 307
		(1864-1935) 2 Doabia's EC at p. 7 Case No. 121 (1955 Edn.), Jamna Prasad v. Sri Krishna Prasad 242, 244
		(1864-1935) 2 Doabia's EC at p. 73 Case No. 120 (1955 Edn.) Prosanna Kumar Das Gupta v. Chattaranjan Das 243
		(1864-1935) 2 Doabia's EC 117, Sh. Mohd. Sadig v. Dr. Saifuddin Kitchlew 306

(1864-1935) 2 Doabia's Ele Cas
243, Lyallapur and Jhang
General Constituency Case
No. 2 306

(In E. P. No. 1 of 1969): M/s. K. C. Sharma, M. S. Gupta, K. L. Rath and C. L. Lakhanpal, Advocates, for Petitioner; (In E. P. No. 3 of 1969): The Petitioner in person; (In E. P. No. 4 of 1969): M/s. K. C. Sharma, K. L. Rath, C. L. Lakhanpal, S. K. Dhingra and M. S. Gupta, Advocates, for Petitioners; (In E. P. No. 5 of 1969): M/s. S. C. Malik, M. S. Gupta and K. L. Rath, Advocates, for Petitioners; (In E. P. No. 1 of 1969): M/s. C. K. Daphtary, D. Narasaraaju, Mohan Kumaramangalam and S. T. Desai, Senior Advocates (M/s. S. K. Dholakia and A. S. Nambiar, Advocates, with them), for Respondent; Mr. Jagdish Swarup, Solicitor-General of India and Dr. L. M. Singhvi, Senior Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with them), for Respondent No. 1 (In E. P. No. 3 of 1969), and the Attorney-General for India, Election Commission of India and Returning Officer, Presidential Election (In E. Ps. Nos. 3 to 5 of 1969); (In E. P. No. 3 of 1969): M/s. C. K. Daphtary, D. Narasaraaju, and Mohan Kumaramangalam, Senior Advocates, (M/s. A. S. Nambiar and S. K. Dholakia, Advocates, with them), for Respondent No. 2; (In E. Ps. Nos. 4 and 5 of 1969): M/s. C. K. Daphtary, D. Narasaraaju, S. T. Desai and Mohan Kumaramangalam, Senior Advocates (M/s. H. K. L. Bhagat and S. K. Dholakia, Advocates, and M/s. J. B. Dadachanji, Ravinder Narain and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co., with them), for Respondent; (In E. P. No. 1 of 1969): Mr. Jagdish Swarup, Solicitor-General of India and Dr. L. M. Singhvi, Senior Advocate (M/s. S. P. Nayar, R. H. Dhebar and Miss Lily Thomas, Advocates, with them), for the Attorney-General for India, Election Commission of India and Returning Officer, Presidential Election.

The judgment of Sikri, Shelat and Vaidialingam, JJ. was delivered by

SIKRI, J.:— On May 11, 1970, this Court dismissed the above petitions and stated that reasons would be given later. We now proceed to give the reasons.

2. These four election petitions filed under Section 14 of the Presidential and Vice-Presidential Elections Act (XXXI of 1952) (hereinafter referred to as the Act), and Article 71 of the Constitution of India challenge the election of the respondent, Shri V. V. Giri, to the office of the President of India. The petitioner in Election Petition No. 1 of 1969, Shri Shiv Kirpal Singh, was a candidate in the election, and so was the petitioner in Election Petition No. 3, Shri Phul Singh. The nominations of both these petitioners were rejected by the Returning Officer. Election Petition No. 4 was filed by Shri N. Sri Rama Reddy, M. P., and twelve other electors, all members of Parliament. Election Petition No. 5 was filed by Shri Abdul Ghani Dar, M. P., and nine other members of Parliament and eight members of Legislative Assemblies of Haryana, Madhya Pradesh and Bihar. Shri V. V. Giri is the sole respondent in Election Petitions Nos. 1, 4 and 5 while in Election Petition No. 3 he was impleaded as respondent No. 2 and Union of India through the Election Commission, was impleaded as respondent No. 1.

3. After the sad demise of the then President of India, Dr. Zakir Hussain, on May 3, 1969, the Election Commission issued a notification under S. 4 of the Act appointing July 24, 1969, as the last date for filing the nomination papers, July 26, 1969, as the date for scrutiny of the nomination papers, and July 29, 1969, as the last date for withdrawal of nomination papers. Polling was fixed for August 16, 1969. 24 nomination papers were filed before the Returning Officer. On scrutiny which took place on July 26, 1969, the Returning Officer rejected 9 nomination papers, including the nomination papers of Shri Shiv Kirpal Singh, petitioner in Election Petition No. 1, and Shri Phul Singh, petitioner in Election Petition No. 3. He accepted the nomination papers of 15 candidates. No candidate withdrew his nomination by the due date. Counting of votes took place on August 20, 1969, when the result was announced and the respondent, Shri V. V. Giri, was declared elected.

4. The election was sought to be challenged on various grounds in these election petitions. Some of these

grounds were common. The grounds may be broadly formulated as follows:

(1) That the nomination papers of Shri Shiv Kirpal Singh, Shri Charan Lal Sahu and Shri Yogi Raj were wrongly rejected by the Returning Officer;

(2) That the nomination papers of Shri V. V. Giri the respondent, were wrongly accepted by the Returning Officer;

(3) That the nomination papers of Shri Rajbhaj Pandurang Nathuji, Shri Santosh Singh Kachhwaha, Shri Babu Lal Mag and Shri Ram Dulare Tripathi were wrongly accepted by the Returning Officer;

(4) That Part III and Section 21 of the Act are ultra vires the Constitution;

(5) That Rules 4 and 6 (3) (a) of the Presidential and Vice-Presidential Election Rules, 1952 (hereinafter referred to as the Rules), promulgated under Section 21 of the Act, are ultra vires the Constitution and the Act;

(6) That the elected members of the Legislative Assemblies of the Union Territories were entitled to be included in the Electoral college for the election of the President and their wrongful non-inclusion had not only materially affected the result of the election but also violated Article 14 of the Constitution;

(7) That the petitioners were entitled to dispute the election even on grounds other than those mentioned in Section 18 of the Act;

(8) That the offence of bribery at the election had been committed by the respondent and his supporters with his connivance; and

(9) That the result of the election had been materially affected by the commission of the offence of bribery by persons other than the respondent.

5. In addition to these allegations it was alleged that the offence of undue influence had been committed at the election with the connivance of the respondent. In any event the result of the election had been materially affected by the commission of this offence. We will elaborate the pleadings on this point when we come to deal with the issues arising out of that allegation.

6. We have read the judgment prepared by Bhargava, J. He has dealt fully with the issues arising out of the allegations other than the allegation

of undue influence and, as we agree with him, it is not necessary to add anything to his reasoning. We may, however, reproduce the issues and the conclusions thereon.

Issue No. 5 of Election Petitions Nos. 1, 4 and 5/1969

E. P. No. 1: Whether Section 21 of the Act is ultra vires the Constitution of India?

E. P. Nos. 4 & 5: Whether Part III and Section 21 of the Act are ultra vires the Constitution of India?

We hold that Part III and Section 21 of the Act are not ultra vires the Constitution of India.

Issue No. 6 of Election Petitions Nos. 1, 4 and 5/69

E. P. Nos. 1, 4 & 5: Whether Rules 4 and 6 (3) (e) of the Rules are ultra vires the Constitution and the rule-making power of the Central Government?

We hold that Rule 4 (3) of the Rules was validly made by the Government in exercise of its rule-making power under Section 21 of the Act. That rule being valid, Rule 6 (3) (e) of the Rules, which is consequential, must also be held to be valid.

Issue No. 1 in Election Petitions Nos. 1, 4 & 5/1969.

E. P. No. 1: Whether the nomination papers of the petitioner, Charan Lal Sahu and Yogi Raj were wrongly rejected as alleged in paragraphs 5 (a) and (b), 6 and 7 of the petition?

E. P. No. 4: Whether the nomination papers of Shiv Kirpal Singh, Charan Lal Sahu and Yogi Raj were wrongly rejected as alleged in paragraphs 8 (a) and 9 (a), (b) and (c) of the petition?

E. P. No. 5: Whether the nomination papers of Shiv Kirpal Singh, Charan Lal Sahu and Yogi Raj were wrongly rejected as alleged in paragraphs 8 (a) and 9 of the petition?

We hold that the nomination paper of Shri Shiv Kirpal Singh was rightly rejected on the ground that it was not accompanied by a certified copy of the entry relating to him in the electoral roll of the Parliamentary constituency in which he was registered as a voter. We further hold that the nomination paper of Sri Charan Lal Sahu was rightly rejected on the ground that he was not 35 years of age on the date of nomination. We also hold that the

nomination paper of Shri Yogi Raj was rightly rejected on the ground that he had been proposed and seconded by the same electors who had proposed and seconded another candidate, Shri Rajbhoj Pandurang Nathuji, the nomination paper of the latter having been received earlier by the Returning Officer.

Issue No. 2 in Election Petition Nos. 1 and 5 and Issue No. 3 in Election Petition No. 4 of 1969.

E. P. No. 1: Whether the nomination papers of the respondent were wrongly accepted as alleged in paragraphs 5 (c) and 8 of the petition?

E. P. No. 4: Whether the nomination papers of the respondent were wrongly accepted as alleged in paragraphs 8 (c) and 11 of the petition?

E. P. No. 5: Whether the nomination papers of the respondent were wrongly accepted as alleged in paragraphs 8 (b) and 10 of the petition?

We hold that the nomination papers of the respondent were validly accepted. The certified copies of the electoral roll filed with the nomination papers were issued by the appropriate authority.

Issue No. 3 in E. Ps. Nos. 1 and 5 and issue No. 2 in E. P. No. 4/1969.

E. P. No. 1: Whether the nomination papers of Rajbhoj Pandurang Nathuji and Babu Lal Mag were wrongly accepted as alleged in paragraphs 5 (b) and 9 of the petition?

E. P. No. 4: Whether the nomination papers of Rajbhoj Pandurang Nathuji, Babu Lal Mag and Ram Dulare Tripathi were wrongly accepted as alleged in paragraphs 8 (b) and 10 (a), (b) and (c) of the petition?

E. P. No. 5: Whether the nomination papers of Rajbhoj Pandurang Nathuji, Santosh Singh Kachhwaha, Babu Lal Mag and Ram Dulare Tripathi were wrongly accepted as alleged in paragraphs 8 (c) and 11 of the petition?

We hold that the nomination paper of Shri Rajbhoj Pandurang Nathuji was validly accepted, the certified copy of the electoral roll filed by him was a valid and a good copy. We further hold that the nomination paper of Shri Santosh Singh Kachhwaha was not invalid even though he signed his nomination paper before his seconder had signed it. His nomination paper, therefore, was rightly accepted. We further hold that the nomination

paper of Shri Babu Lal Mag was not invalid even though he had signed his nomination paper before it was signed by the proposer and the seconder. His nomination paper was, therefore, rightly accepted. We further hold that the nomination paper of Shri Ram Dulare Tripathi was not invalid. The disputed signatures have not been shown to be not genuine.

Issue No. 4 in E. P. No. 1 and issue No. 7 in E. P. Nos. 4 and 5 of 1969.

(a) Whether the elected members of the Legislative Assemblies of the Union Territories were entitled to be included in the electoral college for the election of the President?

(b) If so, whether the non-inclusion of the members of the Legislative Assemblies of the Union Territories in the electoral college amounts to non-compliance with the provisions of the Constitution? If so, whether the result of the election has been materially affected by such non-compliance?

(c) Whether the alleged non-compliance with the provisions of the Constitution has violated Article 14 of the Constitution?

We hold that members of Legislatures created for Union Territories under Article 239A cannot be held to be members of Legislative Assemblies of States. They were, therefore, rightly excluded from the electoral college. Issue No. 4 (a) in Election Petition No. 1 and Issues Nos. 7 (a) in Election Petitions Nos. 4 and 5 are accordingly decided against the petitioners. In view of this conclusion Issue No. 4 (b) and Issue No. 4 (c) of Election Petition No. 1 and Issues Nos. 7 (b) and (c) of Election Petitions Nos. 4 and 5 do not arise.

Issues Nos. 1 and 2 in Election Petition No. 3 of 1969.

1. Whether the nomination paper of Phul Singh, the petitioner, was wrongly rejected?

2. What relief, if any, is the petitioner entitled to?

We hold that the nomination paper of Shri Phul Singh was rightly rejected on the ground that his nomination paper was not signed either by a proposer or a seconder. Election Petition No. 3 of 1969 accordingly fails and is liable to be dismissed. Issue No. 8 in Election Petitions Nos. 4 and 5/1969.

E. P. No. 4:

(a) Whether the petitioners are entitled to dispute the election of the respondent on grounds other than those mentioned in Section 18 of the Act?

(b) If issue No. 8 (a) is decided in favour of the petitioners,

(i) whether the respondent or any person with his connivance printed, published and distributed the pamphlet, Annexure A-3, to the petition?

(ii) Whether the pamphlet, at Annexure A-3, contained any false statement of facts relating to the personal character and conduct of N. Sanjiva Reddy, a candidate at the election and other persons named in the pamphlet?

(iii) Whether the persons found responsible for publishing the pamphlet believed the statements made therein as true or had reason to believe them to be true?

(iv) Whether the pamphlet was published with the object of prejudicing the prospects of the election of Sanjiva Reddy and furthering prospects of the election of the respondent?

(v) Whether the election of the respondent is liable to be declared void on this ground?

E. P. No. 5:

Issue No. 8 in Election Petition No. 5 is substantially the same except that the annexure in Petition No. 5 is Annexure A-38 and not Annexure A-3. On the first part of Issue No. 8 we hold that the petitioners are not entitled to dispute the election of the respondent on grounds other than those mentioned in Sec. 18 of the Act. The other parts of the issue, as a consequence, do not arise at all. Issues Nos. 9, 9A and 10 in E. P. No. 5/1969.

9. Whether the respondent or any other person with his connivance committed the offence of bribery as alleged in paragraph 15 of the petition?

9A Whether the allegations in paragraph 15 constitute bribery within the meaning of the Act?

10. Whether the offence of bribery was committed at the election by any other person without the connivance of the respondent as alleged in paragraph 15 of the petition, and if so, whether it materially affected the result of the election?

We hold that no offence of bribery was committed in the matter of grant

of licence for the Polyester Factory to Swadeshi Cotton Mills.

7. This leaves Issues No. 4 in Election Petition No. 4 and Election Petition No. 5. These read as follows: E. P. No. 4:

(a) Whether all or any of the allegations made in paragraphs 8 (e) and 13 (a) to (m) of the petition constitute in law an offence of undue influence under Section 18 (1) (a) of the Act?

(b) Whether the said allegations made in paragraphs 8 (e) and 13 (a) to (m) are true and proved?

(c) In the event of these allegations being proved and constituting undue influence,

(i) whether the returned candidate has committed the offence of undue influence?

(ii) whether the offence of undue influence was committed by his workers, and if so, with his connivance?

(iii) whether the offence of undue influence was committed by others without his connivance, and if so, whether that has materially affected the result of the election?

E. P. No. 5:

(a) Whether all or any of the allegations made in paragraphs 8 (e) and 13 of the petition constitute in law an offence of undue influence under Section 18 (1) (a) of the Act?

(b) Whether the said allegations in paragraphs 8 (e) and 13 are true and proved?

(c) In the event of these allegations being proved and constituting undue influence—

(i) whether the returned candidate has committed the offence of undue influence?

(ii) whether the offence of undue influence was committed by his workers, and if so, with his connivance?

(iii) whether the offence of undue influence was committed by others without his connivance, and if so, whether that has materially affected the result of the election?

8. We may now refer to the pleadings relevant to Issue No. 5 in Election Petition No. 5.

9. In paragraph 8 (e) of the petition it is stated that the offences of undue influence at the election have been committed by the returned candidate and by his supporters with the

connivance of the returned candidate. It is further stated that the material facts in support of this ground are in para. 13 of the petition. In para. 13 (a) are set out the facts which according to the petitioners led to the sharp cleavage between the electors of the Congress Party and all electors in general. In brief the history of the dispute between the two sections of the Party, which we will refer to as Congress (R) led by Shri Jagjivan Ram and Congress (O) led by Shri Nijalingappa, was set out. We need not extract the pleadings on this part of the case in detail because we will briefly refer to the background of the disputes and the facts as proved before us. But we may mention that this Court is not concerned with the merits of the dispute between the two sections of the Congress Party and we will consider this matter only insofar as it throws any light on the question of the offence of undue influence.

10. In paragraph 13 (b) (ii) it was alleged that "Shri Nijalingappa, Shri S. K. Patil, Shri K. Kamraj, Shri Morarji Desai and Shri Y. B. Chavan, electors at the election, were threatened by Smt. Indira Gandhi on July 12, 1969, at Bangalore with serious consequences with the object of unduly influencing these people for changing their decision to nominate Shri N. Sanjiva Reddy as their candidate. The threat given was repeated subsequently between 12th and 16th July, 1969 a number of times." By order dated January 23, 1970, we directed that the petitioners were not entitled to lead evidence on this sub-para because we were of the opinion that these allegations, even if accepted, did not constitute any interference with the electoral right as defined in Sec. 171-A of the Indian Penal Code, i.e. the right to vote or refrain from voting at an election. As far as Shri Sanjiva Reddy was concerned there is no allegation that the Prime Minister had interfered or attempted to interfere with his right to stand as a candidate.

11. In paragraph 13 (b) (iii) it was alleged that a number of supporters of the returned candidate, and in particular Shri Jagjivan Ram, Shri Yunus Saleem, Shri Shashi Bhushan, Shri Krishan Kant and Shri Chandra Shekhar, Shri Jagat Narain, Shri Mohan Dharia and Shri S. M. Banerji, with the consent or the connivance of

the returned candidate, published by free distribution a pamphlet, Annexure A-38, in Hindi and English, in cyclostyled form as well as in printed form, in which very serious allegations were made which amounted to undue influence within the meaning of Section 171-C of the Indian Penal Code.

12. In paragraph 13 (b) (iv) it was alleged that "this pamphlet was distributed from 9th to 16th August, 1969, among all the electors of the electoral college for the Presidential election. During these days it was also distributed in the Central Hall of the Parliament by the persons mentioned above. A large number of electors were asked to read the contents of this pamphlet and they were asked 'Will you vote for such a debauch and corrupt man?' The minds of the voters were so unduly influenced and an impression was purposely sought to be created that if Mr. Reddy was elected to the office of the President of India, the Rashtrapati Bhavan will become a centre of vice and immorality and that Shri Reddy will assume dictatorial powers and will bring an end to democracy in India. This scare was created in the minds of the electors with the direct object of interfering with their free exercise of their electoral right to vote for the candidate of their choice. As a single instance Shri Yunus Saleem approached Shri Abdul Ghani Dar, Member of Parliament, one of the petitioners herein, and talked to him in this behalf as stated earlier. This was said in the presence of a number of Members of Parliament."

13. In sub-paragraph 13 (b) (v) it was alleged that the petitioner, Shri Abdul Ghani Dar, "wrote a letter to Shri V. V. Giri, copy of which was endorsed to the Prime Minister and Shri Humayun Kabir." In this letter the petitioner requested Shri V. V. Giri to condemn those who had published this pamphlet and make a public statement dissociating himself from and denouncing the publishers of the pamphlet but Shri V. V. Giri failed to do so.

14. In sub-para. 13 (b) (vi) it was alleged that "this low-level pamphlet had evoked great public and press criticism and it came out openly in the press that such low-level pamphlets were being distributed in the election

campaign." It was further alleged that

"even news items regarding this pamphlet appeared in almost all leading newspapers of the country. In spite of this, the returned candidate, who was repeatedly harping upon and asking for votes in the name of character, integrity, etc., failed to dissociate himself from the pamphlet or even to condemn the same."

15. It was alleged in sub-para. (viii) that "the language of the pamphlet and the laudatory references to Smt. Indira Gandhi and her followers themselves point to the origin of the pamphlet."

16. In sub-para. (ix) of para. 13 (b) reference was made to a letter issued by Shri Madhu Limaye, M. P., which he wrote to the Election Commission of India, protesting against the alleged pamphlet and requesting him to take appropriate action. In sub-para. (x) reference is made to the reply of the Chief Election Commissioner. It was alleged in sub-para. (xi) that a similar letter was written by Shri Kanwar Lal Gupta, M. P., to the Election Commission and in sub-para. (xii) reference was made to the reply of the Chief Election Commissioner dated August 14, 1969.

17. In sub-para. (xiii) it was alleged that the returned candidate, Shri V. V. Giri, made various statements at various places condemning the decision of the Congress Parliamentary Board in selecting Shri Reddy as its candidate and described it as immature. It is further alleged that Shri V. V. Giri "repeatedly stated that a *man of character and integrity should have been selected.*" "The returned candidate in well-guarded language was stating that Mr. Reddy was not a man of character. He also exhorted Congressmen to demand a right of vote and made capital of the Congress President's appeal to Jan Sangh and Swatantra Party."

18. In sub-para. (c) (i) of para. 13 it was alleged that

"the supporters of the returned candidate, Smt. Indira Gandhi, Shri Jagjivan Ram, Shri Fakhruddin Ali Ahmed, Shri Yunus Saleem, Dr. Karan Singh, Shri Dinesh Singh, Shri Swaran Singh, Shri I. K. Gujral, Shri Satya Narain Sinha, Shri K. K. Shah and Shri Triguna Sen were all occupying

high ministerial positions in the Central Government and they misused these positions for furthering the prospects of the returned candidate by telephoning a large number of electors from their ministerial telephones of the Government, openly telling them that it was a matter of prestige and existence for them and that if the electors did not vote according to their wishes for Shri V. V. Giri, they would lose all their patronage and that if the electors voted as desired by them, they would receive governmental patronage at every step. So many electors were called by the above named Ministers at their official residences and offices in Delhi and undue influence was brought upon them by ordering them to vote for the returned candidate."

It was further stated that the returned candidate, Shri V. V. Giri, sounded one of the Ministers mentioned above to influence the particular electors who were not found amenable to his own influence or persuasion.

19. In para. 13 (c) (ii) reference was made to Shri Yunus Saleem, Deputy Law Minister, obtaining signatures of the members of Rajya Sabha on some paper which in effect amounted to pledging their support for Shri V. V. Giri, the returned candidate, and what happened in the Rajya Sabha in connection with that incident.

20. In sub-para. 13 (c) (iii) it is alleged that Shri Fakhruddin Ali Ahmed and Shri Yunus Saleem threatened the Muslim voters that Shri Sanjiva Reddy was in fact a candidate of the Jan Sangh party and if he was elected the fate of the Muslim community in India will be in danger and in constant threat of extinction. An instance was given when Shri Yunus Saleem met Shri Abdul Ghani Dar, petitioner, and talked to him in the same terms. Further, reference was made to a letter issued by Shri Abdul Ghani Dar to all Muslim electors describing such a threat as baseless and mischievous. In sub-paragraph (iv) reference was made to a letter written by Shri Abdul Ghani Dar to the press in this connection.

21. In paragraphs 13 (c) (v) and (vi) reference was made to a threat issued to the members of the Legislative Assembly of Bengal that if Shri Sanjiva Reddy was elected he would enforce President's rule in Bengal, thus

wiping off the United Front Government and the Legislative Assembly. Reference was made to a news item appearing in the papers on August 12, 1969, in this connection. We need not say anything more about this allegation because we refused to allow evidence to be led on this issue, as the allegations do not, even if accepted, amount to "undue influence."

22. In sub-para. (vii) it was alleged that a threat was issued to the members of the Legislative Assembly of Andhra Pradesh that the Assembly would be dissolved if Shri Reddy was elected. By order dated January 23, 1970, we refused to allow evidence to be taken on this point as the allegations do not, even if accepted, amount to "undue influence."

23. Some other allegations of undue influence were made in the subsequent paras but we did not allow the petitioners to lead evidence on those paras and they need not be mentioned.

24. The respondent, Shri V. V. Giri, in his reply first stated that

"I propose to traverse the allegations directly made against me and also the insinuations or innuendoes that anything was done at my instance or with my knowledge and consent or connivance. I submit that I cannot traverse the allegations made against the Prime Minister or any other person as I do not have personal knowledge thereof."

The respondent did not, however, admit any of the allegations or insinuations against such persons and it was submitted that the petitioners were put to strict proof of every one of them.

25. The respondent denied the allegation in sub-para. (i) of para. 13 (b) of the petition and said that

"I was always appealing to the voters to exercise their vote according to their conscience and free will. I was, in fact, conducting my campaign single-handed."

In reply to sub-para. (iii) the respondent characterised the allegations as most reckless, wild and false and emphatically denied them. He stated that

"nowhere or at no time was it ever alleged within my knowledge that I or my supporters had anything to do with the publication or circulation of the alleged pamphlets."

26. In reply to sub-para. (iv) of para. 13 (b) the respondent stated that he had no knowledge and did not admit any of the allegations made in that para and the petitioners were put to strict proof. He also did not admit that Shri Yunus Saleem approached Shri Abdul Ghani Dar, as alleged.

27. In reply to sub-para. (v) and (vi) of para 13 (b) the respondent denied that he had received any letter from Shri Abdul Ghani Dar. He stated that the only letter he received from Shri Abdul Ghani Dar was a letter dated July 24, 1969, in reply to respondent's circular letter to the electors seeking their support. He further denied that he ever received a copy of the alleged pamphlet. He further stated:

"I say that in fact I saw the letter of August 11, 1969 of Shri Dar and the pamphlet attached as annexure to the Petition only after I received the copy of the Election Petition and the annexures. I entirely repudiate that I had anything to do with the pamphlet before its publication or after its publication. I also deny that any of my workers or supporters had anything to do with it, with my knowledge or connivance."

28. In reply to sub-para (viii) of para 13 (b) the respondent denied that persons alleged to be his workers and supporters were distributing the pamphlet and were telling voters not to vote for Shri Reddy, as alleged. He characterised both these allegations as baseless and false. In reply to sub-para (ix) he said that he was not aware of the letter, Annexure A-39. In reply to sub-para (x) he said that this matter was not relevant. In reply to sub-para (xi) it was asserted that Shri Gupta's allegations were wild and baseless and the matter was irrelevant. In reply to sub-para (xii) he had no submission to make except that the matter was irrelevant.

29. With reference to sub-para (xiii) of para 13 (b) the respondent denied that during his tour of various places mentioned in the said paragraph he stated in any well-guarded language or otherwise that Shri Reddy was not a man of character. He stated that throughout his statements he adhered to the stand he had taken in his first statement of July 13, 1969, announcing his decision to stand as a candidate for the office of the President. He also an-

nexed copy of a Press Statement issued on August 10, 1969, in which he reiterated the aforesaid stand.

30. With reference to sub-para. (i) of para. 13 (c) the respondent characterised the allegations as reckless, and irresponsible. The petitioner also denied that he sounded any Minister as alleged in the sub-para.

31. With reference to sub-paras. (ii), (iii), (iv) and (v) of para. 13 (c) the respondent said that he had no personal knowledge but put the petitioners to strict proof.

32. The respondent further replied to other paragraphs but nothing much turns on them. We may mention that at various places the respondent alleged that the paras were vague and no particulars had been given.

33. The respondent asked for particulars on various points and this Court directed particulars to be supplied. Particulars were supplied regarding para. 13 (b) (xiii) and para. 13 (c) (i). We will refer to the particulars whenever it is deemed necessary while appreciating the evidence of the petitioners.

34. We need not refer in detail to the allegations in Election Petition No. 4 which are substantially similar to those in Petition No. 5. The Advocate-on-Record for Election Petition No. 4 and Election Petition No. 5 was the same and common evidence was led in both the petitions and common arguments were addressed thereon.

35. From the pleadings and the evidence led the main points which arise for our determination are:

(1) What is the true interpretation of Sec. 18 of the Act?

(2) Was the pamphlet distributed by post to the electors?

(3) Was the pamphlet distributed in the Central Hall of Parliament?

(4) Does the distribution of the pamphlet by post and/or in the Central Hall constitute undue influence under Sec. 18 of the Act?

(5) Was this pamphlet distributed with the connivance of the returned candidate?

(6) Whether the offence of undue influence was committed by others without his connivance, and if so, whether it had material effect on the result of the election?

36. Let us first address ourselves to the question of interpretation of

Sec. 18. We have read the views expressed by Bhargava J., and Mitter J., but with respect we differ from them. Bhargava J., has held that the distribution of the pamphlet amounted to an offence under Sec. 171G, I. P. C., and not under Sec. 171C, I. P. C. According to Mitter J., distribution of the pamphlet by post and in the Central Hall does not by itself fall within Sec. 18 of the Presidential and Vice-Presidential Elections Act, 1952. According to him, before any publication of a defamatory matter relating to a candidate can be treated as commission of the offence of undue influence there must be some overt act in addition to the mere publication—some attempt or persuasion of a voter to restrain the free choice of a candidate before the law of undue influence is attracted. In our opinion, if distribution of the pamphlet by post to electors or in the Central Hall is proved it would constitute 'undue influence' within Sec. 18 and it is not necessary for the petitioners to go further and prove that statements contained in the pamphlet were made the subject of a verbal appeal or persuasion by one member of the electoral college to another and particularly to those in the Congress fold.

37. The Presidential and Vice-Presidential Elections Act, 1952, was passed to regulate certain matters relating to or connected with elections to the office, inter alia, of the President of India. Part III of the Act deals with disputes regarding elections and Sec. 18 therein contained lays down the grounds for declaring the election of a returned candidate to be void. The relevant part of the section provides:

"If the Supreme Court is of opinion:

(a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the connivance of the returned candidate; or

(b) that the result of the election has been materially affected (i) by reason that the offence of bribery or undue influence at the election has been committed by any person who is neither the returned candidate nor a person acting with his connivance..... the Supreme Court shall declare the election of the returned candidate to be void."

Under Sec. 18, therefore, the election has to be declared to be void if, amongst other things, undue influence has been committed (i) by the returned candidate himself, (ii) by a person with his connivance, or (iii) by any person who is neither the returned candidate nor one having acted with his connivance, if the result of the election has been materially affected. Section 18 (2) declares that "for the purposes of this section the offences of bribery and undue influence at an election have the same meaning as in Chapter IXA of the Indian Penal Code."

38. We may here compare the provisions of Sec. 18 (1) (a) and Sec. 18 (1) (b) (i) read with Sec. 18 (2) with Sec. 123 of the Representation of the People Act, 1951. This section lays down corrupt practices for the purposes of that Act which include undue influence upon proof of which an election has to be set aside. Though undue influence for purposes of that Act has the same meaning as in the present Act, that section does not go as far as Sec. 18 of the present Act so as to provide that even if it is committed by a third party, that is to say, not an election agent nor a person with the consent of the returned candidate, the election would still be declared to be void provided of course that it has been materially affected by such undue influence. From the fact that both these Acts were enacted by the same Legislature and Act 31 of 1952 was passed after the Representation of the People Act was passed, it is clear that Parliament deliberately made Sec. 18 stricter than the Representation of the People Act, firstly, by using the words "connivance of the returned candidate" instead of the words "his consent", and secondly, by including undue influence committed even by a stranger, having nothing to do with the returned candidate, as a ground for declaring the election to be void, the only condition in respect of such an act being that it should have materially affected the election. The object of doing so is obvious, namely, that Parliament wanted to ensure that in respect of an election for the highest office in the realm the election should be completely free from any improper influence emanating even from a third party with whom the returned candidate had no

connection and without any connivance on his part. The only limitation, as aforesaid, placed in Sec. 18 is that in such a case it has to be established that the election was materially affected. The questions therefore, which would arise under S. 18 would be: (1) Has the offence of undue influence been committed? (2) If so, was it committed by the returned candidate or by a person with his connivance? and (3) even if the offence committed was by a stranger and without the connivance of the returned candidate, has the commission of that offence by such "any person" materially affected the election?

39. Chapter IXA of the Penal Code which deals with offences relating to elections was introduced in the Code by the Indian Election Offences and Inquiries Act (XXXIX of 1920). Section 171A defines 'candidate' and 'electoral right'. An electoral right means the right of a person to stand or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election. Section 171C, which deals with the offences of undue influence reads as under:

"(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-sec. (1), whoever

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1)."

Sub-section (3) lays down that:

"A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section." Section 171F provides for the penalty for the offence of undue influence

which is either imprisonment upto one year or with fine or both. Section 171G provides:

"Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true in relation to the personal character or conduct of any candidate shall be punished with fine."

40. The electoral right of an elector as defined in Section 171-A (b) of the Indian Penal Code, means "the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election." It was said that the right to vote envisages two stages: the first stage is when the elector goes through the mental process of weighing the merits and demerits of the candidates and then making his choice and the second stage is when having made his choice he goes to cast his vote in favour of the candidate of his choice. The argument was that the language of S. 171C suggests that undue influence comes in at the second and not at the first stage, and therefore, it can only be by way of some act which impedes or obstructs the elector in his freely casting the vote, and not in any act which precedes the second stage, i.e., during the stage when he is making his choice of the candidate whom he would support. This argument was sought to be buttressed by the fact that canvassing is permissible during the first stage, and therefore, the interference or attempted interference contemplated by S. 171C can only be that which is committed at the stage when the elector exercises his right, i.e., after he has made up his mind to vote for his chosen candidate or to refrain from voting. It was further argued that the words used in Section 171C were "the free exercise of vote" and not "exercise of free vote". The use of those words shows that canvassing or propaganda, however virulent, for or against a candidate would not amount to undue influence, and that undue influence can only mean some act by way of threat or fear of some adverse consequence administered at the time of casting the vote.

41. We do not think that the Legislature, while framing Chapter IXA of

the Code ever contemplated such a dichotomy or intended to give such a narrow meaning to the freedom of franchise essential in a representative system of government. In our opinion the argument mentioned above is fallacious. It completely disregards the structure and the provisions of Section 171C. Section 171C is enacted in three parts. The first sub-section contains the definition of "undue influence". This is in wide terms and renders a person voluntarily interfering or attempting to interfere with the free exercise of any electoral right guilty of committing undue influence. That this is very wide is indicated by the opening sentence of sub-section (2), i.e., "without prejudice to the generality of the provisions of sub-sec. (1)." It is well settled that when this expression is used anything contained in the provisions following this expression is not intended to cut down the generality of the meaning of the preceding provision. This was so held by the Privy Council in *King-Emperor v. Sibnath Banerji*, 1945 FCR 195=(AIR 1945 PC 156).

42. It follows from this that we have to look at sub-section (1) as it is without restricting its provisions by what is contained in sub-section (2). Sub-section (3) throws a great deal of light on this question. It proceeds on the assumption that a declaration of public policy or a promise of public action or the mere exercise of a legal right can interfere with an electoral right, and therefore it provides that if there is no intention to interfere with the electoral right it shall not be deemed to be interference within the meaning of this section. At what stage would a declaration of public policy or a promise of public action act and tend to interfere? Surely only at the stage when a voter is trying to make up his mind as to which candidate he would support. If a declaration of public policy or a promise of public action appeals to him, his mind would decide in favour of the candidate who is propounding the public policy or promising a public action. Having made up his mind he would then go and vote and the declaration of public policy having had its effect it would no longer have any effect on the physical final act of casting his vote.

43. Sub-section (3) further proceeds on the basis that the expression

"free exercise of his electoral right" does not mean that a voter is not to be influenced. This expression has to be read in the context of an election in a democratic society and the candidates and their supporters must naturally be allowed to canvass support by all legal and legitimate means. They may propound their programmes, policies and views on various questions which are exercising the minds of the electors. This exercise of the right by a candidate or his supporters to canvass support does not interfere or attempt to interfere with the free exercise of the electoral right. What does, however, attempt to interfere with the free exercise of an electoral right is if we may use the expression, "tyranny over the mind". If the contention of the respondent is to be accepted, it would be quite legitimate on the part of a candidate or his supporters to hypnotise a voter and then send him to vote. At the stage of casting his ballot paper there would be no pressure cast on him because his mind has already been made up for him by the hypnotiser;

44. It was put like this in a book on Elections:

"The freedom of election is two-fold: (1) freedom in the exercise of judgment. Every voter should be free to exercise his own judgment, in selecting the candidate he believes to be best fitted to represent the constituency; (2) Freedom to go and have the means of going to the poll to give his vote without fear or intimidation."* and **

45. We are supported in this view by the Statement of Objects and Reasons attached to the bill which ultimately resulted in the enactment of Chapter IXA. That Statement explains in clear language that "undue influence was intended to mean voluntary interference or attempted interference with the right of any person to stand or not to stand as or withdraw from being a candidate or to vote or refrain from voting, and that the definition covers all threats of injury to person or property and all illegal methods of

*Law and Practice of Elections and Election Petitions — Nanak Chand — 1937 Edn., p. 362;

**Law of Elections and Election Petitions — Nanak Chand—1950 Edn., p. 263.

persuasion, and any interference with the liberty of the candidates or the electors". "The legislature has wisely refrained from defining the forms interference may take. The ingenuity of the human mind is unlimited and perforce the nature of interference must also be unlimited."* and **

46. From a reading of Section 171G it is clear that in pursuit of purity of elections the legislature frowned upon attempts to assail such purity by means of false statements relating to the personal character and conduct of a candidate and made such acts punishable thereunder. But the fact that making of such a false statement is a distinct offence under Section 171G does not and cannot mean that it cannot take the graver form of undue influence punishable under Section 171F. The false statement may be of such virulent, vulgar or scurrilous character that it would either deter or tend to deter voters from supporting that candidate whom they would have supported in the free exercise of their electoral right but for their being affected or attempted to be affected by the maker or the publisher of such a statement. Therefore, it is the degree of gravity of the allegation which will be the determining factor in deciding whether it falls under Section 171C or Section 171G. If the allegation, though false and relating to a candidate's personal character or conduct, made with the intent to affect the result of an election, does not amount to interference or attempt at such interference, the offence would be the lesser one. If, on the other hand, it amounts to interference or an attempt to interfere, it would be the graver offence under Sec. 171-F read with Section 171C.

47. We are also supported in our view by a number of decisions given on similar statutory provisions. The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, contains the following relevant provisions. The expression "electoral right" was defined in the same manner as in Section 171A (b) of the Indian Penal Code. "Corrupt practice" in relation to an election by the members of a Provincial Legislative Assembly to fill seats in Provincial Legislative Council, means one of the practices speci-

fied in Pts. I and II of the First Schedule to this Order. "Undue influence" was defined in cl. 2 of the First Schedule to mean "any direct or indirect interference or attempt to interfere on the part of a candidate or his agent, or of any other person with the connivance of the candidate or his agent with the free exercise of any electoral right, provided that—

(a) without prejudice to the generality of the provisions of this paragraph, any such person as is referred to therein who

(i) threatens any candidate or elector, or any person in whom a candidate or elector is interested, with any injury of any kind, or

(ii) induces or attempts to induce a candidate or elector to believe that he or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of that candidate or elector within the meaning of this paragraph;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this paragraph."

Paragraph 5 of the First Schedule is similar to Section 171G and reads as follows:—

"The publication by a candidate or his agent, or by any other person with the connivance of the candidate or his agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate's election."

These provisions were the subject-matter of decision by the Election Tribunal in Amritsar City (Mohammadan) Constituency Case No. 2, The Indian Election Cases (1935-1950) 2 Doabia's EC 150 at p. 157. It was observed as follows:

"It is true that the definition of undue influence is widely worded and covers all kinds of fraudulent acts or omissions which in any way, directly

or indirectly, interfere with the free exercise of any electoral right, and it is also true that the definition extends not only to actual interference but even to an attempt at interference." But on the facts the Tribunal observed:

"There is no proper evidence of actual interference before us, and as regards the attempt, we have to see if there was the deliberate intent to mislead voters and thus make them exercise their electoral right under the wrong impression that the respondent had been set up as a candidate by the Muslim League."

It was argued before the Commission that threat or element of compulsion was an essential ingredient of the corrupt practice of undue influence. The Commission observed:

"We cannot, however, find any basis in the definition of "undue influence" for the proposition that unless Mr. Zaffar Ali Khan threatened, or compelled the voters to vote in a particular manner, the offence of "undue influence" was not complete. The definition of "undue influence" is very wide in its terms and includes four different forms of interference, viz., direct interference, indirect interference, direct attempt to interfere and indirect attempt to interfere, and it is nowhere laid down that such interference or attempt to interfere should be by the method of compulsion..... although we are prepared to concede that the inducement must be of such a powerful type as would leave no free will to the voter in the exercise of his choice. There would, of course, be in such a case mental compulsion in a sense but it is not necessary that there should be physical compulsion or that a threat must be actually held out by the person who interferes or attempts to interfere" (p. 160).

48. In Jujhar Singh v. Bhairon Lall (1953) 7 ELR 457 at p. 461 (Elec. Tribunal, Kotah), the petitioner was a Ram Rajya Parishad candidate, and the respondent, Bhairon Lall, fought on the Congress ticket. It was alleged that a poster was published against the Ram Rajya Parishad and Jagirdars and this constituted undue influence within Sec. 123 (2) of the Representation of the People Act 1951. It was held that the publication of the poster constituted undue influence. The Commission observed:

"It may be observed that an attempt to interfere by the method of compulsion is not necessary and that even the method of inducement may be sufficient, provided it be of such a powerful type as would leave no free will to the voter in the exercise of his choice. In other words, actual physical compulsion is not necessary, but, positive mental compulsion may be enough to give rise to an undue influence. For the reasons which we shall presently give, we read this sort of mental compulsion in the poster, and, therefore, hold that it falls within the purview of undue influence."

The slogan of the poster was described thus:

"Vote for Congress in order to put an end to the atrocities of the Jagirdars. On the left-hand side, a person—apparently a tenant—is shown tied up to a tree with a rope. On the right there is a well-dressed Jagirdar asking his man, who is seen waving a whip, to flog the tenant. Evidently, the tenant's wife who has apparently attempted to intervene, has been thrown down prostrate on the ground. To the right-hand side of the picture, there is symbol of 'two bullocks with yoke on', and nearabout the slit there are the hands of so many voters, male and female, attempting to cast their votes in the ballot-box."

49-50. In *Radhakanta Mishra v. Nityananda Mahapatra*, (1958) 19 ELR 203 (Orissa), there was a difference of opinion whether the respondent and his agent had committed corrupt practice of undue influence by publishing a booklet entitled "why should you vote for me" where the picture of a dead body with the objectionable caption appeared, and it was stated that the individual had died of police firing and that the Congress had killed him. Barman, J., held that it constituted undue influence while Rao, J., held that it did not. There being difference of opinion, the case went to Das, J., who held that it did not amount to undue influence. Das, J., observed regarding Section 123 (2) of the Representation of the People Act that "there may be some element of mental compulsion, but not necessarily a physical one or a threat actually held out by the person who interferes or attempts to interfere". We are not concerned with the question whether the booklet in that case constituted un-

due influence or not but only with the interpretation of the section. Barman, J., observed: "A voter must be able to freely exercise his electoral right. He must be a free agent. All influences are not necessarily undue or unlawful. Legitimate exercise of influence by a political party or association or even an individual should not be confused with undue influence. Persuasion may be quite legitimate and may be fairly pressed on the voters. On the other hand, pressure of whatever character, whether acting on the fears, threat, etc., if so exercised as to overpower the volition without convincing the judgment is a species of restraint which interferes with the free exercise of electoral right..... It is not necessary to establish that actual violence had been used or even threatened. Methods of inducement which are so powerful as to leave no free will to the voter in the exercise of his choice may amount to undue influence. Imaginary terror may have been created sufficient to deprive him of free agency."

51. The scope of Section 171C, I.P.C., was considered in a recent decision of this Court in *Baburao Patel v. Dr. Zakir Hussain*, (1968) 2 SCR 133 at p. 145 = (AIR 1968 SC 904 at p. 911). Wanchoo, C. J., speaking for the Court observed:

"It will be seen from the above definition that the gist of undue influence at an election consists in voluntary interference or attempt at interference with the free exercise of any electoral right. Any voluntary action which interferes with or attempts to interfere with such free exercise of electoral right would amount to undue influence. But even though the definition in sub-section (1) of Section 171C is wide in terms it cannot take in mere canvassing in favour of a candidate at an election. If that were so, it would be impossible to run democratic elections. Further sub-sec. (2) of Section 171C shows what the nature of undue influence is though of course it does not cut down the generality of the provisions contained in sub-section (1). Where any threat is held out to any candidate or voter or any person in whom a candidate or voter is interested and the threat is of injury of any kind, that would amount to voluntary interference or attempt at interference with the free exercise of

electoral right and would be undue influence. Again where a person induces or attempts to induce a candidate, or voter to believe that he or any person in whom he is interested will become or will be rendered an object of divine displeasure or of spiritual censure, that would also amount to voluntary interference with the free exercise of the electoral right and would be undue influence. What is contained in sub-section (2) of Section 171C is merely illustrative. It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercise of any electoral right begins. That is a matter to be determined in each case; but there can be no doubt that if what is done is merely canvassing it would not be undue influence.

As sub-section (3) of Section 171C shows the mere exercise of a legal right without intent to interfere with an electoral right would not be undue influence."

52. It is not necessary to consider the provisions of the Indian Contract Act or the English Law on the subject because we have a special definition given by Parliament.

53. The question that then arises is: Whether the publication of this pamphlet can be said to constitute undue influence? We have no doubt that it does fall within that definition. It is not necessary to reproduce the pamphlet in detail as we shall only be giving further publicity to this most objectionable pamphlet. The pamphlet after giving various fictitious incidents of sexual immorality, describes Shri N. Sanjiva Reddy a debauch without any sense of shame or morality. Then the pamphlet asks: "Should the name of the Congress be lowered to such depths that this moral leper, this depraved man should be set up as the Congress candidate for the highest post?" It further adds: "A senior Congress M.P. has expressed the fear: If Sanjiva Reddy becomes President, he will turn Rashtrapati Bhavan into a harem, a centre of vice and immorality."

54. It seems to us that these allegations are covered under Sec. 171C, even if they may be covered under Section 171G. But we are not concerned with Section 171G because that section has not been made a ground

for setting aside an election. We are only concerned with Section 171C. Be that as it may, we cannot add another sub-section to S. 171C, as follows:—

"A false statement of fact in relation to the personal character or conduct of any candidate even if made with the intention of interfering with the electoral right shall not be deemed to be interference within the meaning of this section."

55. It was said that this pamphlet cannot come under Section 171C because it was issued anonymously and, therefore, it was not likely to interfere with the choice of the electorate, particularly as the electorate consisted only of members of Parliament and members of State Legislatures. But, in our opinion, this argument is fallacious. First, this has no relevance to the question whether any attempt to interfere with the electoral right has been made or not. Secondly, a series of anonymous attempts in a country like ours would have as much, if not more, effect as one open powerful attempt. It would be dangerous to provide a sanctuary to anonymous attempts. Thirdly, on the facts of this case, can we say that the distribution in the Central Hall is the same thing as anonymous publication? If a member of Parliament distributes a pamphlet, is he not identifying himself with it unless he expressly dissociates himself from the pamphlet? It seems to us that the distribution in the Central Hall by members of Parliament has the same effect as if they had endorsed the pamphlet in writing.

56. We are accordingly of the opinion that distribution of the pamphlet by post as also distribution in the Central Hall constituted an attempt to interfere with the free exercise of the right to vote within Section 18 of the Act.

57. We must first mention that both the parties led extensive evidence to prove the genesis of the dispute between the Congress party led by Shri Jagjivan Ram and the Congress party led by Shri Nijalingappa. We were told about the proceedings of the Faridabad session and the Bangalore Session and the circumstances attending Shri Morarji Desai's resignation. Further the whole of the correspondence between the Prime Minister and Shri Nijalingappa, and between Shri Jagjivan Ram and Shri Fakhruddin

Ali Ahmed and Shri Nijalingappa between August 9 and August 18 was exhibited in the case. But as it is not necessary for us to determine the exact genesis of the dispute we will only take note of the fact that both the congress parties were opposed to each other at the time of the election and had different views on certain economic issues and the Presidential election became a vital issue between them. In view of the above we will have to judge the evidence given by the witnesses with care, and wherever possible seek corroboration of the evidence from circumstances or other independent evidence.

58. We may now deal with the question whether it is possible to find out who printed or published the pamphlet and whether it was distributed by post and/or in the Central Hall of Parliament. Regarding the authorship of the pamphlet no evidence has been led by the petitioners but it was contended on their behalf that if the pamphlet is closely scrutinised there are indications in the pamphlet that it is the work of some Congressmen belonging to that party of the Congress which is now led by Shri Jagjivan Ram. Although this argument appears to be attractive, we cannot come to the conclusion that it was the work of the members of any particular party. The fact that certain witnesses have admitted that the first part of the pamphlet represents their ideology leads us nowhere because it would not be difficult for other persons to reproduce their ideology in words. Their ideology is well known and they are not averse to expounding it in great detail, as was done before us. But as we have already said, we cannot hold that it is the work of members belonging to any particular political party.

59. Regarding the distribution by post there is overwhelming evidence that the pamphlet was widely distributed by post. Part of it will be referred to when dealing with the question of distribution of the pamphlet in the Central Hall. Even the Prime Minister Smt. Indira Gandhi, received a copy of it, as is clear from her letter — Exhibit P-85 — dated August 21, 1969, to Shri Madhu Limaye, M.P., in reply to his letter dated August 13, 1969. In this letter she, inter alia, wrote:

"The leaflet came to me by post and I immediately asked the Home Ministry to institute an inquiry as to the source so that necessary action could be considered. This was, before I received your letter."

No evidence was led by either side as to whether such an inquiry was made, and if so, whether the authorship of the pamphlet was found out. We may mention that Mr. Daphtary, the learned counsel for the respondent, did not argue the question about the distribution by post and admitted that distribution of the pamphlet by post had taken place.

60. Then we come to the question of distribution of the pamphlet in the Central Hall. On this point the evidence is extremely conflicting. Shri Kanwarlal Gupta, M.P., P.W. 11, stated that he saw the pamphlet being distributed in the Central Hall of Parliament by some members; one was Shri Yunus Saleem and the other was Shri Shashi Bhushan. He said that he was definite about these two members. He further stated that he did not receive it in Parliament but some other members did and it was being openly distributed. In cross-examination he stated that Shri Yunus Saleem gave it to two or three people; he came and gave one pamphlet to each. Shri Gupta produced copy of a letter dated August 14, 1969, which he had written to the Chief Election Commissioner in this connection. In this letter — Exhibit P-37 — it is, inter alia, stated:

"Moreover, pamphlets are being distributed in which vulgar charges have been levelled against another candidate for this high office. Character assassination is going on. I am sending a copy of the pamphlet in which vulgar and filthy attacks have been made against Shri N. Sanjiva Reddy. This amounts to corrupt practice under the Election Law. These pamphlets are being distributed by the supporters of the Prime Minister. Shri M. Yunus Saleem, a Minister in her Cabinet and some others are very active in it." (emphasis supplied).

The Chief Election Commissioner acknowledged this letter by his demi-official letter — Exhibit P-16 — dated August 14, 1969. This letter certainly corroborates Shri Kanwar Lal Gupta's statement that Shri Yunus Saleem was

distributing this pamphlet but it would be noted that in the letter to the Election Commissioner there is no mention of the Central Hall of Parliament. We will discuss this letter in detail a little later.

61. Smt. Jayabehn Shah, M.P., P.W. 25, deposed that she saw this pamphlet being distributed in the Central Hall and she saw Shri Shashi Bhushan, M.P., distributing it, although she did not receive it personally from him. We may mention that she belongs to the Congress Party headed by Shri Nijalingappa.

62. Shri Nanubhai Nichhabhai Patel, M.P., P.W. 26, deposed that he saw the pamphlet in the Central Hall of Parliament about the 12th or 13th of August, and Shri Yunus Saleem, Shri Shashi Bhushan, and Shri Chandra Shekhar were distributing the pamphlet; they came to give him this pamphlet but he told them: "Yes, I have received it in my flat". In answer to the question "what did they tell you" he stated:

"They asked me whether I had gone through this pamphlet thoroughly. I said, "Yes". Then they told me "Be careful and before voting you consider all these facts".

In answer to the question "Who told you?", he replied: "Mr. Saleem". In cross-examination he said that he had not told the petitioners or either of them, Shri Rama Reddy or Shri Abdul Ghani Dar, that the pamphlet was distributed by Shri Jagat Narain, Shri Mohan Dharia or by Shri Yunus Saleem. This question was put in cross-examination in view of the particulars supplied by Shri Abdul Ghani Dar, petitioner, that Shri Krishan Kant, Shri Chandra Shekhar, Shri Jagat Narain, Shri Shashi Bhushan and Shri Mohan Dharia had distributed the pamphlet, inter alia, to Shri N. N. Patel, M. P. Shri Abdul Ghani Dar had verified that this was on the information received from the member of Parliament mentioned as recipient of the pamphlet.

63. The learned counsel for the respondent, Mr. Daphtary, had at various times asked questions in cross-examination from the petitioners' witnesses in order to elicit the information they gave to Shri Abdul Ghani Dar or Shri Sri Rama Reddy with a view to show that the particulars and

the evidence in most cases are in conflict. He says that we should draw an inference against the evidence of these witnesses wherever there is conflict between what is stated in the particulars and what is ultimately stated in the evidence. In this particular case it appears that some particulars were given by guess-work rather than by ascertaining from the witnesses. We cannot, however, disbelieve witnesses only because the particulars are at variance with their evidence. But we will bear the fact in mind while appreciating their evidence.

(After discussing evidence (Paras 64 to 129) regarding the distribution of the pamphlet His Lordship proceeded.)

130. Viewing the evidence as a whole we are of the opinion that the pamphlet was distributed by post and in the Central Hall of Parliament by some members of Parliament and there was wide discussion about it in the Central Hall. As we have mentioned earlier, the evidence of the witnesses of the petitioners that there was distribution in the Central Hall is corroborated by contemporaneous documents.

131. On the question as to who were the persons who were distributing the pamphlet in the Central Hall it is not, in our opinion, necessary for us to arrive at a finding from a mass of evidence which is both conflicting and partisan. The distribution of the pamphlet in the Central Hall was relied on by the petitioners for the purpose of bringing home to the respondent knowledge about the pamphlet and its publication and his connection with it. The petitioners, however, have failed in their object, for, there is no evidence whatsoever to show that the respondent had any connection with the pamphlet or with its distribution. Nor is there any evidence to show that anyone connected with the distribution either through the post or in the Central Hall had any contact with the respondent, or that he distributed it with his knowledge or connivance. The question of identity of those who distributed it in the Central Hall, therefore, has in these circumstances become unnecessary and even futile. What is also equally important is that there is no provision in the Act for giving notice to and

hearing persons alleged to be the distributors. A finding that a particular member or members of Parliament committed the offence of publication, an act punishable under the Penal Code, would thus amount to a finding arrived at without giving such person or persons an opportunity of being heard.

132. It was urged on behalf of the petitioners that the respondent, Shri V. V. Giri, had connived at the distribution of the pamphlet.

[Then again discussing evidence regarding such connivance (Paras 132 to 150) His Lordship observed]: We must, therefore, hold that it has not been proved that there was any connivance on the part of Shri Giri to the printing, publishing or distribution of the pamphlet.

151. We have already said, and we may repeat, that there is no evidence whatsoever that there was any intimate connection between Shri V. V. Giri and the alleged distributors. What they were doing in this connection they were doing on their own and Shri Giri cannot be held responsible for their deeds unless, of course, it is established that the result of the election had been materially affected by the distribution of the pamphlet. This question we shall now consider.

152. It is well settled that the burden of proving that the result of the election has been materially affected is on the petitioners. (See *Vashist Narain Sharma v. Dev Chandra*, (1955) 1 SCR 509 = (AIR 1954 SC 513); *Mahadeo v. Babu Udai Pratap Singh*, (1966) 2 SCR 564 = (AIR 1966 SC 824); *Paoki Haokip v. Rishang*, Civil Appeal No. 683 of 1968, D/- 12-8-1968 = (AIR 1969 SC 663) and *G. K. Samal v. R. V. Rao*, Civil Appeal No. 1540 of 1969, D/- 20-1-1970 (SC). The learned counsel, relying on *Surendra Nath Khosla v. Dalip Singh*, 1957 SCR 179 = (AIR 1957 SC 242), urged that this court should draw a presumption, as was done in the case of a rejection of a nomination paper, that the result of the election has been materially affected, from the nature of the pamphlet and the manner of its distribution. He further stressed the fact that the petitioners were not in a position to compel witnesses to disclose their change of view and say for whom they voted.

153. A similar argument was advanced before this Court in *Samant N. Balakrishna v. George Fernandez*, AIR 1969

SC 1201 at p. 1225. But the learned Chief Justice rejected it thus:

"In our opinion the matter cannot be considered on possibility. *Vashist Narain's* case, (1955) 1 SCR 509 = (AIR 1954 SC 513) insists on proof. If the margin of votes were small something might be made of the points mentioned by Mr. Jethamalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently huge. There is no reason, therefore, for a reasonable judicial guess. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature. In *Vashist's* case, (1955) 1 SCR 509 = (AIR 1954 SC 513) and in *Inayatullah v. Diwanchand Mahajan*, 15 ELR 219 = (AIR 1959 Madh Pra 58) the provision was held to prescribe an impossible burden. The law has however remained as before. We are bound by the ruling of this Court and must say that the burden has not been successfully discharged. We cannot overlook the rulings of this Court and follow the English rulings cited to us."

The learned counsel invited us to overrule this decision. It is too late in the day to do this. This view was taken very early by various Election Tribunals. It was observed in *Surendra Narayan Sinha v. Babu Amulyadhane Roy*, (1935-1950) 2 Doabia's E. C. 368 at p. 378:

"In the direct form in which provision is made for this matter in paragraph 7 (1) (c) of the Order there is no scope for interference on the ground that in the opinion of the Commissioners the result of the election might have been affected by the irregularity. This view has been taken in respect of a similar provision to that laid down in paragraph 7 (1) (c) in three cases reported in *Hammond's Election Cases* (1936 edition), namely in *Bulandshahr District (East) 1921* (page 219), *Lahore City (M) 1921* (page 469), and *Patna West (N. M. R.) 1927* (page 535). Then the Commissioner goes on to say that "it may be that in some circumstances the provision in this rule may operate harshly, where a tribunal may feel that the result of an election may well have been affected by a serious irregularity, but it may be impossible for the petitioner to establish this positively but we have to interpret and follow the rule as it stands."

154. Parliament, knowing of the views held by various Commissioners and Judges

have failed to intervene, and it is not for us to legislate.

155. Let us then see if the petitioners have been able to affirmatively prove that the result of the election was materially affected by the distribution of the pamphlet. They sought to prove this by showing what the impact of the pamphlet on various electors and their reaction was. The reaction, as is to be expected varied greatly in its intensity. The witnesses describe it variously "It was in bad taste, very derogatory; it was dirty, scandalous, extremely bad, pernicious, contemptible, character assassination, horrible, vulgar and scurrilous, false and malicious, foul and filthy, unpleasant and foul" Shri Madhu Limaye, M. P., thought that it would affect the chances of his candidate, Shri Giri. Shri Kanwar Lal Gupta, M. P., was in doubt what to do and what not to do. Shri K. S. Chavda, M. P., said that he changed his mind. Shri N. P. C. Naidu, M. P., concluded that members would not vote for Shri Reddy. Shri Shiv Narain, M. P., frankly stated that though he thought that 'such a man' should not be the President, yet Shri Rama Reddy convinced him that the pamphlet was totally false and he abided by the decision of the Congress Party Board. Smt. Jayabehn Shah, M. P., felt perplexed right upto the date she cast the vote but failed to positively assert that she voted for some other candidate because of the pamphlet. Shri N. N. Patel, M. P., said that he changed his attitude after reading the pamphlet and adhered to it till the last moment. Shri Mohan Lal Gautam, M. P. does not disclose how he voted. Neither does Shri S. Supakar, M. P., disclose how he voted, although he felt very sad on reading the pamphlet. Shri C. D. Pande, M. P., said that although his faith in the uprightness of Shri Sanjiva Reddy was shaken, it did not affect his vote. Shri P. N. Deb, M. P., felt very much prejudiced against Shri Reddy but did not say that he voted against him because of this pamphlet. Shri Hukum Chand Kachwai, M. P., a member of the Jan Sangh said that at that time he thought the allegations foul and they did influence his mind, but failed to say whom he voted for. Shri Suraj Bhan, M. P., deposed that the pamphlet, so far as he was concerned, affected the directions which had been given by his leaders. Smt. Pushpabehn Mehta, M. P., does not say that the pamphlet affected her vote.

Shri Morarji Desai, M. P., described the impact on his mind thus:

"This would affect an average voter against Shri S Reddy adversely, because the contents are so shocking and in this country people believe many things without going into them, especially wrong things are believed more easily."

Shri Shri Chand Goyal, M. P., admitted that "it is not that I exercised my franchise guided by it." The impact on Shri Ram Krishan Gupta was totally different than intended. He said that after reading the pamphlet "I became a stronger supporter of Shri Sanjiva Reddy because I thought such like posters are not good and should not be issued." Shri R. Muni-swamiiah, M. L. A., said that the contents prejudiced his mind, and he could not risk not to believe them, but did not disclose how he voted. He, however, admitted that he is a loyal Congressman and has adhered scrupulously to the directives of his party. Shri S. Nijalingappa said that the pamphlet would adversely affect Shri Reddy's chances of success. Shri M. S. Gurupadaswamy, M. P., did not say that the pamphlet affected him although "the motivation was to defame the candidate Shri Sanjiva Reddy and jeopardise his chances of being elected as President." Shri D. S. Raju, M. P., said that he was shocked by the pamphlet but he had always been a loyal Congressman and scrupulously abided by the directives of the party. Shri Patil Putappa, M. P., felt whether he would be doing the right thing by voting for Shri Sanjiva Reddy after reading the pamphlet but admitted that he had always been disciplined and loyal Congressman and loyal to the directives of the party. Shri Sher Khan, M. P., did not believe in the truth of the allegations in the pamphlet as he had known Shri Sanjiva Reddy personally, but felt that those persons who did not know Shri Sanjiva Reddy might be affected by the pamphlet. Chaudhary A. Mohammad, M. P., said that the pamphlet did affect his mind but he did not view his decision in that light, being a loyal soldier of the Congress. Shri C. M. Kedaria deposed that after reading the pamphlet he could not risk voting for such a candidate for such a high post. Whether he actually voted for Shri Sanjiva Reddy or not is anybody's guess because neither side asked him that question. Shri N. Sri Rama Reddy M. P., one of the petitioners, had known Shri Sanjiva Reddy for the last 35 years, and was his counting agent. It is not

suggested that his vote was affected by the pamphlet. Shri Abdul Ghani Dar, M. P., a petitioner, stated that after the pamphlet was read out to him he thought "that country was sinking and extreme danger has been posed to the democracy." It is, however, quite clear from his evidence that he did not believe that Shri Sanjiva Reddy was a debauch. We have not referred to the evidence of electors from U. P. who deposed to meeting Shri Dinesh Singh at Lucknow because, as will presently appear, much reliance cannot be placed on what they say.

156. It will be evident from the above analysis of the evidence that apart from two witnesses it is not certain whether the others were so affected by the pamphlet that they changed their mind. Then there are witnesses who say that there was no effect on their voting, either because they knew Shri Sanjiva Reddy or did not believe the allegations or that they were loyal and disciplined members of the Congress Party. Five witnesses were strongly prejudiced but they do not say that this prejudice finally affected their voting or not. Two remained sad or disgusted but failed to disclose whether it had any effect on them. One thought that the party directive was affected. Apparently he was not personally affected. One witness became a firm supporter of Shri Sanjiva Reddy because of the pamphlet. Some witnesses opined that others would get affected, which evidence cannot assist the petitioners in any manner.

157. On this evidence it is difficult to hold that the petitioners have proved that the publication and distribution of the pamphlet materially affected the result of the election. It only leads to the conclusion that it probably did have some effect but the vast majority of the electors were able to throw off the effect of the pamphlet and vote according to their own personal wish or according to the mandate of their party.

158. There is evidence that there was a great deal of talk about the pamphlet. There was time before voting for the electors to exchange views about the pamphlet and ascertain the truth. Shri Sanjeeva Reddy had been the Speaker of the Lok Sabha and was a well-known and leading political personality.

159. There were various other issues exercising the minds of electors, particularly belonging to the Congress Party.

If in spite of all these factors some were unduly influenced in their thinking it was for them to come and say so. There was no landslide against Shri Sanjiva Reddy. Two hundred and sixty-eight members of Parliament gave him the first preference. Ninety-two members of Parliament, who had given first preference to Shri C. D. Deshmukh gave second preference to Shri Sanjiva Reddy. It is, however, true that if 26 more members of Parliament had voted for Shri Sanjiva Reddy, instead of Shri Giri, the former would have been elected.

160. Therefore, on the evidence before us, it is impossible to sustain the contention of the petitioners. In the result we hold that it has not been proved that the result of the election was materially affected by the publication and distribution of the pamphlet.

161. The learned counsel for the petitioners urged another point in order to impeach the validity of the election. It was said that Shri Dinesh Singh, then Minister for External Affairs, visited Lucknow somewhere round about the 10th of August and exercised undue influence on various members of U. P. Legislature. Shri Dinesh Singh denied having ever visited Lucknow round about that time. He said that he did not go to Lucknow till after the polling date. A number of witnesses have been produced on behalf of the petitioners to establish the visit of Shri Dinesh Singh to Lucknow.

[After discussing the evidence in Paras 162 to 183 His Lordship concluded.]

184. We are satisfied from the evidence which we have extracted above that Shri Dinesh Singh did not visit Lucknow on the 10th of August or any other day thereabout and the case of the petitioners that Shri Dinesh Singh visited Lucknow is not true.

185. We have already mentioned that it was alleged in the petition that Shri V. V. Giri repeatedly stated at various places that "a man of character and integrity should have been selected" and he, in well-guarded language, was stating that Shri Reddy was not a man of character. Shri V. V. Giri denied these allegations and stated that throughout his statements he adhered to the stand as a candidate for the office of the President. The petitioners produced 8 witnesses to substantiate this charge. It is common ground that Shri V. V. Giri visited Lucknow during his election tour —

Lucknow was his first halt—and addressed a meeting at Darulshafa. There is dispute as to what Shri Giri said at the meeting and as to whether he met M. L. As. individually or in groups. The eight witnesses mentioned are: Shri Bansidhar Pandey, P. W. 18, Shri Ram Singh, P. W. 19, Shri Jagdish Pershad, P. W. 20, Shri Rajendra Prasad, P. W. 21, Shri Basant Lal Sharma, P. W. 22, Shri Ram Pyare Panike, P. W. 37, and Shri Abdul Salim Shah, P. W. 38. These witnesses also deposed to Shri Dinesh Singh's visit to Lucknow and we have disbelieved their version. In these circumstances we must view their evidence with extreme care and caution.

186. It will be noticed that the witnesses have given different versions as to what Shri V. V. Giri said.

187. Shri Bansidhar Pandey, P. W. 18, Shri Jagdish Pershad, P. W. 20, and Shri Basant Lal Sharma, P. W. 22, said that Shri Giri told them that they should vote for him in the Presidential election. P. W. 19, Shri Ram Singh's version was: "At that time he asked us that I am the candidate of the Prime Minister and I must be voted for the Presidential Election and she has supported him and therefore I must get the votes". Shri Ram Pyare Panike, P. W. 37, struck a different note. According to him Shri V. V. Giri said: "He told us that we should vote for him because he told us that he was also the Governor of other States and he was also Vice-President. So he told us that a man like him should be voted and we should vote in favour of Mr. Giri". He further deposed that after the meeting he and three or four M. L. As. met Shri Giri separately and he told them the same thing and in addition said: "If you want to progress India a man like me should be voted".

188. P. W. 38, Shri Abdul Salim Shah's version is that Shri V. V. Giri said that he had been the Vice-President and also a Governor on behalf of the Congress and

"I have spent the whole of my life in the Congress in the companionship with Mahatma Gandhi. I deserve it more that I should be elected as the President of India."

He added that at a personal meeting along with Shri Mumtaz Khan Shri Giri asked us whether we would vote for him.

189. The last witness on this point, Shri Mumtaz Khan, P. W. 44, gave the

most detailed version. According to him Shri Giri

"appealed to the members of the Assembly to vote for him. He said that he has held very high offices. He was the Vice-President of India. He was also the Governor of U. P., he has been doing social service all throughout his life and he was a very fit candidate for the Presidency of India. Besides this, he said that the other candidates are not as good as he is. Besides, he also said this thing that the Congress had done a great blunder in nominating Mr. Sanjiva Reddy as its candidate. He said all these things." At a personal meeting with him and two or three friends, according to this witness, Shri Giri

"appealed to us that you vote for me and besides this he said that Sanjiva Reddy is not a suitable candidate. There are so many spots on his character and the Congress High Command has done a great blunder in nominating him, as its candidate. Besides this, he said you see my services and all these things."

190. It will be noticed that Shri Mumtaz Khan, P. W. 44, is the only witness who stated that reference was made to Shri Sanjiva Reddy, and Shri Ram Singh, P. W. 19, is the only witness who mentioned that a reference was made to the Prime Minister.

191. Shri Daphtary, the learned counsel for the respondent, put all the above statements to Shri V. V. Giri. Shri Giri categorically denied meeting M.L.As. individually or in small groups. He said that all his addresses were on the basis of the statement that he issued on July 13, 1969. He stated that at no stage he said that he was supported by the Prime Minister either at Lucknow or elsewhere. He further deposed that he never referred to the "other candidates" and whatever he stated was about his own qualifications. He denied having referred to Shri Sanjiva Reddy and also denied having ever said that Shri Sanjiva Reddy was not a suitable candidate, and further, according to Shri Giri, it was absolutely false that he said that

"there are so many spots on his character and the Congress High Command has done a great blunder in nominating him as its candidate".

He admitted that he said about himself, his qualifications, but there also he was very guarded.

192. On the respondent's side Shri Shivanand Nautiyal, M. L. A., R. W. 26,

supported Shri Giri's version of the meeting. Shri Nautiyal admitted that he was an active supporter of Shri Giri. According to him, Shri Giri said that he was an independent candidate and told everything about his work and nothing more; in particular he did not, in the course of what he said, refer to Shri Sanjiva Reddy, nor did Shri Giri say that he was Shrimati Indira Gandhi's candidate. According to the witness, after the meeting Shri Giri left, accompanied by 17 or 18 people, and that no talk took place between them and Shri Giri. In cross-examination he stated that Shri Giri talked about his work and his visit to many countries and he explained everything but did not discuss political issues with them.

193. Another witness, Shri Ashraf Ali Khan, M. L. A., R. W. 27, gave an account of Shri Giri's talk to them. He said:

"He talked about his candidature that he was seeking his election as an independent candidate, because he considered that the post of the President was of such a stature that a non-party man should seek election, and that he had always stood for the common man and worked for him throughout his labour movement, and he was seeking the vote of all persons who believed in the ideology of the common man".

He further added that not a single word was said about Shri Sanjiva Reddy or that he was a candidate put up by Smt. Indira Gandhi. The witness admitted that he was elected on the Congress ticket; he only went to the meeting because it was held in the hostel compound. He said that other congressmen also attended the meeting because it was held in the hostel.

194. The statement of Shri V. V. Giri, dated July 13, 1969, is exhibited as P. 66A. Our attention was invited by the learned counsel for the petitioners to the sentence in the statement:

"I would only say that the candidate selected for the highest office should possess character, integrity, patriotism, experience, record of service and sacrifice. I feel in all modesty I could claim to have these attributes in some measure". We are unable to appreciate how this sentence makes it probable that Shri Giri would mention Shri Sanjiva Reddy and say something about his character at Lucknow. Another passage in the statement which was pointed out was:

"The highest office of the land must be one that is above party politics. While the majority party has every right to choose its nominee, in a democracy care should be taken to see the candidate so selected enjoys, as far as possible, the confidence of other groups also. I am deeply pained by the recent events that have tended to lower the dignity and moral authority of this august office."

We are again unable to see how this makes it more probable that Shri Giri would attack the character of Shri Sanjiva Reddy at Lucknow.

195. Further, on August 1, 1969, it was not definitely known whether Smt. Indira Gandhi would support the candidature of Shri Giri. There is no evidence of Shri Giri having met the Prime Minister except on July 20, 1969. Shri Giri said that he had not spoken either to the Prime Minister or to any Minister before he announced his candidature. He further stated that he saw the Prime Minister on July 20, 1969, when she came to see him at a ceremonial function when he was leaving the Rashtrapati Bhavan and she had come to say "good-bye" and he said "good-bye" to her. He categorically stated that they did not meet each other any time between the 20th July and the 16th August, 1969.

195-A. We are of the view that Shri Giri's version is preferable to the version given by the petitioners insofar as there is any conflict, and therefore we hold that the allegations made in the petition in this respect have not been substantiated.

196. We may next deal with the allegations in paragraph 13 (c) (iii) of the petition to the effect that Shri Fakhruddin Ali Ahmed and Shri Yunus Saleem threatened Muslim voters that Shri Sanjiva Reddy was in fact a candidate of the Jan Sangh Party and that if he was elected the fate of the Muslim community in India will be in danger and in constant threat of extinction.

[Then after discussing evidence (paras 196 to 213) His Lordship observed.] It seems to us that the evidence on this point is too unsatisfactory to be believed without corroboration from independent sources.

214. In view of these considerations we hold that the allegations in sub-para 13 (c) (iii) have not been proved.

215. Only a few minor points now remain. No evidence was led in connection with the allegation made in sub-para (c) (i) of para 13 of the petition.

It was alleged, to state briefly, that the supporters of the returned candidate, Smt. Indira Gandhi and other Ministers, had misused their position for furthering the prospects of the returned candidate by telephoning large number of electors from their ministerial telephones. No witness was produced to prove these allegations. Telephone records and bills were summoned and produced in Court but no effort was made to connect the telephone records with the Ministers and the electors, who are alleged to have been contacted. There is no evidence regarding the electors who are alleged to have been called by the above named Ministers at their official residences and offices. No evidence was led on the allegation that Shri V. V. Giri sounded one of the Ministers to influence any particular electors who were found not amenable to his influence or persuasions. We must hold these allegations not proved.

216. Regarding the allegations in para 13 (c) (v), para 13 (c) (vi) and para 13 (c) (vii), we did not allow any evidence to be taken on the points because we were of the view that even if they were accepted, the allegations did not amount to undue influence. It seems to us that the threats indicated in those paras were too fanciful and remote and they could not constitute any attempt to interfere with the electoral rights of the electors.

217. It was stated in para 13 (c) (xiii) that

"on August 6, 1969 the U. P. Congress Committee President, Shri Kamalapati Tripathi and Shri C. B. Gupta, Chief Minister, jointly addressed a meeting of the Congress M. L. As. and appealed for solid backing for Shri Reddy. But when undue influence of the scare reached them they changed their stand. On August 13, 1969, Shri Kamalapati Tripathi also pleaded for freedom to vote. The same was the fate of the other State leaders".

According to Shri Kamalapati Tripathi, R. W. 61, he had issued an appeal, Ex. P74, on August 12, 1969, to all Congress legislators of the U. P. State Legislative Assembly, asking them to cast their vote in favour of Shri Sanjiva Reddy. He gave reasons in Ex. P74 why this should be done. But then he changed his stand. He gave the following explanation in answer to the question: "After issuing this appeal did you change your position in relation to the Presidential election?"

"Well, I may say that I made a choice. The letters to the Congress President of that time, Shri Nijalingappa, written by Jagivan Ram and Fakhruddin Ali Ahmad, were published in the papers on the 12th of August, if I remember the date correctly, in which the demand to sanction the freedom to vote was published. I also made a request to the Congress President to allow this freedom of vote in view of the serious situation developing within the organisation regarding this question, and I requested that by sanctioning that freedom of vote, perhaps, it would be possible to maintain the unity and avoid disruption in the organization". He further added:

"It was, perhaps, on the 14th evening. And then I saw very clearly that on this issue a split was going to take place in the organization. So, when the organization was going to be divided, as I saw it, I thought that I should make a choice of my own self as to where I should belong, and I made that choice."

It seems to us that no connection has been proved between the change in his stand and the alleged scare mentioned in sub-para 13 (c) (xiii).

218. In conclusion we hold the pamphlet was sent by post. Further, the pamphlet was distributed in the Central Hall of Parliament. This distribution itself constitutes undue influence within S. 18(1) (a) of the Act. It is, however, not proved that this pamphlet was distributed by workers of the respondent, or with the connivance of the returned candidate. We further hold that it has not been proved that the result of the election has been materially affected by the distribution of the pamphlet. The rest of the allegations either do not amount to undue influence or were not proved.

Issue No. 7 in E. P. No 1/1969, Issue No. 9 in E. P. No. 4/1969 and Issue No. 11 in E. P. No. 5/1969

What relief, if any, are the petitioners entitled to?

219. The petitioners are not entitled to any relief as no ground has been made out for declaring the election of the respondent to be void.

220. In our order dated May 11, 1970, we had directed that the parties will bear their own costs. We passed this order regarding costs because we were satisfied that the pamphlet had been sent by post and distributed in the Central Hall and this justified the petitioners in bringing the two main petitions. Most of the evi-

dence which was led in Court dealt with the question of the distribution of the pamphlet. Further, as pointed out in the judgment, a number of witnesses have not told the whole truth. As a matter of fact we were distressed to see truth being sacrificed at the altar of political advantage by these witnesses.

221. BHARGAVA, J. — These four election petitions all challenge the election of the President of India for which polling was held on the 16th August, 1969, and the result of which was declared on the 20th August, 1969. The petitioners in Election Petitions Nos. 1 and 3 of 1969 were candidates at the election. The nomination papers of both these petitioners were rejected by the Returning Officer. The petitioners in the other two Election Petitions Nos. 4 and 5 of 1969 were electors for the election of the President. The successful candidate, Shri V. V. Giri, is the sole respondent in Election Petitions Nos. 1, 4 and 5 of 1969, while, in Election Petition No. 3 of 1969, he was impleaded as respondent No. 2 and the Union of India, through the Election Commission, as respondent No. 1. In this judgment, the reference to respondent will be to the successful candidate, Shri V. V. Giri.

222. The election was occasioned by the demise of the then President of India on the 3rd May, 1969. The Election Commission issued a notification under S. 4 of the Presidential and Vice-Presidential Elections Act No. XXXI of 1952 (hereinafter referred to as "the Act") appointing the 24th July, 1969, as the last date for filing nomination papers. The date for scrutiny of the nomination papers was 26th July, 1969, and the last date for withdrawal of nominations was the 29th July, 1969. The polling was fixed for the 16th August, 1969.

223. 24 nomination papers were filed by the last date for filing nominations. The scrutiny took place on 26th July, 1969, in which the Returning Officer rejected 9 nomination papers, including the nomination papers of the petitioners in Election Petitions Nos. 1 and 3 of 1969. He accepted the nomination papers of 15 candidates. None of the 15 candidates withdrew his nomination by 29th July, 1969, the last date for withdrawal. At the poll on 16th August, 1969, consequently, there were these 15 candidates. Counting of votes took place up to the 20th August, 1969, when the result was declared and the respondent, who was

one of the candidates whose nomination had been accepted by the Returning Officer, was declared elected. These election petitions have been filed by various persons, as enumerated above, challenging this election of the respondent.

224. Various grounds have been taken in the pleadings in these election petitions for challenging the validity of the election of the respondent which, briefly described, are:—

(1) That the nomination papers of candidates Shri Shiv Kirpal Singh, Shri Charan Lal Sahu and Shri Yogi Raj were wrongly rejected by the Returning Officer;

(2) That the nomination papers of the respondent were wrongly accepted by the Returning Officer;

(3) That the nomination papers of Shri Rajbhoj Pandurang Nathuji, Shri Santosh Singh Kachhwaha, Shri Babu Lal Mag and Shri Ram Dulare Tripathi were wrongly accepted by the Returning Officer;

(4) That the offence of undue influence had been committed at the election by the respondent and his supporters with the connivance of the respondent;

(5) That the result of the election had been materially affected by the commission of offence of undue influence by persons other than the respondent without his connivance;

(6) That the offence of bribery at the election had been committed by the respondent and his supporters with his connivance;

(7) That the result of the election had been materially affected by the commission of the offence of bribery by persons other than the respondent;

(8) That Part III and Section 21 of the Act are ultra vires the Constitution as well as Rules 4 and 6 (3) (e) of the Presidential and Vice-Presidential Election Rules, 1952 (hereinafter referred to as "the Rules") promulgated under Section 21 of the Act are ultra vires the Constitution and the Act;

(9) That the elected Members of the Legislative Assemblies of the Union Territories were entitled to be included in the Electoral College for the election of the President and their wrongful non-inclusion had materially affected the result of the election, as well as it had violated Article 14 of the Constitution; and

(10) That the petitioners were entitled to dispute the election even on grounds other than those mentioned in Section 18 of the Act, viz., that the respondent or any person with his connivance had printed, published and distributed a pamphlet containing scurrilous attacks against the personal and moral character of one of the candidates, Shri N. Sanjiva Reddy, which were false.

225. The detailed facts relating to these grounds will be more conveniently mentioned when dealing with the various issues framed on the basis of these pleadings and, to avoid repetition, they are not being mentioned at this stage. On these pleadings, the following issues were framed in the various election petitions—
Election Petition No. 1 of 1969.

1. Whether the nomination papers of the petitioner, Shri Charan Lal Sahu and Shri Yogi Raj were wrongly rejected as alleged in paragraphs 5 (a) and (b), 6 and 7 of the petition?

2. Whether the nomination papers of the respondent were wrongly accepted as alleged in paragraphs 5 (c) and 8 of the petition?

3. Whether the nomination papers of Shri Rajbhoj Pandurang Nathuji and Pandit Babu Lal Mag were wrongly accepted as alleged in paras 5 (d) and 9 of the petition?

4. (a) Whether the elected members of the Legislative Assemblies of the Union Territories were entitled to be included in the Electoral College for the election of the President?

(b) Whether the non-inclusion of the members of the Legislative Assemblies of the Union Territories in the Electoral College amounts to non-compliance with the provisions of the Constitution? If so, whether the result of the election has been materially affected by such non-compliance?

(c) Whether the alleged non-compliance with the provisions of the Constitution has violated Article 14 of the Constitution?

5. Whether Section 21 of the Act is ultra vires the Constitution of India?

6. Whether Rules 4 and 6 (3) (e) of the Rules are ultra vires the Constitution and the rule-making power of the Central Government?

7. What reliefs, if any, is the petitioner entitled to?

Election Petition No. 3 of 1969

1. Whether the nomination paper of Shri Phul Singh, the petitioner, was wrongly rejected?

2. What relief, if any, is the petitioner entitled to?

Election Petition No. 4 of 1969.

1. Whether the nomination papers of Shri Shiv Kirpal Singh, Shri Charan Lal Sahu and Shri Yogi Raj were wrongly rejected, as alleged in paragraphs 8 (a) and 9 (a), (b) and (c) of the petition?

2. Whether the nomination papers of Shri Rajbhoj Pandurang Nathuji, Pandit Babu Lal Mag and Dr. Ram Dulare Tripathi were wrongly accepted as alleged in paragraphs 8 (b) and 10 (a), (b) and (c) of the petition?

3. Whether the nomination papers of the respondent were wrongly accepted as alleged in paragraphs 8 (c) and 11 of the petition?

4. (a) Whether all or any of the allegations made in paragraphs 8 (e) and 13 (a) to (m) of the petition constitute in law an offence of undue influence under Section 18 (1) (a) of the Act?

(b) whether the said allegations made in paragraphs 8 (e) and 13 (a) to (m) are true and proved?

(c) In the event of these allegations being proved and constituting undue influence—

(i) whether the returned candidate has committed the offence of undue influence?

(ii) whether the offence of undue influence was committed by his workers, and if so, with his connivance?

(iii) whether the offence of undue influence was committed by others without his connivance, and if so, whether that has materially affected the result of the election?

5. Whether Part III and Section 21 of the Act are ultra vires the Constitution of India?

6. Whether Rules 4 and 6 (3) (e) of the Rules are ultra vires the Constitution and the rule-making power of the Central Government?

7. (a) Whether the elected members of the Legislative Assemblies of the Union Territories were entitled to be included in the Electoral College for the election of the President?

(b) If so, whether the non-inclusion of the members of the Legislative Assemblies of the Union Territories in the Electoral College amounts to non-compliance with the provisions of the Constitution? If so, whether the result of the election has been materially affected by such non-compliance?

(c) Whether the alleged non-compliance with the provisions of the Constitution has violated Article 14 of the Constitution?

8. (a) Whether the petitioners are entitled to dispute the election of the respondent on grounds other than those mentioned in Section 18 of the Act?

(b) If Issue No. 8 (a) is decided in favour of the petitioners—

(i) whether the respondent or any person with his connivance printed, published and distributed the pamphlet at Annexure A-3 to the petition?

(ii) whether the pamphlet at Annexure A-3 contained any false statement of facts relating to the personal character and conduct of Shri N. Sanjiva Reddy, a candidate at the election and other persons named in the pamphlet?

(iii) whether the persons found responsible for publishing the pamphlet believed the statements made therein as true or had reason to believe them to be true?

(iv) whether the pamphlet was published with the object of prejudicing the prospects of the election of Shri Sanjiva Reddy and furthering the prospects of the election of the respondent?

(v) whether the election of the respondent is liable to be declared void on this ground?

9. What reliefs, if any, are the petitioners entitled to?

Election Petition No. 5 of 1969.

1. Whether the nomination papers of Shri Shiv Kirpal Singh, Shri Charan Lal Sahu and Shri Yogi Raj were wrongly rejected as alleged in paragraphs 8 (a) and 9 of the petition?

2. Whether the nomination papers of the respondent were wrongly accepted as alleged in paragraphs 8 (b) and 10 of the petition?

3. Whether the nomination papers of Shri Rajbhoj Pandurang Nathuji, Shri Santosh Singh Kachhwaha, Pandit Babu Lal Mag and Dr. Ram Dulare Tripathi were wrongly accepted as alleged in paragraphs 8 (c) and 11 of the petition?

4. (a) Whether all or any of the allegations made in paragraphs 8 (e) and 13 of the petition constitute in law an offence of undue influence under Section 18 (1) of the Act?

(b) Whether the said allegations in paragraphs 8 (e) and 13 are true and proved?

(c) In the event of these allegations being proved and constituting undue influence—

(i) whether the returned candidate has committed the offence of undue influence?

(ii) whether the offence of undue influence was committed by his workers, and if so, with his connivance?

(iii) whether the offence of undue influence was committed by others without his connivance, and if so, whether that has materially affected the result of the election?

5. Whether Part III and Section 21 of the Act are ultra vires the Constitution of India?

6. Whether Rules 4 and 6 (3) (e) of the Rules are ultra vires the Constitution and the rule-making power of the Central Government?

7. (a) Whether the elected members of the Legislative Assemblies of the Union Territories were entitled to be included in the Electoral College for the election of the President?

(b) If so, whether the non-inclusion of the members of the Legislative Assemblies of the Union Territories in the Electoral College amounts to non-compliance with the provisions of the Constitution? If so, whether the result of the election has been materially affected by such non-compliance?

(c) Whether the alleged non-compliance with the provisions of the Constitution has violated Article 14 of the Constitution?

8. (a) Whether the petitioners are entitled to dispute the election of the respondent on grounds other than those mentioned in Section 18 of the Act?

(b) If Issue No. 8 (a) is decided in favour of the petitioners—

(i) whether the respondent or any person with his connivance printed, published and distributed the pamphlet at Annexure A-38 to the petition?

(ii) whether the pamphlet at Annexure A-38 contained any false statement of facts relating to the personal character and conduct of Shri N. Sanjiva Reddy, a candidate at the election and other persons named in the pamphlet?

(iii) whether the persons found responsible for publishing the pamphlet believed the statements made therein as true or had reason to believe them to be true?

(iv) whether the pamphlet was published with the object of prejudicing the prospects of the election of Shri Sanjiva Reddy and furthering the prospects of the election of the respondent?

(v) whether the election of the respondent is liable to be declared void on this ground?

9. Whether the respondent or any other person with his connivance committed the offence of bribery as alleged in paragraph 15 of the petition?

9A. Whether the allegations in para. 15 constitute bribery within the meaning of the Act?

10. Whether the offence of bribery was committed at the election by any other person without the connivance of the respondent as alleged in paragraph 15 of the petition, and if so, whether it materially affected the result of the election?

11. What reliefs, if any, are the petitioners entitled to?

FINDINGS

Issue No. 5 of Election Petitions
Nos 1, 4 and 5 of 1969.

226. Under this issue in Election Petition No. 1 of 1969, the only point raised relates to the validity of Section 21 of the Act, while, in the other two election petitions Nos 4 and 5 of 1969, the validity of Part III of the Act as a whole is also challenged. It was contended that Part III of the Act is *ultra vires* Article 71(1) of the Constitution on the ground that it purports to curtail the jurisdiction conferred on the Supreme Court to enquire into and decide all doubts and disputes arising out of or in connection with the election of a President or Vice-President by laying down certain limitations, such as the grounds on which only the election of a President or Vice-President can be challenged in an election petition. The question of validity of the Act was considered by this Court in *Dr. N. B. Khare v. Election Commission of India*, 1958 SCR 648 = (AIR 1958 SC 139), where the Court dealt with the contention that the Act and the Rules framed thereunder are void on the ground that they derogate from the jurisdiction of the Supreme Court to enquire into and decide all disputes and doubts arising out of or in connection with the election of the President or the Vice-President. This proposition was supported by the argument that, under Section 18 of the Act, the election could be set aside only on certain grounds and that, further, under clause (b), it could be done only if the result of the election is shown to have been materially affected and that these are restrictions on the jurisdiction conferred by Article 71 (1) and are *ultra vires*. The Court held:

"Article 71 (1) merely prescribes the forum in which disputes in connection with the election of the President and

Vice-President would be enquired into. It does not prescribe the conditions under which the petition for setting aside an election could be presented. Under Article 71 (3), it is Parliament that is authorised to make law for regulating any matter relating to or connected with the election of the President or Vice-President, and the Act has been passed by Parliament in accordance with this provision. The right to stand for election and the right to move for setting aside an election are not common law rights. They must be conferred by statute and can be enforced only in accordance with the conditions laid down therein. The contention that the Act and the Rules derogate from the jurisdiction of the Supreme Court under Article 71 (1) must accordingly be rejected."

The argument advanced was that the Court, in giving that decision, incorrectly proceeded on the basis that Article 71 (1) merely prescribes the forum for the decision of doubts and disputes arising out of or in connection with the election of a President and Vice-President, and ignored the circumstance that Article 71 (1) actually confers jurisdiction on the Supreme Court which jurisdiction cannot be curtailed by a parliamentary law passed under Article 71 (3) as the power of Parliament to pass the law is subject to the provisions of the Constitution, including the provision contained in Article 71 (1). The distinction sought to be drawn has no force at all. In that case, the Court specifically dealt with the argument that Article 71 (1) confers jurisdiction on the Supreme Court and gave its decision after considering this aspect. In any case, even if the argument advanced is accepted that Article 71 (1) defines the jurisdiction of the Supreme Court, the manner in which that jurisdiction is to be exercised can only be regulated by an Act of Parliament passed in exercise of its power under Article 71 (3). In exercise of that power to regulate all matters relating to or connected with the election of a President or Vice-President, Parliament clearly had the power of laying down the grounds on which the election can be challenged and set aside, in addition to other matters relating to the election.

227. In this connection, learned counsel also wanted to draw an inference from the provision in Article 329 (b) of the Constitution which lays down that no election to either House of Parliament or to the House or either House of the Legis-

lature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The argument was that, in this Article, there was specific mention of a law made for calling in question an election by an election petition, whereas there is no such corresponding provision in Article 71 of the Constitution. The argument advanced is clearly misconceived. In the case of elections to either House of Parliament or to the House or either House of the Legislature of a State, Parliament exercises powers to make law with respect to all matters relating to or in connection with the election under Article 327 and not under Article 329 (b). Article 329 (b) is a provision which lays down a limitation on the manner in which an election can be called in question, while the procedure for calling in question the election, as well as the grounds on which the election can be called in question, can only be laid down by Parliament by a law passed under Article 327. In the case of Article 71, it appears that no need was felt of making a provision similar to Article 329 (b) when Article 71 (1) itself laid down the limitation that all doubts and disputes arising out of or in connection with the election of a President or Vice-President are to be enquired into and decided by the Supreme Court whose decision shall be final. This limitation does not affect or limit the power of Parliament to regulate matters relating to filing of election petitions in the Supreme Court and of the ground, on which the elections can be challenged when the Supreme Court exercises its jurisdiction under Article 71 (1). In these circumstances, the argument that Part III of the Act is ultra vires Article 71 (1) of the Constitution must be rejected.

228. So far as the validity of Sec. 21 of the Act is concerned, it was challenged on the ground that the power of making rules suffers from the vice of excessive delegation of legislative powers inasmuch as even essential matters of policy are left to be prescribed by rules by the Government and there are no guiding principles, so that the power can be exercised arbitrarily. It was further stressed that, in the Act, no provision similar to Section 169 (3) of the Representation of the People Act, 1951 or Section 28 (3) of the Representation of the People

Act, 1950, was included by Parliament so as to require that the Rules framed under Section 21 of the Act should be laid before each House of Parliament and that the Rules should be subject to modifications or annulment by Parliament. It is not possible to hold that Section 21 suffers from any such defects. Parliament laid down the essential matters of policy relating to elections, including election petitions, in the Act itself and, thereafter, in Section 21, delegated the power of making rules to the Central Government, subject to two principles of guidance. One is that the Rules are to be made after consulting the Election Commission, and the second is that the Rules must be such as are needed for carrying out the purposes of the Act. This second limitation clearly requires that the Government, in making Rules, has to ensure that the Rules are all required for carrying out the purposes of the Act; and that itself is a sufficient limitation on the exercise of that power arbitrarily by the Government. In Part II of the Act, the Legislature has laid down the essential regulations for holding the elections, and in Part III, similarly, the essential matters relating to filing of election petitions and their decision, including the grounds on which the elections can be challenged, have been prescribed by Parliament itself. It is in order to give effect to these principles laid down by Parliament itself in the Act that the Government is to exercise its power of making rules. Such power being already limited by the purposes of the Act cannot be held to be unguided or even arbitrary, even though Parliament did not choose to lay down the requirement that the Rules framed must be laid on the table of the two Houses of Parliament and should be subject to modification or annulment within a specified period. In fact, Parliament all the time has the power of altering the Rules by amending the Act itself in case it disapproves of any of the Rules made by the Government, while any Rule, which is shown to have been made in contravention of the provisions of the Act, or for any reason other than to give effect to the purposes of the Act, would be declared void by the Court not on the ground that there was excessive delegation of legislative power, but that it goes beyond the scope of the power conferred on the Government under Section 21 of the Act. Section 21 of the Act itself cannot, therefore, be held to be void on any ground.

Issue No. 6 of Election Petitions Nos. 1, 4 and 5 of 1969.

229. Under this issue, the petitioners challenged the validity of Rule 4 (1) of the Rules to the extent that it requires that a certified copy of the entry relating to the candidate in the electoral roll for the Parliamentary constituency in which he is registered must accompany the nomination paper, and the validity of the consequential provision in Rule 4 (2) which lays down that a nomination paper, to which the certified copy referred to in sub-r. (1) of this Rule is not attached, shall be rejected. This part of Rule 4 (1) is challenged on two grounds. One is that such a requirement is beyond the rule-making power of the Government under Section 21 of the Act, and the second is that the Rule is arbitrary and unreasonable inasmuch as it lays down only one single manner of showing that a candidate is an elector for a Parliamentary constituency by filing a certified copy of the entry, ruling out all other methods, such as filing of the published electoral roll itself. On the face of it, the first ground raised has no force. Clause (d) of sub-section (2) of Section 21 lays down that the Rules made under that section may, in particular, and without prejudice to the generality of the power granted under sub-section (1), provide for the form and manner in which nominations may be made and the procedure to be followed in respect of the presentation of nomination papers; and the requirement that a certified copy of the entry, showing that the candidate being nominated is an elector for a Parliamentary constituency which alone makes him eligible to stand as a candidate for the office of President or Vice-President, must accompany the nomination paper falls squarely within this clause. The requirement relates to the manner of proving that the candidate is an elector in a Parliamentary constituency. In any case, this provision in Rule 4 (1) would be fully covered by Section 21 (1) of the Act inasmuch as the requirement is for no other purpose except of ensuring a smooth and proper election to the office of the President or Vice-President which object can be achieved by enabling the Returning Officer to ensure that candidates, whose nominations are accepted by him, are eligible for election. In this connection, reference was made to the decision of this Court in *Ranjit Singh v. Pritam Singh*, (1966) 3 SCR 543 = (AIR 1966 SC 1626),

where the Court had to deal with Section 33 (5) of the Representation of the People Act, 1951, and the Court held:—

"The object of this provision obviously is to enable the returning officer to check whether the person standing for election is qualified for the purpose. The electoral roll of the constituency for which the returning officer is making scrutiny would be with him, and it is not necessary for a candidate to produce the copy of the roll of that constituency. But where the candidate belongs to another constituency, the returning officer would not have the roll of that other constituency with him and therefore the provision contained in Section 33 (5) has been made by the legislature to enable the returning officer to check that the candidate is qualified for standing for election. For that purpose the candidate is given the choice either to produce a copy of the electoral roll of that other constituency, or of the relevant part thereof or of a certified copy of the relevant entries in such roll before the returning officer at the time of the scrutiny, if he has not already filed such copy with the nomination paper."

This decision clearly supports the view that the requirement in Rule 4 (1) that a certified copy of the entry showing that the candidate is an elector in a Parliamentary constituency is necessary in order to enable the Returning Officer to check whether the candidate is eligible for nomination and election. The manner in which the Returning Officer should be given the necessary information is a matter of detail relating to nomination and, consequently, this Rule is within the scope of the power conferred on the Central Government to make Rules for giving effect to the purposes of the Act.

230. Based on this very decision cited above, learned counsel for the petitioners urged that, in Section 33 (5) of the Representation of the People Act, 1951, the requirement is the production of either a copy of the electoral roll, or of the relevant part thereof, or a certified copy of the relevant entry in such roll, while, in Rule 4 (1) of the Rules, the only manner of satisfying the Returning Officer about eligibility permitted is the filing of a certified copy of the entry and, consequently, the requirement in Rule 4 (1) is arbitrary and unreasonable. It has to be kept in view that the election for the office of the President or Vice-President does not stand on the same footing as the election

for membership of a House of Parliament or a House of the State Legislature. In the latter case the Returning Officer usually has the electoral roll of the constituency, from which election is to be held, with him and, by and large, the candidates standing from a constituency are enrolled as electors in the same constituency. Provision had to be made in Section 33 (5) of the Representation of the People Act, 1951, for those limited cases where the candidate stood for election from a constituency different from the one in which he is enrolled as an elector. In the case of election for the office of President or Vice-President, any elector enrolled in the electoral roll of any Parliamentary constituency in India is entitled to stand as a candidate, and it is clear that the electoral rolls of those constituencies will not be with the Returning Officer. In every case, therefore, it would be necessary that some evidence should be available with the Returning Officer so as to enable him to ensure that the candidate is eligible for election. In order to make certain that the election proceeds smoothly and to minimise the chances of disputes or doubts arising, the requirement laid down in Rule 4 (1) is that a certified copy of the entry alone should be accepted as the proper proof for showing eligibility of the candidate. Electoral rolls are subject to revision from time to time. At the general elections, they are fully revised and, then, subsequent alterations are made in them as occasions arise. The election to the office of a President or Vice-President may not coincide with or be very close to the time when there is general revision of the electoral rolls, so that the electoral rolls printed and published nearabout the time of general elections may be out of date by the time the election for the office of a President or Vice-President is held. The published electoral roll may, therefore, be misleading if it is allowed to be filed before the Returning Officer to show eligibility in the case of a Presidential or Vice-Presidential election. That seems to be the reason why Rule 4 (1) lays down that a certified copy of the entry alone will be the proper manner of satisfying the Returning Officer of the eligibility of the candidate. The original electoral roll, of course, cannot be produced as there is only one original which is retained either by the Electoral Registration Officer or in the office where the Chief Electoral Registration Officer directs it to be pre-

served in accordance with the Rules framed under the Representation of the People Act, 1950. In such circumstances, if the rule-making authority did not consider it safe to rely on printed copies of the electoral rolls issued generally at the time of general elections to Parliamentary constituency, it cannot be said that the authority acted arbitrarily or unreasonably. The smoothness of the elections could only be ensured by requiring the filing of a certified copy of the entry which would be immune from any doubt or challenge. The mere fact that the requirement of R. 4 (1) of the Rules differs from the requirement of Section 33 (5) of the Representation of the People Act, 1951, cannot be a ground for holding that Rule 4 (1) lays down an unreasonable restriction, so that this Rule must be held to be valid. Rule 4 (2), which prescribes the consequence for non-compliance with the requirement of Rule 4 (1), must also be held to be valid as it is intended merely to make the valid Rule 4 (1) effective.

231. The next challenge is to the validity of Rule 4 (3) and the consequential Rule 6 (3) (e) of the Rules. Rule 4 (3) lays down that no elector shall subscribe, whether as proposer or as seconder, more than one nomination paper at any election, and Rule 6 (3) (e) is the consequential provision laying down that the Returning Officer shall reject a nomination paper on the ground that the proposer or seconder has subscribed, whether as proposer or seconder, another nomination paper received earlier by the Returning Officer at the same election. The validity of Rule 4 (3) has been impugned on the ground that it is in derogation of the rights conferred on a candidate or on electors by Section 5 (2) of the Act. Section 5 reads as follows:—

"5. Nomination of candidates.— (1) Any person may be nominated as a candidate for election to the office of President or Vice-President if he is qualified to be elected to that office under the Constitution.

(2) Each candidate shall be nominated by a nomination paper completed in the prescribed form and subscribed by the candidate himself as assenting to the nomination and by two electors as proposer and seconder."

The argument is that every candidate, under Section 5 (2), has a right to be nominated by any two electors as proposer and seconder without any limitation

as to who those two electors are and irrespective of those electors having done any act, such as having proposed or seconded another candidate. It is also urged that this provision confers a right on every elector to subscribe a nomination paper as proposer or seconder without any limitation as to the number of nomination papers which can be so subscribed by him.

232. The submission that Section 5 (2) should be read as conferring any right either on the candidate or on the electors in respect of signing of nomination papers cannot be accepted. On the face of it, the provision made in Section 5 relates to procedural matters leading up to the exercise of electoral rights of a candidate or an elector. The filing of nomination paper only regulates the manner in which a candidate is to signify the fact that he desires to be elected, and the provision for the nomination paper being signed by two electors as proposer and seconder is meant only to indicate to the electors in general that the candidate is being put forward for election by at least two electors. The nomination paper also serves the purpose of informing the Returning Officer who are the candidates, so that appropriate steps can be taken for holding the poll by having ballot papers printed and appropriate number of ballot boxes provided. The language of Section 5 (2) itself shows that it was while prescribing the manner of subscribing a nomination paper that Parliament laid down that it should be subscribed by the candidate himself as assenting to the nomination and by two electors as proposer and seconder. Had there been an intention to confer a right on any of them, the language would have been different giving such indication by laying down what the candidate and the electors are entitled to do in respect of a nomination paper. Obviously, Section 5 only lays down the essential ingredients of the process of nomination, leaving the details of the manner of nomination to be filled up by Rules made by the Government under Section 21 of the Act. Rule 4 (3), which requires that no elector shall subscribe, whether as proposer or seconder, more than one nomination paper at any election, is, thus, supplementary to Section 5 (2) as containing a more detailed direction in respect of filing of nomination papers.

233. In this connection learned counsel for the petitioners referred to the deci-

sion of this Court in *Amolak Chand v. Raghuveer Singh*, (1968) 3 SCR 246 = (AIR 1968 SC 1203), in which a similar provision contained in Section 33 of the Representation of the People Act, 1951, as amended by the Amending Act 27 of 1956, came up for consideration. Prior to the Amending Act 27 of 1956, Section 33, dealing with this subject, specifically laid down that any person, whose name is registered in the electoral roll of the constituency and who is not subject to any disqualification mentioned in Section 16 of the Representation of the People Act, 1950, may subscribe as proposer or seconder as many nomination papers as there are vacancies to be filled, but no more, and there was also a consequential provision in Section 36 (7) (b) which laid down that, where a person has subscribed, whether as proposer or seconder, a larger number of nomination papers than there are vacancies to be filled, those of the papers so subscribed which have been first received, up to the number of vacancies to be filled, shall be deemed to be valid. These provisions were omitted by the Amending Act 27 of 1956, and thereafter, the language of Section 33 became similar to that of Section 5 (2) of the Act inasmuch as it required the candidate to deliver to the Returning Officer a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer. The question arose whether, if a single elector signed more than one nomination paper as a proposer, any of the nomination papers could be held to be invalid. The Court held that, after the enactment of the Amending Act 27 of 1956, there was no ban in Section 33 on an elector signing more than one nomination paper and, consequently, if an elector signed more than one nomination paper, all the nomination papers would be valid. That case is, thus, limited to the question whether there is or is no ban on an elector signing more than one nomination paper as a proposer. It did not lay down that every elector had been conferred a right to sign the nomination paper of more than one candidate as a proposer. While no right can be read as having been conferred by such a provision, there will be no bar to a rule being made by the rule-making authority limiting the number of nomination papers to be signed by each elector as a proposer or a seconder. In fact, Rules are always meant to fill in details of procedure in respect of which the Act does

not contain specific provisions. The Rules are meant to supplement the provisions of the Act and to deal with matters incidental, in respect of which there is no definite provision made in the Act itself. The fact that there is no ban in Section 5 (2) of the Act on an elector signing more than one nomination paper as a proposer or a seconder does not, therefore, mean that Rule 4 (3) of the Rules could not have been competently made by the Government. Rule 4 (3), on the face of it, contains a very reasonable direction. If there is only one vacancy for which election is to be held, an elector can reasonably be expected to nominate only one candidate as proposer and put him forward before the other electors as a suitable person to be chosen. Similarly, when seconding a nomination paper, an elector indicates his preference for that candidate to the general electorate which is to cast votes at the election. If the indication of such choice is restricted to as many candidates as there are vacancies, the provision, is, on the face of it, salutary and conducive to proper election.

234. The historical background of the Rules relating to elections in India also bears out that such a provision has always been considered desirable. The earliest Rules that have been brought to our notice are the Electoral Rules and Regulations made for elections to the Legislative Assembly at the Centre and to the Legislative Councils of Provinces under the Government of India Act. The Rules, as revised up to 25th August, 1934, made by the Central Government, contain a provision in Rule 11(3) of Part IV, similar to that of Section 5 of the Act, by laying down that the nomination paper shall be subscribed by the candidate himself as assenting to the nomination and by two persons as proposer and seconder whose names are registered on the electoral roll of the constituency. This is followed by sub-rule (4) which limits the number of nomination papers to be subscribed as proposer or seconder by an elector to the number of vacancies to be filled but no more. These two requirements having been laid down by the Rules, the further procedure was governed by the Regulations made for each Province for conducting the elections in that Province even in respect of the Central Legislative Assembly. In the Presidency of Madras, Regulation 7 (1) (iii) empowered the Returning Officer to refuse any nomination on the ground that

there has been a failure on the part of the candidate or his proposer or seconder to comply with any of the provisions of Rule 11; and it was in exercise of this power that the Returning Officer could reject the nomination paper signed by an elector or proposer in excess of the number of vacancies. For the Presidency of Bombay, a similar provision was made in Regulation 3 of the Legislative Assembly (Bombay) Electoral Regulations dated 13th September, 1923, for rejection of the nomination paper by the Returning Officer. The corresponding provision for the Province of Bengal was contained in Regulation 20, for United Provinces in Regulation 9, for Punjab in Regulation 4; for Burma in Regulation V; for Bihar and Orissa in Regulation 24; for the Central Provinces in Regulation 4; and for Delhi in Regulation 5. All these Regulations were made under Rule 15 of the Legislative Assembly Electoral Rules. Thus, the principle that an elector should not sign nomination papers as proposer or seconder in excess of the number of vacancies was observed throughout India. Similar provisions existed in the various Provinces in respect of elections to be held to the Legislative Councils of the Provinces. Later, when the Council of State came into existence after the Government of India Act, 1935, provision was made in Rule 11 (4) limiting the number of nomination papers, which could be subscribed by an elector as proposer or seconder, to the number of vacancies to be filled and no more. Even in the Representation of the People Act, 1951, when first enacted, there was a similar provision. The Act, with which we are concerned, was passed in 1952 in this state of legislation and it is obvious that Parliament, when enacting Section 5 left it to the rule-making authority to make detailed provisions of this nature.

235. It may also be mentioned that a similar provision exists in the Rules governing elections in England. The Act in question is the Representation of the People Act, 1949, and the Rules for Conduct of Elections were contained in the Second Schedule to that Act. Rule 8 (1) of the Second Schedule was similar to Section 5 (2) of the Act laying down that the nomination paper shall be subscribed by two electors as proposer and seconder, and by eight other electors as assenting to the nomination. Rule 8 (5) laid down the limitation that no person shall subscribe more than one nomination paper at the

same election and, if he does, his signature shall be inoperative on any paper other than the one first delivered. The provision is not only similar, but it is significant that, when laying down the limitation in Rule 8 (5), the language used indicates that no right on an elector to subscribe as proposer and seconder any number of nominations was envisaged as having been conferred by Rule 8 (1). If we were to hold that Rule 8 (1), which is similar to Section 5 (2) of the Act, conferred a right on an elector to subscribe any number of nomination papers as proposer and seconder, Rule 8 (5) would have contained words indicating that it will override the provisions of Rule 8 (1). This could have been done either by making Rule 8 (1) subject to Rule 8 (5), or by stating in Rule 8 (5) that it shall prevail notwithstanding anything contained in R. 8 (1). There was, in fact, no need to use such qualifying words, because Rule 8 (1) could not be interpreted as conferring a right on an elector to subscribe more than one nomination paper as proposer or seconder, so that Rule 8 (5) was not a limitation on any right conferred by the earlier sub-rule. In these circumstances, it must be held that Rule 4 (3) of the Rules was validly made by the Government in exercise of its rule-making power under Section 21 of the Act. That Rule being valid, Rule 6 (3) (e) of the Rules, which is consequential, must also be held to be valid.

Issue No. 1 in Election Petitions Nos. 1, 4 and 5 of 1969

236. These issues between them raise the question of the validity of the rejection of the nomination papers of three persons Shri Shiv Kirpal Singh, Shri Charan Lal Sahu and Shri Yogi Raj. The nomination paper of Shri Shiv Kirpal Singh was rejected on the ground that it was not accompanied by a certified copy of the entry relating to him in the electoral roll for the Parliamentary constituency in which he was registered. Instead, his nomination paper was accompanied by a few printed sheets purporting to be part of the electoral roll of that constituency containing his name as an elector. It has already been held above, when dealing with Issue No. 6, that Rule 4 (1), requiring that the nomination paper must be accompanied by a certified copy of the electoral roll containing the entry relating to the candidate is valid and mandatory. Since there was clear non-compliance with that Rule, the rejection

of the nomination paper of Shri Shiv Kirpal Singh was correct and justified.

237. The nomination paper of Shri Charan Lal Sahu was rejected on the ground that he was less than 35 years of age on the date of nomination. The nomination paper was, no doubt, accompanied by a certified copy of the entry in the electoral roll in which his age was shown as 32 years on 1st January, 1966. The Returning Officer had some doubt whether Shri Charan Lal Sahu had completed the age of 35 years and, consequently, he asked Shri Charan Lal Sahu, who was present at the time of scrutiny, to state his date of birth. He gave in writing that his date of birth was 15th March, 1935. According to this date of birth given by Shri Charan Lal Sahu himself in his own handwriting to the Returning Officer, he was clearly below 35 years of age on the date of nomination. The nomination paper was rejected on this ground. The rejection is based on Shri Charan Lal Sahu's own statement given before the Returning Officer; and it is significant that in none of these election petitions has any assertion been made that, in fact, the age of Shri Charan Lal Sahu was more than 35 years on the date of nomination. The only attempt made is to challenge the order of the Returning Officer on the ground that the entry in the electoral roll showed that he was qualified as a candidate, having attained the age of 35 years. That entry is of little value after Shri Charan Lal Sahu's own statement in writing indicating that he was less than 35 years of age. While no election petitioner is prepared to assert and prove that Shri Charan Lal Sahu had in fact completed 35 years on the date of nomination, it has to be held that the rejection of his nomination paper was fully justified and correct.

238. So far as the rejection of the nomination paper of Shri Yogi Raj is concerned, his nomination paper was rejected on the ground that he had been proposed and seconded by the same electors who had proposed and seconded another candidate, Shri Rajbhoj Pandurang Nathuji, and the nomination of the latter was received earlier by the Returning Officer. The Returning Officer rejected the nomination paper by an order made in accordance with Rule 6 (3) (e) read with Rule 4 (3) of the Rules. The correctness of this order was challenged on the ground that these Rules are ultra vires the Act. In

dealing with Issue No. 6 it has already been held that these Rules are valid and are not in contravention of Section 5 (2) of the Act. The rejection of his nomination paper, based on these valid Rules, was justified and, consequently, it cannot be held that his nomination paper was wrongly rejected.

Issue No. 2 in Election Petitions Nos. 1 and 5 and Issue No. 3 in Election Petition No. 4/1969.

239. The acceptance of the nomination paper of the respondent has been challenged on the ground that his nomination paper was not accompanied by a certified copy of the entry relating to him in the Parliamentary constituency in which he was registered. After examining the certified copy filed, it is not possible to accept the submission, because, on the face of it, it is a certified copy of the electoral roll issued by the appropriate authority. These issues are, therefore, decided against the election petitioners.

Issue No. 3 in Election Petitions Nos. 1 and 5 and Issue No. 2 in Election Petition No. 4/1969.

240. Under these issues, the validity of the acceptance of the nomination papers of four candidates, Shri Rajbhoj Pandurang Nathuji, Shri Santosh Singh Kachhwaha, Pandit Babu Lal Mag and Dr. Ram Dulare Tripathi, was challenged. In Election Petition No. 5 of 1969, the nomination paper of Shri Rajbhoj Pandurang Nathuji was challenged on two grounds, but one of the grounds was given up, and the only ground, which was pressed and which was also common to other election petitions, was that the copy of the electoral roll, which accompanied his nomination paper was not certified by the appropriate officer. This submission was made on the wrong basis that the Rules required that the certified copy must be issued either by the Electoral Registration Officer or the Assistant Electoral Registration Officer. The copy was, in fact, issued by one Shri M. V. Madke with a rubber seal under it showing that he was functioning as Tehsildar, Poona City. It appears that the permanent Tehsildar of Poona City was the Assistant Electoral Registration Officer, but at the time of the issue of the copy, he happened to be absent and Shri M. V. Madke, who was Aval Karkun, was acting in his place. Since Shri M. V. Madke was acting in place of the Tehsildar, he was also in charge of the electoral rolls which were in his custody. He

was further empowered to exercise all the powers given to the Tehsildar. He, therefore, was competent to issue the certified copy in two capacities, viz., (1) as exercising powers of the Tehsildar conferred on him while he was acting in place of the permanent Tehsildar and (2) in the capacity of custodian of the document of which the copy was required. There is nothing in the Rules framed under the Act, or under the Representation of the People Act, 1950 and Rules framed thereunder, requiring that a certified copy of the electoral roll must necessarily be issued by either an Electoral Registration Officer or an Assistant Electoral Registration Officer. Every government servant, who has custody of a document, is competent to issue certified copies of that document, so that the certified copy issued by Shri M. V. Madke was a valid and good copy and there was no reason for rejection of his nomination paper. It was rightly accepted.

241. In the case of Shri Santosh Singh Kachhwaha, the only ground pressed was that his nomination paper was signed by the proposer and the candidate on 16th July, 1969, while the seconder signed it on 21st July, 1969. Thereafter, the candidate himself presented this nomination paper to the Returning Officer on 23rd July, 1969. His case may be considered with that of Pandit Babu Lal Mag in which also the ground for challenging the validity of the nomination paper is similar. His nomination paper was signed by him on 18th July, 1969, while both the proposer and the seconder signed it on 21st July, 1969. Thereafter, Pandit Babu Lal Mag himself presented the nomination paper to the Returning Officer. The point raised was that, in one case, the seconder signed the nomination paper after the candidate, while, in the other case, both the proposer and the seconder signed after the candidate had done so. The nomination paper shows that the candidate, when signing, purports to "assent to this nomination". It was urged that a signature in token of such assent to that particular nomination must be made by a candidate after both the proposer and the seconder have signed. Reliance was placed in this connection on the decision in *Harmon v. Park*, (1881) 7 QBD 369. In that case, the question arose about the validity of a nomination paper of a candidate Mark Harmon which, when initially presented, had the name of William Ball as proposer, together with sig-

natures of the seconder and eight burgesses as assenting parties to that nomination. The clerk, on looking at the burgess roll, found that the name of William Ball was on the list of electors, but it was noted in the margin "not entitled to vote here". At the time of presentation, one John Green, a duly enrolled burgess, happened to come into the office and, seeing the nomination paper signed by Ball, and knowing that the name of William Ball was not on the burgess roll as a person entitled to vote struck out Ball's signature and inserted his own name in lieu thereof. At that time, Ball the original proposer, the seconder and the assenting burgesses were not present. Green handed in his nomination paper to the town clerk. It was in these circumstances that the nomination paper was held to be invalid. *Grove, J.*, held.—

"The argument for the appellant was that these eight persons assent to the nomination of the candidate as a proper person to be nominated, an argument which if carried to its full extent must involve the proposition that the assenting burgesses may subscribe a nomination paper with the names of proposer and seconder in blank. But the assents required by the Act are to the nomination in the form in which it is written so that any person assenting may first see who is proposer and seconder. It may well induce them to give their assent if they find that the proposer and seconder are good and responsible persons, in whom they may trust. I think, therefore, that the nomination was bad, and the name of the appellant properly rejected as a candidate".
Lindley, J., agreeing with him said:—

"The Act of Parliament requires that the eight burgesses shall assent to the nomination. What then is the nomination in writing to which they assent? The nomination consists in filling up the name of the candidate on the nomination form, with the signatures of the proposer and seconder. The argument for the petitioner comes to this, that the eight persons might sign even before the name of the candidate was on the nomination paper. This is not the kind of assent required by the statute. The nomination must precede the assent, the assent must not precede the nomination."

Thus, in that case, the nomination paper was held to be invalid, because the signature of John Green, who was ultimately the proposer, was put on the nomination paper after the seconder, the candidate

and the eight assenting burgesses had all signed it. However, the point to be noticed is that, in that case, the invalidity was found because the circumstances in which John Green substituted his name as the proposer showed that the assenting eight burgesses had no knowledge at all that he had become the proposer, as they had only assented to the nomination signed by William Ball. John Green substituted his name for that of William Ball in the absence of the burgesses. On this ground, it was held that the nomination paper could not be held to contain in it the assent of the eight burgesses. That case is distinguishable from the present case. In the present case, when the candidates concerned signed in token of their assent before the proposers or the seconders had signed their nomination papers, the candidates knew that they were assenting to be put forward as candidates at the election and, subsequently, after the proposers and seconders had signed their nomination papers, they themselves took those nomination papers and presented them before the Returning Officer. Clearly, therefore, they indicated their assent to being nominated by the particular proposers and seconders, who signed their nomination papers, by taking the step, after their signatures, of carrying the nomination papers to the Returning Officer and presenting them as valid nominations.

242. There is further the circumstance that, though, in England, in the particular circumstances of the case in (1881) 7 QBD 369 (supra), it was held that a nomination paper was invalid if signed by the proposer after it had been signed by eight burgesses in token of their assent, the law as to nominations in India has throughout been interpreted differently. As early as the year 1922, when also the provision in respect of signing of nomination papers was similar, it was held by the Election Tribunal in *Jamuna Prasad v. Sri Krishna Prasad*, (1864-1935) 2 Doab's E. C. at p. 7 Case No. 121 (1935 Edn.) that:

"there is no rule as to the order in which names should be signed. On the other hand, the subscription by the candidate is mentioned in the rule before that by the proposer and seconder. We should not read into the words of the rule any words which do not exist and say that the proposer and the seconder must sign their names before the subscription by the candidate himself; when the requirement

is merely that the candidate must also subscribe to the paper as assenting to the nomination, that is to say, the naming of himself as a candidate for the constituency. What has been done by the petitioner does not offend the words or the spirit of the rule."

The Election Tribunal also took notice of the decision in (1881) 7 QBD 369 (supra) and distinguished it on the ground that that case could not apply where the subscription by the candidate himself and the making of signatures by the proposer and the seconder had only to be considered, while there was no question of assent of other persons like elector burgesses.

243. The same view was taken in the year 1924 by the Election Tribunal in the case of Prosanna Kumar Das Gupta v. Chittaranjan Das, (1864-1935) 2 Doabia's E. C. at p. 73 Case No. 120 (1955 Edn.). In that case also, the Tribunal distinguished the decision in (1881) 7 QBD 369 (supra) and, in addition, referred to the decision in Cox v. Davies, (1898) 2 QBD 202. In the latter case, Grantham, J., had occasion to deal with a situation very similar to the one in the present case. He held:—

"The language of the present rule is not the same as that of the section upon which those cases were decided. It would require a good deal to convince me that there is anything wrong in a candidate filling his own name in after those of his proposer and seconder. In my own practical experience of elections it is a thing which is constantly done. If the signatures of the proposer and seconder were used for the purpose of filling in the name of a candidate that they did not intend, that would be another matter. (1881) 7 QBD 369 was a very different case from this".

In this case, the validity of the nomination paper was being challenged on the ground that the candidate had filled in his own name after the proposer and seconder had already signed it and, yet, it was held that the nomination paper was valid on the ground that there was nothing to show that the proposer and seconder did not intend to nominate that particular candidate. In the present case, there is nothing to show that the candidates did not intend to be nominated by the proposers and seconders who had signed their nomination papers after they had signed them in token of their assent. On the other hand, as indicated above, it must be held

that the candidates actually signified their assent to being nominated by the proposers and seconders, who had signed earlier, by presenting the nomination papers themselves to the Returning Officer.

244. Another Election Tribunal, in the year 1946, arrived at the same decision in the case of Mahant Digvijai Nath v. Sri Prakash, (1935-51) Election Cases, at p. 147 case No. 24. In that case also, the candidate had signed the nomination paper before it was signed by the proposer and seconder. The Tribunal placed reliance on the decision in (1864-1935) 2 Doabia's E. C. at p. 7 Case No. 121 (1955 Edn.) (supra) and held:—

"Even if it is assumed that strictly speaking the candidate must sign his name after the proposer and seconder have signed it, there is no direction in the rules that it should be so and that there is no "invalidating consequence" provided for in the rules in case this has not been done."

In fact, the Tribunal went to the extent of holding that:—

"It is not open to the returning officer to enquire in what order the signatures had been made so long as the signatures are not found to be not genuine or obtained by fraud."

In that case also, the Tribunal took notice of the two English decisions in (1881) 7 QBD 369 (supra) and (1898) 2 QBD 202 (supra) and inferred that it cannot be held that there is any natural order in which nomination paper should be filled up and signed and, unless there is something specific in the Rules, the fact that a candidate gives his assent on the nomination paper before the proposer and seconder had signed it or before the other entries had been completed is of no consequence. Thus, when the Act was enacted in 1952, the law in India, as administered by various Election Tribunals, was clear that the order, in which signatures are made on a nomination paper by the candidate, the proposer and the seconder, is immaterial and no nomination paper would be invalid if the signatures are made by the candidate before the proposer and the seconder signed it. The Legislature, when enacting the Act, must be presumed to know that this was the law as interpreted in India and, consequently, when the language incorporated in Section 5 (2) of the Act was used, it must have been intended that nomination papers would not be invalid by reason of the candidate making his signature before the proposer

and the seconder. Even subsequently, a similar provision in the Representation of the People Act, 1951, and the Rules framed thereunder for conduct of elections and election petitions, was interpreted in the same manner by the Election Tribunal in the case of Yamuna Prasad v. Jagdish Prasad Khare, (1957-1958) 13 ELR 1 (SC). Consequently, it cannot be held that, in the present case, the nomination paper of Shri Babu Lal Mag was invalid because he signed his nomination paper before it was signed by the proposer and seconder, or that the nomination paper of Shri Santosh Singh Kachhwaha was invalid because he signed his nomination paper before his seconder had signed it. The nomination papers of both these candidates, were therefore, rightly accepted.

245. So far as the nomination paper of Dr. Ram Dulare Tripathi is concerned, the allegation was that it did not appear to bear the signature of the proposer and the seconder, because a mere look will make it clear ex facie that the whole of the nomination paper, including the signatures of the proposer, the seconder, and the candidate are in the handwriting of one person. This allegation was controverted by the Returning Officer in his counter-affidavit who has sworn that it did not appear to him that all the signatures were in one handwriting and that he was satisfied that the nomination paper had been properly proposed, seconded and signed. After his counter-affidavit, when the petition was argued, learned counsel for the petitioners did not press this issue and did not try to produce any evidence to show that the signatures of the proposer, the seconder, and the candidate were not genuine. Consequently, the acceptance of the nomination paper of Dr. Ram Dulare Tripathi was not invalid.

Issue No. 4 in Election Petition No. 1 of 1969 and Issue No 7 in Election Petitions Nos. 4 and 5 of 1969.

246. The ground covered by these issues is sought to be raised on the basis of the provisions contained in Article 54 of the Constitution read with the definition of "State" contained in Clause (58) of Section 3 of the General Clauses Act, 1897. It was urged that, under Art. 54, the Electoral College consists of the elected members of both Houses of Parliament, and the elected members of the Legislative Assemblies of the States. Relying on the definition of "State" in Section 3(58) of the General Clauses Act,

it is argued that Union Territories are also States and, consequently, the elected members of the Legislative Assemblies of the Union Territories must also be included in the Electoral College. Their omission is a material irregularity which vitiates this election.

247. There are two reasons why, on the face of it, this submission has to be rejected as untenable. Article 54, no doubt, lays down that all elected members of the Legislative Assemblies of the States are to be included in the electoral college, but the word "States" used in this Article cannot include Union Territories. It is true that, under Article 367, the General Clauses Act applies for interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India; but that Act has been applied as it stood on 26th January, 1950, when the Constitution came into force, subject only to any adaptations and modifications that may be made therein under Article 372. The General Clauses Act, as it was in 1950 and as adapted or modified under Article 372, did not define "State" so as to include a Union Territory. The Constitution was amended by the Constitution (Seventh Amendment) Act, 1956, which introduced Article 372-A in the Constitution permitting adaptations and modifications of all laws which may be necessary or expedient for the purpose of bringing the provisions of the law into accord with the Constitution as amended by the Seventh Amendment Act, 1956. It was in exercise of this power under Article 372-A that Section 3 (58) of the General Clauses Act was amended, so that, thereafter, "States" as defined included Union Territories also. The new definition of "State" in Section 3 (58) of the General Clauses Act as a result of modifications and adaptations under Article 372-A would, no doubt, apply to the interpretation of all laws of Parliament, but it cannot apply to the interpretation of the Constitution, because Article 367 was not amended and it was not laid down that the General Clauses Act, as adapted or modified under any Article other than Article 372, will also apply to the interpretation of the Constitution. Since, until its amendment in 1956, Section 3 (58) of the General Clauses Act did not define "State" as including Union Territories for purposes of interpretation of Article 54, the Union Territories cannot be treated as included in the word "State".

248. The second reason why it must be held that members of Legislatures of Union Territories cannot form part of the electoral college under Article 54 is that that Article confines the electoral college to members of Legislative Assemblies of the States and there are no Legislative Assemblies in the Union Territories. Under Article 168, for every State there is to be a Legislature which shall consist of the Governor, in certain States two Houses, and in some other States one House. The Article further lays down that where there are two Houses of Legislature; one is to be known as the Legislative Council and the other as the Legislative Assembly and, where there is only one House, it is to be known as the Legislative Assembly. On the face of it only members of Houses known as Legislative Assemblies under Article 168 can be members of the Electoral College under Article 54. In the case of Union Territories, the provision for Legislatures is contained in Article 239-A, but that Article does not mention that any House of the Legislature created for any of the Union Territories will be known as a Legislative Assembly. All that that Article lays down is that Parliament may, by law, create a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union Territory. Such a Legislature created by Parliament is not a Legislative Assembly as contemplated by Article 168 or Article 54. Members of Legislatures created for Union Territories under Article 239-A cannot therefore, be held to be members of Legislative Assemblies of States. They were, therefore, rightly excluded from the electoral college, so that the issues are decided against the election petitioners.

Issues Nos. 1 and 2 in Election Petition No. 3 of 1969.

249. The nomination paper of Shri Phul Singh, petitioner in this election petition, was rejected on the ground that his nomination paper was not signed either by a proposer or a seconder, so that the nomination paper did not comply with the requirements of Section 5 (2) of the Act and was liable to be rejected under R. 6 (3) of the Rules. This petition was argued by Shri Phul Singh in person, and the only argument that was advanced by him was that Section 5 (2) of the Act, requiring that there must be a nomination signed by two electors as proposer and seconder, is ultra vires the Constitution. According to him, he possessed all the qualifications

for being a candidate laid down in Article 58. He had proved that he was an elector registered in a Parliamentary constituency by producing a certified copy of the entry relating to him in the electoral roll. He had also produced a certificate that he had resigned from government service and was not holding an office of profit under the Government. He relied on the electoral roll to show that he was a citizen of India. He also produced a copy of his High School certificate showing that he was not less than 35 years of age. In these circumstances, according to him, his nomination paper could not be rejected on the ground that he had not been nominated by two electors as proposer and seconder. On the face of it, his argument that Section 5 (2) of the Act contravenes Article 58 or any other Article of the Constitution has no force at all. Section 5 (2) of the Act was enacted by Parliament in exercise of its power of regulating all matters relating to or connected with the election of a President or Vice-President and, in exercise of this power, Parliament was fully competent to lay down how a candidate, otherwise qualified, must become a candidate by seeking nomination by two electors and to prescribe the detailed subsequent procedure leading up to the polling and declaration of result. The requirement laid down by Parliament that every person must be nominated by two electors as proposer and seconder is a reasonable requirement relating to regulation of election to the office of a President and cannot be held to be a curtailment of the right of a qualified candidate to stand as a candidate under Article 58. In these circumstances, the ground, on which the election petition has been filed, fails and, consequently, the petition is liable to be dismissed.

Issue No. 8 in Election Petitions Nos. 4 and 5 of 1969.

250. This issue was raised by the petitioners on the plea that Part III of the Act, which includes Section 18, is ultra vires Article 71 (1) of the Constitution, so that the petitioners are entitled to challenge an election of the President on grounds other than those mentioned in Section 18 of the Act. This contention fails in view of the finding on Issue No. 5 that Part III of the Act is not ultra vires Article 71 of the Constitution and that Parliament did not act contrary to the provisions of the Constitution in limiting the

grounds of challenge of an election in an election petition by enumerating them in Section 18 of the Act. Consequently, the first part of Issue No. 8 has to be answered in the negative, holding that the petitioners are not entitled to dispute the election of the respondent on grounds other than those mentioned in Section 18 of the Act. The other parts of the issue, as a consequence, do not arise at all. The issue is answered against the petitioners.

Issues Nos. 9, 9-A and 10 in Election Petition No 5/1969.

251. These issues are based on the allegations made in paragraph 15 of the petition in which there is, first, a general charge that the offence of bribery was freely committed at the election by the supporters of the respondent (returned candidate), with his connivance, with the object of inducing the electors to exercise their vote in favour of the respondent. With this object, gratification was offered and given to them. This general allegation is followed by a specific instance in which it is mentioned that a licence for setting up an industry in Polyester Fibre was to be granted by the Government of India. The Punjab State Government also applied for the licence. The licence, was, however refused to the public sector and was, instead, granted to a private limited company in which Shri Sita Ram Jaipuria, a Member of the Rajya Sabha, who was also an influential elector, had financial interest. It was alleged that this licence was granted to the Company as a gratification with the object of inducing Shri Sita Ram Jaipuria and the electors under his influence to exercise their vote in favour of the respondent and against Shri Sanjiva Reddy, in whose favour they were intending to vote earlier. According to the petitioners, this licence was granted during the election period. A further allegation was made that one Shri Kanwar Lal Gupta, a Member of Parliament, wrote a letter to the Election Commission stating that money was being offered to some members to vote for the respondent; and, from this, it was also clear that the offence of bribery was rampant during the elections.

252. So far as this second allegation relating to the letter of Shri Kanwar Lal Gupta, Member of Parliament, is concerned, no evidence was allowed to be tendered on it on behalf of the petitioners, because the allegation was in a very general form stating that the offence of bri-

bbery was rampant; and this pleading was also based solely on a letter written to the Election Commission. No specific instances were cited and no particulars were given. On the face of it, a general allegation that bribery was rampant in the elections could not be made the subject-matter of a specific charge of commission of offence of bribery.

253. Evidence was allowed to be led on the first charge which, if the facts had been proved to be true, could possibly constitute the offence of bribery. If, in fact, the licence had been granted to a private limited company with the specific purpose of obtaining the vote of Shri Sita Ram Jaipuria, an elector and a Member of Parliament, for the respondent, that could constitute bribery. However, from the evidence led on this issue on behalf of the petitioners themselves, it appears that no case at all of commission of the offence of bribery during the election period could possibly be established; and that appears to be the reason why, when arguments were heard by the Court after the evidence had been recorded, counsel for the petitioners did not even try to argue that this offence of bribery had been established. The then Chief Minister of Punjab, Sardar Gurnam Singh, and the Director of Industries, Punjab, were examined as witnesses on behalf of the petitioners to prove that an application for grant of the licence for Polyester Fibre Factory was sent to the Central Government on behalf of the Industrial Development Corporation which was a public limited concern owned by the Punjab Government. The petitioners also examined the Director of Industries, U. P., the Registrar of Companies, U. P., and the Secretary of the Swadeshi Cotton Mills Ltd., Kanpur, to prove that an application was also presented for the licence for the same factory on behalf of Swadeshi Cotton Mills in which Shri Sita Ram Jaipuria holds shares in his own name and a large number of shares are also held by his wife, his children, and other close relatives. The Secretary to the Government of India, Ministry of Industrial Development, and the Under-Secretary to the Government of India, Ministry of Petroleum and Chemicals, were also produced as witnesses and they proved the fact that the licence for the Polyester Fibre Factory was granted in favour of Swadeshi Cotton Mills in preference to the public sector company, the Industrial Development Corporation owned by the Punjab

Government. The evidence of the latter two witnesses also, however, proved the circumstances in which the licence was granted to the Swadeshi Cotton Mills, Kanpur, disregarding the claim of the Industrial Development Corporation of Punjab. According to the evidence of these two witnesses, the procedure obtaining is that all applications for such licences are first processed in the relevant Ministries and are examined and completed if any further material is to be obtained. The Administrative Ministry, which in this case was the Ministry of Petroleum and Chemicals, prepares a note showing the various factors relating to each application which require to be taken into consideration. Thereafter, these applications come up for consideration before a sub-committee of the Licensing Committee of the Government of India. The Licensing Committee is a large body which includes amongst its members Secretaries of various Ministries as well as representatives of State Governments. This Committee appoints sub-committees for licences concerned with specific Ministries of the Government. In the case of the Polyester Fibre Factory, the meeting of the sub-committee took place on the 7th July, 1969 when the decision was taken to grant the licence to Swadeshi Cotton Mills, Kanpur. In accordance with the rules, this decision of the sub-committee was submitted to the Minister in charge of the Ministry of Industrial Development who gave his approval in the second week of July. It was subsequently that a letter of intent for granting the licence to Swadeshi Cotton Mills was issued on behalf of the Government of India on 24th July, 1969. According to the procedure prevailing, any parties who were claimants for licence and whose claims were rejected, had a right to make a representation after the issue of the letter of intent and their representation had to be considered by the full Licensing Committee. The meeting of the full Licensing Committee was actually held on the 13th November, 1969. At this meeting, representatives of the U. P. Government as well as the Punjab Government were present and they argued the cases on behalf of the two parties from their States, viz, the Swadeshi Cotton Mills Ltd., Kanpur, and the Industrial Development Corporation, Punjab. It appears that it was on the basis of the fact that the letter of intent was issued on 24th July, 1969 that this charge of

bribery was put forward by alleging that the licence was granted to Swadeshi Cotton Mills during the election period. As has been indicated earlier, the decision about the grant of licence to Swadeshi Cotton Mills was taken by the sub-committee on the 7th July, 1969, and even the Minister in charge of the Ministry of Industrial Development gave his approval in the second week of July. The candidature of Shri Sanjiva Reddy for the office of the President was decided upon by the Parliamentary Board of the Congress on 12th July, 1969, and the respondent announced his candidature for the first time on 13th July, 1969, which was the last but one day before the close of the second week of July. On the face of it, the grant of the licence to Swadeshi Cotton Mills could not possibly have any relation to the candidature of either Shri Sanjiva Reddy or the respondent for the office of the President, and it is impossible to accept that the licence was granted to Swadeshi Cotton Mills for the purpose of inducing Shri Sita Ram Jaipuria to vote and exercise his influence in favour of the respondent. The grant of the licence was in due course in accordance with the procedure prevailing in the Ministry of the Government of India and had no relation at all with the candidature of the respondent for the office of the President which, in fact, was announced after that decision had already been arrived at. Consequently, the conclusion follows that no offence of bribery was committed in the matter of grant of licence for the Polyester Fibre Factory to Swadeshi Cotton Mills; and this ground for setting aside the election of the respondent, therefore, fails and is rejected.

Issue No. 4 (a), (b) and (c) in Election Petitions Nos. 4 and 5 of 1969.

254. This issue relates to the challenge to the validity of the election of the respondent on the ground of commission of a number of offences of undue influence under Section 18 (1) (a) and (b) (i) of the Act which lays down that, if the Supreme Court is of opinion—

(a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the connivance of the returned candidate; or

(b) that the result of the election has been materially affected—

(i) by reason that the offence of bribery or undue influence at the election has

been committed by any person who is neither the returned candidate nor a person acting with his connivance, the Supreme Court shall declare the election of the returned candidate to be void. Section 18 (2) gives the definition of the words "bribery and undue influence" by laying down that, for the purposes of this section, the offences of bribery and undue influence at an election have the same meaning as in Chapter IX-A of the Indian Penal Code. In the Indian Penal Code, Section 171C which defines "undue influence" is as follows:—

"171C. (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever—

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section."

To appreciate the significance of this definition, reference may also be made to Clause (b) of Section 171A which defines "electoral right" as meaning the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election. The definition of "undue influence" also uses the word "injury" in S. 171C (2) (a), and this word has also been given a special meaning under the Indian Penal Code, having been defined in Section 44 as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property".

255. In order to decide whether the various allegations made in the two election petitions do constitute the commission of the offence of undue influence it

is necessary to understand properly what acts constitute undue influence as defined in Section 171C of the Indian Penal Code. Sub-section (1) of Section 171C, in general terms, makes any act an undue influence if it interferes or attempts to interfere with the free exercise of any electoral right, and if it is committed voluntarily. The question has arisen what acts can be held to interfere with the free exercise of an electoral right. We are here concerned with the electoral right of a voter which, according to the definition in Section 171A (b), is the right to vote or refrain from voting. Undue influence can be held to be committed if the person charged with the offence interferes or attempts to interfere with the free exercise of this right of voting or refraining from voting. When an elector exercises the right of vote, it can be envisaged that he goes through the mental process of first taking a decision that he will vote in favour of a particular candidate and, thereafter, having made up his mind, he has to go and exercise that electoral right by casting the vote in favour of the candidate chosen by him. The language used in Section 171C indicates that the offence of undue influence comes in at the second stage when the offender interferes or attempts to interfere with the free exercise of that choice of voting in accordance with the decision already taken by the voter. It, therefore, follows that, if any acts are done which merely influence the voter in making his choice between one candidate or another, they will not amount to interference with the free exercise of the electoral right. In fact all canvassing that is carried on and which is considered legitimate is intended to influence the choice of a voter at the first stage and that is quite permissible. Once the choice has been made by a voter, there should be no interference with the free exercise by him of that choice by actually casting the vote, or, in the alternative, there may be a case where a voter may decide that he will not vote for any candidate at all, but some acts are done which compel him to cast his vote. It is in such cases that the offence of undue influence will be held to have been committed. The language used in the definition of "undue influence" implies that an offence of undue influence will be held to have been committed if the elector, having made up his mind to cast a vote for a particular candidate, does not do so because of the act of the offender,

and this can only be if he is under a threat or fear of some adverse consequence. Whenever any threat of adverse consequence is given, it will tend to divert the elector from freely exercising his electoral right by voting for the candidate chosen by him for the purpose. In a case where the voter is threatened with an injury as defined in the Indian Penal Code it has to be deemed under S. 171C (2) (a) that it interferes with the free exercise of the electoral right of the voter; and the same applies if the elector is induced or attempt is made to induce him to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure. In the first case, under Clause (a), it is a temporal harm illegally caused to the person, in body, mind, reputation or property, while in the second case, under Clause (b), the interference is because of the fear of becoming an object of Divine displeasure or of spiritual censure. There can, however, be cases where the threat may not be of an injury as defined in Section 44, I. P. C. where the harm caused must be illegal. Cases can arise where there may be no illegality in the threatened consequence to the voter and, yet, it may interfere with the free exercise of his right to vote. An instance that can be cited is where a father may threaten to disinherit his son in respect of property solely owned by the father unless his son voted for a particular candidate or refrained from voting for some other candidate. The consequence of non-compliance with the wishes of the father would be the loss of inheritance to the son which is not an injury as defined in Section 44, I. P. C. Such an attempt by the father would clearly amount to exercise of undue influence by him on his son. But, in cases where the only act done is for the purpose of convincing the voter that a particular candidate is not the proper candidate to whom the vote should be given, that act cannot be held to be one which interferes with the free exercise of the electoral right.

-256. It has, however, been argued that there may be a case where such virulent propaganda may be carried on against a candidate as may cloud the mind and judgment of the voters and almost compel them to come to a decision that they should not vote for that particular candidate. It was urged that, in such a case, it should be held that undue influence was exercised on the voters. In consider-

ing this proposition, various aspects have to be kept in view. The first is that, if it is held that propaganda adverse to a candidate can amount to undue influence, it will be almost impossible to draw a line and differentiate between legitimate propaganda which will amount to undue influence and that which will not. Then comes the question of the reverse type of propaganda where a particular candidate is so highly praised that voters are influenced to the extent of considering him an excellent person well above all other candidates; and the question will be whether such an influence on the mind of a voter can be held to be undue influence. More important than all these aspects is the scheme of the law and the language used in it which, in my opinion, very clearly show that mere propaganda against a candidate cannot be held to be exercise of undue influence. The word "free" is used in Section 171C, I. P. C., as qualifying "exercise" and not as qualifying the word "vote". If undue influence had been defined as interference with the exercise of free vote, possibly the definition could have been construed as indicating that influence brought on the mind of a voter so as to change the manner of his voting by affecting his choice and judgment in selecting the candidate for whom he is going to cast his vote, would be comprised within undue influence. The word "free" having been used as qualifying the word "exercise" gives the indication that the freedom envisaged is to cast the vote in accordance with the choice already arrived at and, if such freedom of casting the vote in that manner is interfered with, the offence of undue influence will be held to have been committed. In Words and Phrases, Permanent Edition, Vol. 17A by West Publishing Company, the meaning of the word "free" in various contexts accepted in America has been given, and the relevant meaning which can assist is in the following words:—

— "Within the constitutional provision, elections are "free" when the voters are subjected to no intimidation or improper influence, and whenever every voter is allowed to vote as his own judgment and conscience dictate."

This meaning clearly indicates that the question of freedom actually arises at the stage when a voter has already exercised his judgment and conscience, has decided which candidate he will vote for, and is then allowed to cast his vote freely with-

out any interference in the form of intimidation or improper influence.

257. A very important aspect in considering this argument is that whatever meaning is given to the expression "undue influence" in the Act will also apply when interpreting the provisions of the Indian Penal Code, because the Act imports the definition of "undue influence" from Section 171C of the Code. In the Indian Penal Code, a new Chapter IXA was introduced by the Indian Elections Offences and Inquiries Act 39 of 1920. The Statement of Objects and Reasons attached to the Bill which culminated in that Act explained this provision by stating that:

"undue influence at an election is defined as the voluntary interference or attempted interference with the right of any person to stand, or not to stand, or withdraw from being, a candidate, or to vote or refrain from voting. This covers all threats of injury to person or property and all illegal methods of persuasion and any interference with the liberty of the candidates or the electors."

The language used in Section 171C was, thus, intended to cover only cases where the interference comes at the stage when the elector must have liberty to cast his vote freely, having already made up his mind how that vote is going to be cast. It is interference at this stage that was envisaged as amounting to undue influence.

258. The subject of influence at the stage of making a choice was dealt with in Chapter IXA of the Indian Penal Code under a separate and distinct provision which is contained in Section 171-G and is as follows:—

"Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, shall be punished with fine."

258A. The section clearly recognises that, at elections, there is bound to be propaganda in which candidates or their supporters may be issuing statements so as to influence the voters against their rival candidates, and it limits the prohibition by law to only those statements of fact which are false, or believed to be false, or believed not to be true, in relation to the personal character or conduct of any

candidate. Propaganda can be not only by attacking the personal character or conduct of a candidate, but even his political or public character and activities. On the face of it, Section 171G envisages that propaganda of the latter type will not be treated as an offence. Only when the propaganda is in the form of false statements of fact relating to the personal character or conduct of the candidate that the law will punish the person indulging in it by making him liable to payment of fine. These false statements about the personal character or conduct of the candidate may, of course, be scurrilous and foul, but, even then, the offence committed would fall under Sec. 171G, I. P. C., which makes the offence punishable with fine only. On the other hand, an offence of undue influence as defined in Section 171C, I. P. C., has been made punishable under Section 171F, I. P. C., with imprisonment of either description for a term which may extend to one year or with fine, or with both. If it is held that false propaganda against personal character or conduct of a candidate can amount to undue influence, the person indulging in that propaganda would become liable to punishment under S. 171F, I. P. C., which has been considered a more serious offence by being made punishable with imprisonment in addition to, or, in the alternative, with fine. This interpretation would thus make S. 171G, I. P. C., totally ineffective and otiose. If the false statements as to personal character or conduct are held to be punishable under Section 171F as constituting offence of undue influence, there would be no point in prosecuting the same person for the less serious offence under Sec. 171G. In fact, Section 171G would be fully covered by Section 171F and, consequently, the interpretation sought to be urged in these petitions has to be rejected.

259. It is true, that, in the Act, there is no provision indicating that publication by a candidate, or by any other person with his connivance, of a statement of fact which is false in relation to the personal character or conduct of another candidate will be deemed to be a corrupt practice on the commission of which an election can be declared void. Such omission in the Act cannot, however, be a good reason for enlarging the meaning of the offence of undue influence so as to hold that an election of a President or Vice-President must also be set aside on such a ground. It may be noticed in this

connection that, in the Representation of the People Act, 1951 there is a specific provision contained in Sec. 123 (4) laying down that a corrupt practice is constituted by the publication by a candidate or his agent or by any other person, with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election. In the Representation of the People Act, 1951 also, undue influence is defined in almost the same language as that contained in Section 171C, I. P. C. In that Act, therefore, an election can be declared void not only on the ground of commission of the corrupt practice of undue influence, but also on the ground of publication of false propaganda as to the personal character or conduct of a candidate. Parliament, however, chose not to include any such provision in the Act which was passed when the Representation of the People Act, 1951 had already been enacted and enforced. The Court is not concerned with the reasons which weighed with the Parliament in making such an omission in the Act when a similar provision had been kept in the earlier enactment in respect of elections to the Central and State Legislatures. The omission may be deliberate or accidental, but, in either case, it is not for the courts to attempt to fill up this gap by enlarging the meaning to be given to the expression "undue influence" which is the corrupt practice included in the Act as a ground for setting aside the election. It is clear from the scheme of Chapter IXA of the Indian Penal Code that false propaganda as to the personal character and conduct of a candidate was created as a separate offence and the definition given in Section 171C of "undue influence" was not intended to lay down that such propaganda will amount to interference with the free exercise of electoral right so as to constitute undue influence.

260. The only case of this Court dealing with the question of undue influence under the Act is reported in (1968) 2 SCR 133 = (AIR 1968 SC 904), where the Court had to consider the distinction between canvassing and exercise of undue influence and held:—

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"It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercise of any electoral right begins. That is a matter to be determined in each case; but there can be no doubt that, if what is done is merely canvassing, it would not be undue influence. As sub-section (3) of Sec. 171-C shows, the mere exercise of a legal right without intent to interfere with an electoral right would not be undue influence." The Court, after reviewing the relevant case law under the Representation of the People Act, then proceeded to hold:—

"It will be seen from the above review of the cases relating to undue influence that it has been consistently held in this country that it is open to Ministers to canvass for candidates of their party standing for election. Such canvassing does not amount to undue influence but is proper use of the Minister's right to ask the public to support candidates belonging to the Minister's party. It is only where a Minister abuses his position as such and goes beyond merely asking for support for candidates belonging to his party that a question of undue influence may arise. But so long as the Minister only asks the electors to vote for a particular candidate belonging to his party and puts forward before the public the merits of his candidate it cannot be said that by merely making such request to the electorate the Minister exercises undue influence. The fact that the Minister's request was addressed in the form of what is called a whip is also immaterial so long as it is clear that there is no compulsion on the electorate to vote in the manner indicated."

In that case, the Court thus envisaged that the question of undue influence will arise if there is some sort of compulsion on the electorate to vote in the manner indicated by the person alleged to have committed that corrupt practice, and a question of such compulsion can obviously arise only when a voter, having made his choice as to the person for whom he will cast his vote, is under some pressure to vote for another candidate owing to the undue influence exercised on him. The nature of interference, which would constitute undue influence, was further clarified when dealing with the letters issued by the Chief Whip of the Congress Party requesting members not to cast their second preference vote, by stating:—

"Such a request or advice does not, in our opinion, interfere with the free exercise of their electoral right, for the electors still would be free to do what they desired in spite of the advice."

The Court, thus, envisaged that undue influence is exercised when an elector is not free to do what he desires, while influencing his desire will not be exercise of undue influence

261. It has already been indicated above that the scheme of Chapter IXA of the Indian Penal Code and Section 123 of the Representation of the People Act is quite similar inasmuch as, in both these enactments, undue influence is defined in almost identical language and the publication of false statements as to the personal character of a candidate has been separately made either a criminal offence or a corrupt practice in practically the same language. Consequently, some assistance can be derived from the interpretation that has been given to the provisions contained in Section 123, sub-sections (2) and (4) of the Representation of the People Act, 1951. Dealing with this aspect in the case of *Ram Dial v. Sant Lal*, 1959 Supp (2) SCR 748 = (AIR 1959 SC 855) this Court first pointed out that the law in England relating to undue influence at elections is not the same as the law in India and, consequently, proceeded to interpret the law here without taking into account the principles laid down in England. In that case, the question arose whether, what a religious leader had done by issuing a *hukam* or *farman*, amounted to undue influence or not. The Court held:—

"There cannot be the least doubt that a religious leader has the right freely to express his opinion on the comparative merits of the contesting candidates and to canvass for such of them as he considers worthy of the confidence of the electors. In other words, the religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. If the reli-

gious head had said that he preferred the appellant to the other candidate, because, in his opinion, he was more worthy of the confidence of the electors for certain reasons, good, bad or indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence, however great, could not be said to have been misused. But in the instant case, as it appears, according to the finding of the High Court, in agreement with the Tribunal, that the religious leader practically left no free choice to the Nandhari electors, not only by issuing the *hukam* or *farman*, as contained in Ext. P.1 quoted above, but also by his speeches, to the effect that they must vote for the appellant, implying that disobedience of his mandate would carry divine displeasure or spiritual censure the case is clearly brought within the purview of the second paragraph of the proviso to Section 123 (2) of the Act."

In that case, thus, the Court envisaged that the '*hukam*' or '*farman*' issued by the religious leader was a mandate, the disobedience of which would carry divine displeasure or spiritual censure, and it was for this reason that it was held that corrupt practice of undue influence had been committed.

262. In the case of *Inder Lal v. Lal Singh*, 1962 Supp (3) SCR 114 = (AIR 1962 SC 1156), this Court explained the scope and purpose of sub-section (4) of Section 123 of the Representation of the People Act by pointing out that, for the protection of the constituency against acts which would be fatal to the freedom of election, the statute had provided for the inclusion of the circulation of false statements concerning the private character of a candidate amongst corrupt practices, and dissemination of false statements about the personal character of a candidate had been constituted into a corrupt practice. This corrupt practice was envisaged as separate and distinct from the corrupt practice of undue influence mentioned in Section 123 (2) of that Act.

263. In the case of *Lalroukung v. Hoakhohal Tangjom*, Civil Appeal No. 1315 of 1968, D/- 9-1-1969 (SC) this Court dealt with a case where there had been an assault close to the polling station after certain pamphlets had been issued, wherein threats were freely canvassed and exhortations made that those, who opposed the candidates supported by the two organisations (which issued the pam-

phlets), would not be forgotten nor spared. The Court then proceeded to hold:—

“In the light of propaganda of this nature carried on before the polling days, it is impossible to view the assault as an isolated incident nor can it be legitimately argued that the conclusion of the Judicial Commissioner that it was a culmination of those threats was either an unreasonable or an unwarranted conclusion. There can be no doubt that such rowdiness at a polling station was bound to deter voters from coming to the polling station to exercise freely their franchise. We have no doubt that the assault by the appellant's polling agent attracted Section 123 (2), proviso (a), and that also rendered the election void.”

This was again a case where the exercise of their electoral right by the voters was interfered by physical act of assault and threat on voters who intended to vote for the rival candidate.

264. The last case of this Court which may be referred is the decision in *Manubhai Nandlal Amersey v. Popatlal Manilal Joshi*, AIR 1969 SC 734 in which the effect of a speech came up for consideration and it was held:—

“The actual effect of the speech is not material. Corrupt practice is committed if the speech is calculated to interfere with the free exercise of electoral right and to leave no choice to the electors in the matter. In considering the speeches, the status of the speaker and the character of the audience are relevant considerations.”

This case also, thus, envisaged that there must be some element of compulsion on the voter to vote in a particular manner before the act said to be a corrupt practice can be held to amount to undue influence.

265. Coming to the decisions of the High Courts, the first case that may be cited is the decision of the Orissa High Court in (1958) 19 ELR 203 (Orissa). Barman, J., explained undue influence in the following words:—

“A voter must be able to freely exercise his electoral right. He must be a free agent. All influences are not necessarily undue or unlawful. Legitimate exercise of influence by a political party or association or even an individual should not be confused with undue influence. Persuasion may be quite legitimate and may be fairly pressed on the voters. On

the other hand, pressure of whatever character, whether acting on the fears, threat, etc., if so exercised as to overpower the volition without convincing the judgment is a species of restraint which interferes with the free exercise of electoral right. In such an atmosphere, the free play of the elector's judgment, discretion or wishes is overborne and this will constitute undue influence, though no force is either used or threatened. It is not necessary to establish that actual violence had been used or even threatened. Methods of inducement which are so powerful as to leave no free will to the voter in the exercise of his choice may amount to undue influence. Imaginary terror may have been created sufficient to deprive him of free agency.”

He, thus, distinguished between influence which is exercised for convincing the judgment of a voter, and influence the result of which is that the free play of the elector's judgment, discretion or wishes is overborne and the elector is left no free will to exercise his choice. In this decision, thus, the distinction, as indicated above, is clearly brought out. In that case, however, a picture with a caption had been published as a part of a cover of booklet, and it was held that its publication amounted to exercise of undue influence. The reason is indicated when the learned Judge, dealing with this poster, held:—

“The picture with the caption, as it stood, was intended to be made catchy with an ulterior motive and was deliberately published in that asked form in order to create a feeling of terror, fear and hatred and was such a compelling appeal to the mind of the voters as to amount to interference with the free exercise of voters' electoral right.”

The picture in question showed a dead boy with a caption in Oriya which, translated in English, was to the effect: “Do not vote for the Congress who killed Sahid Sunil”. That picture, thus, did not contain any false statement or representation as to the personal character of a candidate; but Barman, J., held:—

“The picture of the dead boy with the caption was a direct charge against the Congress that it killed the deceased boy. This was a misrepresentation of fact. It was as a result of firing by the police that the boy unfortunately got involved. We do not know whether the Congress Party took a stern view of the firing, whether the Congress Party itself condemned the

firing, and whether ultimately those responsible for the firing were reprimanded and punished for the unfortunate incident. The catchy caption that the Congress killed the boy was false representation made by the respondent No. 1 with intent to strike terror into the mind of the voters and thereby to interfere with the free exercise of electoral right of such terror-stricken voters. The picture with the caption was a distortion of a situation for political ends done with the intention as aforesaid. It was an artful device to catch the imagination of the voters. It terrorised the voters and was likely to create in their mind a feeling of terror, fear, hatred or strong prejudice against the Congress. In the caption under the dead boy's picture was a veiled threat to the voters that if they voted for the Congress who were capable of killing, then such Congress, so retained in power, would again,—as it actually did in the past, resort to such killing of men in which the voters themselves or their children might also be killed in the same way as it was openly demonstrated by the picture of the dead boy with the caption. It at least did create or was likely to create or had the tendency to create terror and an unknown fear in the mind of the voters. The picture of the dead boy with the caption frightened the voters or was likely to frighten them and it was intended to overawe voters which interfered or was likely to interfere or had the tendency to interfere with the free exercise of electoral right of the voters."

It will, thus, be seen that the main reason for holding that the publication of the picture amounted to exercise of undue influence was that it created terror and fear in the minds of voters of personal harm to themselves or their children in case they voted for the Congress candidate. The publication of the picture was not held to be undue influence or interference with the electoral right because it contained false propaganda against the candidate or the Congress Party, but because of the element of compulsion which was envisaged as arising in the minds of the voters not to vote for the Congress because of the fear of consequences which might be visited on themselves or their children in case they voted for the Congress. Barman, J., in this connection, also referred to the decisions of Election Tribunals in *Sardul Singh v. Hukam Singh*, (1953) 6 ELR 316 (Election Tribunal Patiala) and (1953) 7 ELR 457 (Election

Tribunal, Kotah) and agreed with the principles laid down in those cases. I shall indicate later the ratio of those two decisions. The other two Judges, constituting the majority, differed from Barman, J., and held that the publication of the picture did not amount to undue influence, because, in their opinion, no inference could be drawn that the publication of this picture was intended to create a fear in the minds of the voters. Rao, J., dealt with the submission of Mr. Rath, the counsel, that a look at the photo will make the voter think that, if he votes for the Congress Party during whose office the killing took place, he would be similarly killed and therefore it created a fear in his mind and thus interferes with the free exercise of the electoral right. He rejected it by saying that, in his opinion, this was a far-fetched argument. He further held:—

"The picture simply represents Sunil De after being shot at by the police firing with the caption underneath "Do not vote for the Congress who killed Sahid Sunil". It does not say that, if the voters give their votes for the Congress, all the voters or some of them would be shot as Sunil De. Further, the shooting of Sunil De is known to everybody and that is on account of police firing in connection with the States Reorganisation Committee Report's disturbances, the voters therefore cannot be influenced to think by publication of this poster that if they voted for the Congress they would be shot at like that. It is also significant that there is nothing mentioned about this poster in the election campaign in the booklet on whose cover the photo is printed. The respondent No. 1, therefore, could not have intended to cause fear in the minds of the voters by publication of exhibit 3 in order to interfere with the free exercise of their votes."

Das, J., dealt with this aspect as follows:—

"Nothing has been stated in the body of exhibit 3 relating to this picture. The picture simply represented a dead person after being shot by the police firing with the caption: "Do not vote for the Congress who killed Saheed (Martyr) Sunil". Nowhere it was stated if the voters gave their votes to the Congress they would be shot at as Sunil. The further fact is that Sunil De was shot at by the police firing in connection with the disturbance arising out of the recommendations of the States Reorganisation Commission of which the electors had known before.

Thus, the voters cannot be said to have been influenced to think that if they voted for the Congress they would be shot at like Sunil. Hence, in my opinion, the respondent No. 1 could not have intended to cause any fear in the minds of the voters by the above publication to constitute interference with the free exercise of the electoral right of the voters."

The decisions by these two Judges are, of course, of no help; but, as indicated earlier, even the decision of Barman, J., is in line with the view taken above and does not indicate that mere false propaganda as to the personal character of a candidate or even relating to the party sponsoring the candidate can amount to the corrupt practice of undue influence.

266. The next case which may be cited is another decision of the Orissa High Court in Abdul Rahiman Khan v. Radha Krushna Biswas Roy, AIR 1959 Orissa 188. In that case, the successful candidate had published a poem and the question arose whether the publication of that poem amounted to exercise of undue influence. The Court first, in general terms, dealt with the scope of undue influence by saying:—

"Section 123 of the Act is rather wide in its term and contemplates four distinct forms of interference with the free exercise of any electoral right, viz., direct interference, indirect interference, direct attempt at interference and indirect attempt at interference. There is nothing in the definition that such interference or attempt at interference should be by any method of compulsion. Evidently, the offence includes such interference or attempts to interfere by any method, and it definitely includes the method of inducement wherein there may not be any compulsion at all. The inducement again must be of such powerful type as would leave no free will to the voter in the exercise of his electoral right."

This general explanation does not appear to be inconsistent with the view taken above, because it was held that, even if there be no compulsion at all, the inducement must be of such powerful type as would leave no free will to the voter in the exercise of his electoral right. The freedom of will envisaged, obviously, is to vote in accordance with his choice. On the facts in that case, it was found that, in the poem, there were threats against Raja of Kalahandi in whom the defeated candidate was interested. After referring

to the Raja of Kalahandi, the objectionable portion read as follows:—

"Without any consideration for your own and others, you acted as a devil. Would anybody now be able to save you if you are beaten mercilessly? Having done all the above mischiefs, now you are appealing to the electors for their vote as a shameless person. If there were a grain of shame left in you, you would not have progressed at all. You are a thief and a Badmas and you should not remain in our land. You who belong to the Ganatantra party are only fit for the gallows."

These words, clearly, contained a threat to the life and were, therefore, rightly held to amount to exercise of undue influence. Similarly, another portion was to the following effect:—

"The leader of your Party was making money by selling widows is well known to the raiyats. Since there is not a bit of sense left in you, you are now seeking votes of these raiyats of Koraput. They will no longer be dissuaded by your words."

It was further stated that:

"the raiyats of this Constituency are bound to take revenge on you. How dare you ask for their votes?"

266-A. Again, the Court, in holding that these publications amounted to exercise of undue influence, was fully justified, because there were clear threats against the life of the candidate.

267. The only other case of a High Court that requires to be noticed is the decision of the Punjab High Court in Amir Chand Tota Ram, Delhi v. Smt. Sucheta Kripalani, AIR 1961 Punj 383. The Court expressed its view by holding:—

"The legal phrase "undue influence" denotes something legally wrong or violative of a legal duty. In order to establish undue influence, it must be proved that the influence was such as to deprive the person affected of the free exercise of his will. It must amount to imposing a restraint on the will of another whereby he is prevented from doing what he wishes to do or is forced to do which he does not wish to do.

An advice, argument persuasion or solicitation cannot constitute undue influence. Honest intercession, even importunity, falls short of controlling a person's free exercise of his will. A persuasion, which leaves a person free to adopt his own course, is not undue influence. Other-

wise a suggestion or an entreaty from somebody, held in esteem, could be treated as undue influence. In the absence of proof that a person has been, in consequence of the alleged influence, deprived of free agency no question of there being an undue influence arises.

It is not objectionable to exercise an influence by acts of kindness or appeals to the free reason and understanding. So long as the free agency of the other person is not prevented or impaired by obtaining a domination over the mind of another, it cannot be deemed as an exercise of an undue influence. The essence of "undue influence" is that a person is constrained to do against his will, but for the influence he would have refused to do if left to exercise his own judgment. It has to be shown that a person's volition had thus been controlled by another whereby he could not pursue his own inclination, being too weak to resist the importunity and in view of the pressure exercised on his mind he could not act intelligently and voluntarily and had become subject to the will of the other who had thus obtained domination over his mind."

267A. This exposition of the scope of "undue influence" is also in line with the view taken above. It envisages that the corrupt practice of undue influence is committed when a person is constrained to do against his will and is unable to act in accordance with his judgment. Such a position can only arise if the influence is brought on the person concerned after he has already formed his judgment and decided how he will exercise his electoral right. Propaganda for the purpose of influencing the judgment, even if undesirable, cannot be held to be undue influence.

268. Coming to the cases of Election Tribunals, the earliest case that needs consideration is the decision in (1953) 6 ELR 316 (Election Tribunal, Patiala) (supra). In that case, the Tribunal held:

"It is not necessary that there should be any actual threat or physical compulsion held out, but the method of inducement as may be adopted should convey to the mind of the person addressed that non-compliance with the wishes of the person offering the inducement may result in physical or spiritual harm to himself or to any other person in whom he is interested. Some fear of harm resulting from non-compliance with the request

thus, seems to constitute an essential element in "undue influence".

269. On behalf of the petitioners, emphasis was laid on the decision of the Election Tribunal in (1953) 7 ELR 457 (Elec. Tri., Kotah) (supra).

In that case, it was held:—

"It may be observed that an attempt to interfere by the method of compulsion is not necessary and that even the method of inducement may be sufficient, provided it be of such a powerful type as would leave no free will to the voter in the exercise of his choice. In other words, actual physical compulsion is not necessary, but positive mental compulsion may be enough to give rise to an undue influence."

269A. After expressing this view, the Tribunal proceeded to hold that the publication of a particular poster amounted to exercise of undue influence. Referring to it, the Tribunal held:—

"The poster was, therefore, clearly designed not only to catch voters for respondent No. 1, but, also, to overawe voters, the majority of whom were men of no better intelligence than ordinary illiterate villagers and to create a feeling of positive prejudice, if not of terror as well, in their minds against the petitioner."

269B. Reliance was placed primarily on the last part of this quotation where the Tribunal held that the creation of a feeling of positive prejudice in the minds of the voters can amount to undue influence. But this part of the sentence has to be read in conjunction with the earlier part where a clear inference was drawn that the poster was clearly designed to overawe the voters. This was the reason why the Tribunal held that the publication of the poster amounted to undue influence, though, when defining undue influence in general, the Tribunal had clearly stated that the inducement must be of such a powerful type as would leave no free will to the voter in the exercise of his choice. In stating this principle, the Tribunal was clearly referring to the stage when, having made his choice, the voter wants to exercise it in accordance with his free will and that free will is interfered with. The Tribunal's decision is also, thus, in line with the view taken above.

270. The next decision of a Tribunal on which reliance has been placed is in Radha Krishna v. Tara Chand, (1956) 12 ELR 378 (Ele. Tri. Lucknow); but that decision appears to be of no help as, in

that case, relying on an English decision, the Tribunal held that, before a threat can be said to amount to undue influence, the question must be put, was it a serious and deliberate threat uttered with the intention of carrying it into effect, and proceeded to apply that test to the case before it. The Tribunal, therefore, dealt with a situation where there was clearly a threat to the voters, but even the threat in question contained in the slogan was held not to constitute corrupt practice, as there was nothing to show that the purpose of the slogan was to directly or indirectly interfere with any person's free exercise of his electoral right.

271. In *Amir Chand v. Sucheta Kripalani*, (1958) 18 ELR 209 (Ele. Tri. Delhi) the Tribunal, after quoting the definition of "undue influence" contained in Section 123 (2) of the Representation of the People Act, 1951, held:—

"The definition, no doubt, is in general terms but it has an element of compulsion and it is an abuse of influence that will constitute undue influence". These remarks also do not go contrary to the view taken above.

272. The last case that requires notice is the decision of a Tribunal in *Kataria Takandas Hemraj v. Pinto Frederick Michael*, (1958) 18 ELR 403 (Ele. Tri. Surat) in which it was said:—

"A candidate, or as matter of fact, any person has every right to persuade people to vote in his favour at the election and in that respect he is further entitled to be even critical of the policy and the acts of the rival party or its candidate and that way it may as well be legitimate for them to influence the voters, provided they did not transgress the legitimate bounds of criticism. It is only undue influence which can be taken exception of, and, even though that term is wide enough to cover any interference with the exercise of the electoral right, one can justifiably call any act as an interference only when it has in it an element of compulsion so as to give way to free thinking in the exercise of the electoral rights of the voters."

This case also, therefore, envisaged some element of compulsion as a result of which a voter is unable to exercise his electoral right in accordance with his judgment and choice. None of the decisions rendered so far by the Courts or Tribunals in India, thus, go contrary to the view expressed above and, if at all, a majority

of them are in line with it. It is in the light of this interpretation of what undue influence means that this Court has to proceed further to see which of the allegations made in the present petitions can amount to charges of undue influence and whether they have been established so as to vitiate the election.

273. The principal charge of undue influence, on which a mass of evidence has been led by the petitioners, relates to the publication of a pamphlet which contained scurrilous and vulgar allegations as to the personal character of Shri Sanjiva Reddy. It is not necessary for me to set out the details of the contents of that pamphlet. It is sufficient to mention that apart from allegations against Shri Sanjiva Reddy, there were no other allegations in it which could amount to a threat of any adverse consequence to any voter in case he cast his vote in favour of Shri Reddy. Even in the evidence, no witness stated that as a result of reading this pamphlet, he apprehended any adverse consequence either to himself or to anyone in whom he may be interested. No doubt, some witnesses stated that, on reading the pamphlet, they felt that, if Shri Sanjiva Reddy is elected as President, the Rashtrapati Bhavan may become a brothel; but that also does not amount to a threat of a nature which would constitute undue influence as explained above. Consequently, the publication of this pamphlet cannot constitute undue influence, so that it is totally unnecessary to go into the question whether it was printed, published and distributed at all; if so, by whom, and, further, whether such printing, publication or distribution was or was not with the connivance of the respondent. As I have held earlier, in the Act there is no provision made for setting aside election on the ground of publication of false statements as to the personal conduct or character of a candidate even if it affects his prospects in the election, so that no evidence need have been taken with regard to the printing, publication or distribution of this pamphlet or with regard to the question as to whether there was any connivance by the respondent in its printing, publication or distribution. The challenge to the election of the respondent based on this petition fails on this preliminary ground. However, I may add that, having had the benefit of reading the judgment proposed to be delivered by my brother Sikri, J., on these issues, I agree with his assess-

ment of the evidence tendered by the parties and the findings recorded by him. These findings of fact are to the effect that, though the pamphlet was distributed by post and in the Central Hall of Parliament, it has not been proved that this distribution was with the connivance of the respondent or that the distribution materially affected the result of the election. Consequently, even on the assumption that the publication of this pamphlet could constitute undue influence, the election of the respondent is not liable to be set aside.

274. Apart from this ground based on the pamphlet, a number of other instances of exercise of undue influence were also cited and relied upon in these two election petitions. These grounds have also been dealt with by my brother Sikri, J., and some by my brother Mitter, J. I agree with their reasons and findings for holding that none of these charges of undue influence has been established, so that the challenge to the election of the respondent on the ground of exercise of undue influence fails altogether.

275. I also agree with the order directing parties to bear their own costs and the reasons for that order given by my brother Sikri, J., in his judgment. Issue No. 7 in Election Petition No. 1 of 1969, Issue No. 9 in Election Petition No. 4 of 1969, and Issue No. 11 in Election Petition No. 5 of 1969.

276. As a result of the findings on other issues, the petitioners in none of these petitions are entitled to any relief, as no ground has been made out for declaring the election of the respondent as void.

MITTER, J.—277. I have had the benefit of reading the judgments of my colleagues. The facts leading up to the filing of these petitions and the issues settled therein have been set out in the judgment of my learned colleague Bhargava, J. I am in agreement with him in his conclusion on issues other than issue No. 4 in Election Petitions 4 and 5 of 1969. I regret to have to differ from my other colleagues on this issue. As Petition No. 5 is more comprehensive than Petition No. 4 I prefer to refer to the allegations made in Petition No. 5 alone. Leaving out of account the technical grounds on which the election has been challenged, the petitioners have asked for a declaration that the election be declared void on the following grounds:

(1) That the offence of undue influence at the election had been committed by the returned candidate (hereinafter referred to as the 'respondent') and by his supporters with the connivance of the respondent as mentioned in paragraph (a) and various sub-paragraphs of 13 (b) and (c) of the Petition.

(b) The result of the election was materially affected by reason of the offence of undue influence at the election having been committed by persons mentioned in paragraph 13 of the petition.

278. Undue influence is alleged to have been committed in diverse ways on various persons details whereof are given hereinafter.

279. Paragraph 13 of Petition No. 5 purports to give a summary of the events which are alleged to have formed the background in which the offences were said to have been committed. Put briefly they are as follows.

(1) After the demise of the late Dr. Zakir Hussain, the Prime Minister of India who was also an influential leader in the Congress Party took the view that the respondent who was then the Vice-President of India should be adopted as the Congress candidate for the office which had fallen vacant. This was not acceptable to all her colleagues in the Congress Parliamentary Board (hereinafter referred to as the 'Board')—a body which had in the past selected the party's candidate for the office of the President. The controversy which thus arose could not be settled because of want of unanimity of opinion and the matter was left to be decided at the Bangalore Session of the All India Congress Committee (hereinafter referred to as the 'Committee') to be held in July 1969.

(2) No consensus being attained at the meeting of the Board held in Bangalore on July 12, 1969 the matter was decided by voting. The Prime Minister and Sri Fakhruddin Ali Ahmed voted for Sri Jagjivan Ram while Sri Morarji Desai, Sri Y. B. Chavan, Sri S. K. Patil and Sri Kamaraj voted in favour of Sri N. Sanjeeva Reddy.

(3) The decision of the Board greatly upset the Prime Minister and she then and there threatened the members of the Board that it would lead to serious consequences and that she should not have been over-ruled in that manner.

(4) The official announcement of the selection of Sri Sanjeeva Reddy as Congress candidate for the office of the Presi-

dent of India was made on 13th July, 1969 and on the same day the respondent who was then acting as the President of India called a Press conference at Rashtrapati Bhavan whereat he announced his candidature for the office of the President. He issued a statement condemning the selection of Sri Sanjeeva Reddy as based on partisan considerations and emphasised that a candidate for the highest office in the land should possess character, integrity, patriotism, experience and a good record of service and sacrifice. According to the petitioner there was an insinuation that the above requisite qualifications were lacking in Sri Sanjeeva Reddy.

(5) Being upset by the decision of the Board, the Prime Minister without any consultation with her colleagues in the Cabinet advised the Acting President of India that she would withdraw the Finance portfolio from Sri Morarji Desai. Her advice being accepted Sri Morarji Desai was relieved of his portfolio. She followed it up with the promulgation of the Bank Nationalisation Ordinance, a day before Parliament was to commence its session. This Ordinance was signed by the respondent acting as President.

(6) On the 22nd July, 1969 the Prime Minister proposed Sri Sanjeeva Reddy as a candidate for the office of the President of India which was duly seconded by Sri Swaran Singh, a Cabinet Minister.

(7) The Prime Minister however expressed difficulty in issuing a written appeal in support of the candidature of Sri Sanjeeva Reddy.

(8) At a meeting of the Board held on August 6, 1969 there was a joint address by the Prime Minister and the Congress President, Sri S. Nijalingappa, in support of Sri Sanjeeva Reddy's candidature. At this meeting the Prime Minister stated that she stood by the decision of the party while on his part Sri Nijalingappa said that he had been in contact with leaders of various opposition parties, namely, the P. S. P., the S. S. P., the Jan Sangh, B. K. D. and others and that the response in favour of Sri Sanjeeva Reddy had been encouraging.

(9) On August 9, an anonymous pamphlet in cyclostyled form and a printed pamphlet both without the name of the publisher or the printer were published by free distribution among the members of the electoral college for the Presidential election. In this the leaders of the party like Shri S. K. Patil, Shri Atulya

Ghosh and others were castigated as self-seekers who had tried to become virtual dictators and Sri Sanjeeva Reddy who had been selected by these people was described as a corrupt and immoral person. The pamphlet charged Sri Sanjeeva Reddy not only with lack of probity but as having been guilty of gross misdemeanour towards members of the other sex on a number of occasions culminating in the statement that if he were to become the President he would "turn Rashtrapati Bhavan into a harem, a centre of vice and immorality."

(10) Not satisfied with what the Prime Minister had said at the Congress Parliamentary meeting on August 6, Sri Nijalingappa requested her specifically on August 9 to issue an appeal to the members of the party to vote and work for the success of the Congress candidate. The Prime Minister avoided doing this and merely said that people should abide by the decision of the Board.

(11) This was followed by certain correspondence by and between Sri Fakhruddin Ali Ahmed and Sri Jagjiwan Ram jointly on the one hand and Sri Nijalingappa on the other, as also by and between Sri Nijalingappa and the Prime Minister from August 11 to August 15. The correspondence showed an open cleavage between the members of the party and it became clear that the Prime Minister and her colleagues in the Cabinet and their supporters made the issue of the success at the election by defeating the group which opposed her at the meeting of the Board on July, 12, as one of prestige and political survival of the Prime Minister.

280. Against the above background the offence of undue influence was said to have been committed by the returned candidate and some persons named and unnamed and described as the workers and supporters of the respondent with his connivance by voluntarily interfering and attempting to interfere with the free exercise of the electoral rights of the candidates and the electors in general and some of them named in particular.

(a) According to paragraph 13 (b) (ii) of the petition Sri S. Nijalingappa, Sri S. K. Patil, Sri K. Kamaraj, Sri Morarji Desai and Sri Y. B. Chavan, electors at the election were threatened by the Prime Minister on the 12th July at Bangalore with serious consequences with the object of unduly influencing them so as to make them change their decision to nominate

Sri Sanjeeva Reddy as their candidate. The threat is alleged to have been repeated subsequently on a number of occasions. It was also said to be a direct attempt to dissuade Sri Sanjeeva Reddy from standing as a candidate.

(b) In paragraph 13 (b) (iii) of the petition it was stated that with the object of interfering with the free exercise of the electoral rights of Sri Sanjeeva Reddy, Sri Nijalingappa, Sri Kamaraj and others, electors at the election, supporters of the respondent viz., Sri Jagjivan Ram, Sri Yunus Saleem, Sri Sashi Bhushan, Sri Krishna Kant, Sri Chandrasekhar, Sri Jagat Narain Sri Mohan Dharia and Sri S. M. Banerjee in particular and other supporters and workers of the respondent in general with the consent and connivance of the respondent published by free distribution a pamphlet, annexure A-38 to the petition, in Hindi and English, in cyclostyled form as well as in printed form in which serious allegations, as already noted, were made amounting to the commission of undue influence upon the persons named within the meaning of Section 171-C, I. P. C.

(c) According to paragraph 13 (b) (iv) of the petition this pamphlet was distributed from 9th to 16th August among all electors of the electoral college for the Presidential election. It was distributed in the Central hall of Parliament by the abovenamed person i. e., Sri Jagjivan Ram and others. A large number of electors were asked to read the contents of the pamphlet, and were also asked to say whether they would vote for such a debauch and corrupt man. An instance of this is given in paragraph 13 (b) (iv) of the petition: Sri Yunus Saleem approaching Abdul Gani Dar, one of the petitioners and talking to him as above in the presence of other members of Parliament.

(d) The petitioner, Sri Abdul Ghani Dar took strong exception to what was going on and wrote a letter to the respondent endorsing a copy thereof to the Prime Minister and Sri Humayun Kahir requesting the respondent to condemn those who had published the pamphlet and make a public statement dissociating himself from and denouncing the publishers of the pamphlet.

(e) The respondent himself during his tour of the country addressed pressmen and members of the public at various places and repeatedly stated that a man of character and integrity should have been selected,

(f) according to paragraph 13 (c) (i) the supporters of the respondent, namely, the Prime Minister and some of her Cabinet colleagues like Sri Jagjivan Ram, Sri Fakhruddin Ali Ahmed, Sri Yunus Saleem, Dr. Karan Singh, Sri Dinesh Singh, Sri Swaran Singh, Sri I. K. Gujral, Sri S. S. Sinha, Sri K. K. Shah and Sri Triguna Sen misused their position for furthering the prospects of the returned candidate by contacting a large number of electors on the telephone and openly telling them that if the electors did not vote for the respondent they would lose all the patronage which they would otherwise be given. Electors were called by some of the abovenamed Ministers at their Official residences and offices in Delhi and undue influence brought to bear upon them by ordering them to vote for the returned candidate.

(g) According to paragraph 13 (c) (iii) of the petition Sri Fakhruddin Ali Ahmed and Sri Yunus Saleem threatened the Muslim electors that Sri Sanjeeva Reddy was in fact a candidate of the Jan Sangh Party and if he was elected the fate of the Muslim community in India would be in danger. This undue influence was exercised over all the Muslim electors in the country and specially those in Parliament. An instance of this is given as having taken place between Sri Yunus Saleem and Sri Abdul Ghani Dar.

(h) The workers and supporters of the respondent became desperate and demanded freedom of vote at the election so that the members of the Congress party may not feel themselves bound by their party affiliation to vote for Sri Sanjeeva Reddy. It was stated that such a scare was created that the President of the U. P. Congress Committee, Sri Kamalapati Tripathi and the Chief Minister Sri C. B. Gupta who had on August 6, 1969 addressed a meeting for solidly backing Sri Sanjeeva Reddy changed their stand and on the 13th August, 1969 Sri Kamalapati Tripathi also pleaded for freedom of vote.

(i) According to paragraph 13 (c) (v) a scare was raised and undue influence exercised on the minds of the members of the Legislative Assembly of Bengal that if successful Sri Sanjeeva Reddy would enforce President's Rule in Bengal wiping off the United Front Government and the legislative assembly. According to paragraph 13 (c) (ii) a similar scare was raised with regard to enforcement of President's Rule in Andhra Pradesh. According to paragraph 13 (c) (x) the returned candi-

date, the Prime Minister, Sri Jagjivan Ram Sri Kakhruddin Ali Ahmed and others entered into a conspiracy calculated to maintain the said Ministers in their office by the allegation that Sri Nijalingappa had entered into an arrangement with the leaders of the Jan Sangh and Swatantra Party to oust the Congress Government from the Centre and to establish a Coalition Government.

280A. There are other allegations of undue influence in the said paragraph but as they were not pressed no further notice need be taken of them.

281. In paragraph 14 of the petition it was stated that the result of the election had been materially affected by reason of the commission of the offence of undue influence at the election by the persons mentioned in paragraph 13 of the petition.

282. In paragraph 16 of the petition it was stated that in case the Court came to the conclusion that the offences mentioned above, though committed were not connived at by the respondent, still the election ought to be declared void as the result of it had been materially affected by the above practices.

283. In the counter affidavit filed by the respondent the above charges were all denied and the correctness of the statements disputed. The respondent stated expressly that for want of knowledge he could not traverse the allegations in the various sub-paragraphs of paragraph 13 of the petition except those which were made against him or imputed to him and alleged to have been said or done at his instance or with his connivance. He stated categorically in paragraph 25 of the counter affidavit that he had been carrying on his campaign single handed and that in between July 30, and 13th August he was out of Delhi most of the time touring different parts of the country. He disputed the correctness of the charges made in the various sub-paragraphs of paragraph 13 and denied that he had been contacted by the Prime Minister at Delhi from Bangalore as alleged or that she had suggested that as soon as an official announcement regarding the selection of Sri Sanjeeva Reddy was made he should announce his own candidature for the office of the President. With regard to his press conference he said that he had only outlined the necessary qualifications for the office of the President and that his statement

could by no means be read as an attack on the personal conduct or character of Sri Sanjeeva Reddy. He said further that he had approved of the taking over of the portfolio of Finance from Sri Morarji Desai on the 16th July, on the recommendation of the Prime Minister but the signing of the Bank Nationalisation Ordinance had nothing to do with the Presidential Election. He stated in clear terms that he had no knowledge of any of the statements relating to printing, publishing and distribution of the unsigned pamphlet, whether printed or otherwise and he completely dissociated himself therefrom. He denied the insinuation that he had anything to do with the Prime Minister's alleged call for a free vote to get support for himself. He characterised the allegations regarding the publication and distribution of the pamphlet mentioned in the petition by anybody as his supporters or workers with his consent and connivance, as reckless, wild and false. He denied having received any letter from Sri Abdul Ghani Dar as mentioned in the petition or any copy of the pamphlet. He denied ever having hinted in any of his public addresses anything derogatory to the personal conduct or character of Sri Sanjeeva Reddy. With regard to paragraph 13 (c) (i) of the petition he stated that he was not aware of any of the persons having acted in the manner alleged therein. With regard to paragraph 13 (c) (ii) and (iii) as also 13 (c) (x) he disclaimed all knowledge.

284. On 21st January, 1970, the Court directed the petitioners to furnish several particulars of the petition mostly relating to paragraph 13 (b) (iii), 13 (b) (iv), 13 (c) (i) and 13 (c) (iii). In compliance with the same the petitioners gave inter alia the following particulars.

285. With regard to paragraph 13 (b) (iv) they stated "that the persons who had distributed the pamphlet between the 9th and 16th August, 1969, were already mentioned in paragraph 13 (b) (iii) and some other persons who had done so were being mentioned in particulars furnished to paragraph 13 (b) (iii), namely, Shri Maulana Ishaq Sambali, Sri Akbar Ali, M. P., Sri Bhupesh Gupta M. P. and Sri Randhir Singh M. P. With regard to the place and date on which the persons mentioned in paragraph 13 (b) (iii) were alleged to have distributed the pamphlet it was said that on 9th August, 1969, Sri Sashi Bhushan, M. P. and Sri Krishan Kant, M. P. had together distributed copies of the said pamphlet to various members of

Parliament at the latter's resident in New Delhi. It was also said that the pamphlet had been distributed by leaving the same at the residence of nine other electors at their residence on 9th August, late in the evening. Little attempt was made to prove these statements.

286. The names of 18 persons were given as having received the said pamphlet at their residence by post in various places in India. They were all members of the Legislative Assemblies of Uttar Pradesh as also of Madhya Pradesh, Bihar and Chandigarh. Of these some but not all were examined in Court.

287. Further, with regard to distribution of the pamphlet it was said that the persons already mentioned in paragraph 13 (b) (iii) as also those mentioned in reply to the application for particulars given above distributed the same individually and in groups of two or more on all days between 11th and 15th August to the general body of electors frequenting the Central hall of Parliament. The names of 29 members of Parliament were given as the recipients of the pamphlets in the above manner. Further groups of M. Ps. were mentioned as having distributed the said pamphlets to some or other of the petitioners on the 11th August, 1969, in the Central hall of Parliament. With regard to the telephone calls by Ministers exercising undue influence over the members of the electoral college referred to in paragraph 13 (c) (i) about 30 M. Ps. were named as having been so contacted by 11 named Ministers including the Prime Minister, Sri Fakhruddin Ali Ahmed, Sri Jagjivan Ram, Sri Yunus Saleem and Sri I. K. Gujral. With the exception of three of them, namely, Sri Fakhruddin Ali Ahmed, Sri Yunus Saleem and Sri I. K. Gujral, no attempt was made to substantiate the above. I do not think it necessary to dilate more on the correctness of the particulars and the attempt to establish the same except to say that little effort was made to establish the allegations which were verified either as true to the knowledge of the deponent, Sri Abdul Ghani Dar or as being based on information received by him from the persons named, some of whom were called as witnesses but did not support the version of Sri Abdul Ghani Dar as given in the particulars.

288. For the sake of convenience issue No. 4 is reproduced below:

Issue 4 in Election Petitions Nos. 4 and 5.

(a) Whether all or any of the allegations made in paragraphs 8 (e) and 13 (a) to (m) of the petitions constitute in law an offence of undue influence under Section 18 (1) (a) of the Presidential and Vice-Presidential Elections Act of 1952?

(b) Whether the said allegations made in paragraphs 8 (e) and 13 (a) to (m) are true and proved?

(c) In the event of these allegations being proved constituting undue influence, whether

(i) the returned candidate has committed the offence of undue influence?

(ii) Whether undue influence was committed by his workers and if so, with his connivance? and

(iii) Whether undue influence was committed by others without his connivance and if so, whether that has materially affected the result of the election?

289. Before going into the evidence adduced one must note the provisions of the law relating to the election of the President of India and in particular the grounds on which such an election can be challenged and then briefly consider the history of the law of undue influence generally and examine the statutory provisions of the law of undue influence applicable to elections and the exposition thereof in India.

290. Article 71 (1) of our Constitution provides that all doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be enquired into and decided by the Supreme Court whose decision shall be final. Sub-clause (3) of that article lays down that:

"Subject to the provisions of this Constitution, Parliament may by law regulate the matter relating to or connected with the election of a President or Vice-President."

By Act 31 of 1952, the Presidential and Vice-Presidential Elections Act (hereinafter referred to as the 'Act') Parliament made provisions for the conduct of Presidential and Vice-Presidential elections. Disputes regarding elections are dealt with in Part III of the Act containing Sections 13 to 20. Section 16 of the Act lays down the reliefs which may be claimed by a petitioner and Section 18 specifies the grounds for declaring the election of a returned candidate to be void. The relevant part thereof reads as follows:

"18 (1) If the Supreme Court is of opinion—

(a) that the offence of bribery or undue influence at the election has been committed by the returned candidate or by any person with the connivance of the returned candidate; or

(b) that the result of the election has been materially affected—

(i) by reason that the offence of bribery or undue influence at the election has been committed by any person who is neither the returned candidate nor a person acting with his connivance;

(c) * * *

The Supreme Court shall declare the election of the returned candidate to be void.

(2) For the purposes of this section, the offences of bribery and undue influence at an election have the same meaning as in Chapter IX-A of the Indian Penal Code (Act 45 of 1860)."

291. Section 21 contained in part IV provides for the making of rules to give effect to the Act. The provisions in the Constitution and the Presidential and Vice-Presidential Elections Act of 1952 and the Rules framed thereunder form a complete code relating to such election and all doubts and disputes regarding the validity of such elections which can be adjudicated upon by the Supreme Court must arise within the limits specified thereby.

292. Chapter IX-A of the Indian Penal Code which deals with offences relating to elections was introduced by the Indian Elections Offences and Inquiries Act, 39 of 1920, Section 2. Section 171-A in that part defines candidates and electoral right. Bribery is defined in Section 171-B. Undue influence at elections is covered by Section 171-C which runs as follows:—

"(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever—

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such

candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section."

Under Section 171-F whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description which may extend to one year or with fine or with both. Under Section 171-G:

"Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine."

293. It will be noted that the words used in sub-sec. (1) of Sec. 171-C are very wide and sub-sec. (2) though illustrative of sub-section (1) does not purport to comprehend all the facets of undue influence under sub-section (1). The statement of objects and reasons of the Act of 1920 makes the intention of the legislature clear. It reads:

"The second sub-clause is merely explanatory of the general definitions in the first sub-clause and does not restrict the generality of the words used there. We have considered the criticisms of this clause based on the generality of the words employed but we are satisfied that any attempt at specific enumeration would be open to serious danger of loopholes in what we regard as a most salutary provision."

On the facts of this case the vital question before us is, whether the mere publication of a false statement highly derogatory of the personal conduct or character of a candidate or the dissemination of a scurrilous pamphlet depicting a candidate as one of lecherous character will fall under sub-section (1) of Section 171-C or whether in order to prove the commission of the offence the election petitioner must go farther and establish that there was an attempt on the part of some persons to interfere with the free choice of a candidate on the part of the voters by making use of the pamphlet so as to deflect their will and restrict their choice to persons other than the one defamed.

294. Undue influence is an old and well known English legal concept. Be-

fore the expression came to be used in litigation over elections it had acquired a definite significance to English lawyers although its exposition in common law was somewhat different from that which the equity lawyers gave it. The concept was developed along a particular line by Judges in England trying election disputes and our Indian law has by and large followed the same pattern. According to Anson on English law of Contract (22nd Edition) Chapter VII:

"A contract which has been obtained by means of pressure or intimidation is voidable at common law or in equity on the ground of duress. At common law the definition of duress is a narrow one and only the more extreme forms of coercion will suffice. In equity, however, owing to the development of the doctrine of constructive fraud, a contract may be rescinded in cases where common law provides no remedy. . . . At common law duress consists in actual or threatened violence or imprisonment, the subject of it must be the contracting party himself, or his wife, parent, child, or other near relative, and it must be inflicted or threatened to be inflicted by the other party to the contract, or at least it must be known to him when he entered into the contract." (see p. 243).

The learned author goes on to say at pages 244 and 245:

"Equity, on the other hand, will treat contracts as voidable when they have been induced by forms of pressure of coercion which do not amount to duress at common law."

The term 'undue influence' has sometimes been used by the Courts to describe the equitable doctrine of coercion which has just been referred to, but it also includes, and it would perhaps be convenient to confine it, forms of pressure much less direct or substantial than those already discussed. It may arise where the parties stand to one another in a relation of confidence which puts one of them in a position to exercise over the other an influence which may be perfectly natural and proper in itself, but is capable of being unfairly used.

If it can be shown that one party exercised such domination over the mind and will of the other that his independence of decision was substantially undermined, the party whose will was overborne will be entitled to relief on the ground of undue influence.

There is no need for any special relationship to exist between the parties, although, of course, it may do so. The mere fact that denomination was exercised is sufficient; no abuse of confidence need be proved."

295. According to Cheshire and Fifoot on the Law of Contract (7th Edition) p. 264.

"The Courts have never attempted to define undue influence with precision, but it has been described as 'some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by' the guilty party."

296. So far as the English Law of Elections on which principally our election laws are based is concerned, reference may be made to some of the well-known text books on the subject. According to Rogers Parliamentary Elections and Petitions, 20th Edition Chapter XI p. 325;

"In England corruptly influence a voter, whether by the more direct and grosser form of treating or the more indirect and subtler form of wagers was always an offence as a species of bribery; but unduly influencing a voter was not, before the 17 and 18 Vict. c. 102, an offence in the strict sense of the word, although its prevalence is mentioned in many resolutions of the House of Commons, and many statutes have been passed to prohibit the evil in particular instances; and although a vote unduly influenced is void at common law and will be struck off on a scrutiny."

The learned author goes on to add:

"As early as 3 Edw. 1, c. 5, which is declaratory of the common law, in affirming the vital principles of freedom of election, said, "Because elections ought to be free, the King commandeth, upon forfeiture, that no man by force of arms, nor by malice or menacing, shall disturb any to make free election."

Rogers notes that in the case of Lichfield (1869) 1 O'M & H. 25, Willes, J., defined undue influence as

"using any violence or threatening any damage, or resorting to any fraudulent contrivance to restrain the liberty of a voter, so as either to compel or frighten him into voting or abstaining from voting otherwise than he freely wills."

In the same case the learned Judge added (at p. 28):

"The law cannot strike at the existence of influence. The law can no more take away from a man, who has property, or who can give employment, the insensible but powerful influence he has over those who he can benefit by the proper use of his wealth, than the law could take away his honesty, his good feeling, his courage, his good looks, or any other qualities which give a man influence over his fellows. It is the abuse of influence with which alone the law can deal. Influence cannot be said to be abused because it exists and operates. It is only abused in cases of this kind, where an inducement is held out by a promise to induce voters to vote or not to vote at an election." This case was decided upon 17 and 18 Vict. c. 102, Section 5.

297. According to Rogers the following are the principal kinds of improper influence:

1. The use of open force or violence, or the threat thereof.

2. The infliction of any temporal injury, damage, harm or loss or by the threat thereof.

3. The infliction of any spiritual injury, damage, harm or loss, or by the threat thereof.

4. The impeding etc. the due exercise of the franchise etc. by abduction, duress, or any fraudulent device or contrivance.

298. Section 101 of the Representation of the People Act, 1949 appears to be the latest codification of the English law on the subject of undue influence. Under sub-section (1) a person shall be guilty of corrupt practice if he is guilty of undue influence. Sub-section (2) of the section is in two parts. Under clause (b) a person shall be guilty of undue influence if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise of an elector or proxy for an elector, or thereby compels, induces or prevails upon an elector or proxy for an elector either to vote or to refrain from voting.

299. Under Section 91(1) of the Representation of the People Act, 1949:

"Any person who, or any director of any body or association corporate which, before or during an election, shall, for the purpose of affecting the return of any candidate at the election, make or publish any false statement of fact in relation to the personal character or conduct of the candidate shall be guilty of an illegal

practice, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true."

300. It will thus be noticed that in England the law of undue influence as regards elections is somewhat akin to that branch of the law as expounded by the courts of equity and both have a common facet, namely, the inducement of a person to act otherwise than under his free will by resort to any fraudulent device or contrivance.

301. Coming now to our Indian law, Section 16 of the Contract Act which came on the statute book in 1872 laid down by sub-section (1) that:

"A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

In substance our law of contract with regard to undue influence stresses upon the domination of the will by another to obtain an unfair advantage by the exercise thereof. So far as our election law is concerned the earliest attempt seems to have been the codification in 1919 under Chapter IX-A of the Indian Penal Code. This was followed by the Government of India (Provincial Elections) Corrupt Practices and Election Petitions Order, 1936 which will be shortly described as the Corrupt Practices Order. This law was passed after the Government of India Act of 1935. Corrupt practice in relation to an election by the members of a Provincial Legislature to fill seats in Provincial Legislative Council, meant one of the practices specified in Parts I and II of the First Schedule to the Order, and in relation to any other election, meant one of the practices specified in Parts, I, II and III of that Schedule. Part I of the First Schedule defined undue influence in Clause 2 in the following terms:—

"Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of a candidate or his agent, or of any other person with the connivance of the candidate or his agent, with the free exercise of any electoral right:

Provided that—

(a) without prejudice to the generality of the provisions of this paragraph, any such person as is referred to therein who—

(i) threatens any candidate or elector, or any person in whom a candidate or

elector is interested, with any injury of any kind, or

(u) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of that candidate or elector within the meaning of this paragraph:

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this paragraph."

302. It will be noticed that there is a good deal of similarity between this provision and that in Section 171-C of the Indian Penal Code. There is greater similarity between undue influence as defined in Section 171-C and the definition of that expression in Section 123 of the Representation of the People Act, 1951 — another Parliamentary Act. Under the Act of 1951 undue influence is defined as follows in Section 123 (2):

"Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right:

Provided that —

(a) Without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate or an elector or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause:

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause."

This Act contains a further provision in clause (4) of Section 123 laying down that "the publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any statement of fact which is false and which he either believes to be false or does not believe to be true in relation to the personal conduct or character of any candidate in relation to the candidature or withdrawal, of any candidate being a statement reasonably calculated to prejudice the election of that candidate at an election"

will be deemed to be a corrupt practice for the purpose of that Act.

303. It will be noted that under subsection (4) publication of a false statement relating to the personal conduct or character of a candidate only becomes a corrupt practice when it is done by a rival or his agent or any other person with his consent. However opprobrious such publication may be it is not an electoral offence under the Act of 1951 and would not be a ground for setting aside an election although it might become culpable under Section 499 of the Indian Penal Code and as such punishable with simple imprisonment for a term which may extend to two years or with fine or with both. Clearly such publication per se would not amount to any direct or indirect interference or attempt to interfere with the free exercise of an electoral right so as to attract Section 123 (2) of the Act. Even in England it would be an illegal practice within the meaning of Section 91 (1) of the Representation of the People Act. By itself it would not make the publisher of the statement guilty of undue influence. While enacting the statute of 1952 the legislature had before it the electoral offences codified in Chapter IX-A of the Indian Penal Code. It recognised the necessity of a law prescribing for the annulment of an election only if bribery or undue influence was committed thereat. Such offence if committed by a candidate or by any person with his connivance was enough for declaring the election void. But if committed by any person who was not the returned candidate nor one acting with his connivance, it was not to affect the election unless the result of it had been materially affected by such malpractices. So far as this branch of the law is concerned the only difference between the Act of 1951 and the Act of 1952 lies in the fact

that under the latter Act corrupt practices of bribery or undue influence by one who was not a party to the election or his agent are also brought in. But the nature and character of undue influence under both the Acts remains the same. I see no reason for taking a view that what would not be undue influence under the Act of 1951 can become one under the Act of 1952.

304. If publication of any defamatory matter relating to a candidate was to be treated as a direct or indirect interference or attempt to interfere with the free exercise of any electoral right under the wide words of Section 171-C (1) there would have been no occasion for the legislature to provide for it separately under Section 123 (4) of the Act of 1951. In my view the same position would obtain under the Act of 1952 and before any publication of a defamatory matter relating to a candidate can be treated as commission of the offence of undue influence there must be some overt act in addition to the mere publication — some attempt or persuasion of a voter to restrain the free choice of a candidate before the law of undue influence is excited.

305. The above proposition may be illustrated as follows: If anonymous posters containing defamatory matter about a candidate's personal conduct or character were to be displayed in prominent places in the constituency so as to attract the notice of electors, it would come within the mischief of Section 171-G of the Indian Penal Code but would fall short of exercise of undue influence under Sec. 171-C. An attempt to denigrate a person in such a way could not be said to be directed to thwarting the free choice of electors inasmuch as the poster by itself would give no indication as to the source of information on which the imputations were made or of their authenticity. But if an unsigned pamphlet containing matter defamatory of the personal conduct or character of a candidate be pressed personally upon an elector by another with an attempt to make the receiver believe that there was some basis for the charges levelled against the candidate, the person receiving the pamphlet would be likely to give credence to the imputations made therein and would thus be subject to a restraint on his franchise. As a mere attempt to interfere with the free exercise of an electoral right is sufficient for the purpose of Section 171-C (1) of the Indian Penal Code it is not necessary to prove positively that

there was actual domination of or overbearing of the will of the elector to lead to the inference that undue influence was exercised: it would be sufficient to show that there was an attempt to pervert the unfettered choice of a voter by resort to illegitimate persuasion *inter alia* by pressing upon him a document containing such a false statement of fact relating to the conduct or character of a candidate as would make any right-thinking man shrink from selecting him and shun him in the process of selection of a candidate. In such a case it would not be difficult to hold that there was in fact malice behind the publication and the adoption of a fraudulent device calculated to defeat or deflect the will of the elector. In this view of the matter the publication of a false statement of fact relating to the conduct or character of a person coupled with an attempt to persuade electors by such publication would attract the operation of Section 171-C (1) of the Indian Penal Code. It would also fall within the definition of undue influence in Section 123 (2) of the R. P. Act of 1951 and the definition given in Clause 2 of the Corrupt Practices Order, 1936.

306. I may now proceed to note some of the reports of Election Commissions under the Corrupt Practices Order 1936 before examining more recent decisions. In Amritsar City (Mohammadan) Constituency — Sh. Mohammad Sadiq v. Dr. Saifuddin Kitchlew, (1864-1935) 2 Doabia's E. C. 117 before the Second Election Petitions Commission Bench the scope of undue influence under the First Schedule to the Corrupt Practices Order, 1936 came to be considered. It was the case of the petitioner that one Feroze-ud-Din Ahmed by administering oaths to his audience which included numerous voters, restricted their choice to the returned candidate Dr. Kitchlew, under pain of spiritual penalties and thereby interfered with the free exercise of their right to vote. Counsel for the respondent argued that the element of compulsion was an essential ingredient of the corrupt practice of undue influence and contended that it was not even alleged that Feroze-ud-Din Ahmed had compelled his audience to take the alleged oaths. The Commissioners found that

"such oaths were taken and that Feroze-ud-Din Ahmed also reminded his audiences of the penalties provided for breach of such oaths by their religion. It is evident that the element of compulsion was

present in the minds of those voters who had taken oaths to vote for Dr. Kitchlew at the time when they marked their ballot-papers, they had given an undertaking, supported by the sanction of loss of faith, which inevitably leads to divine displeasure and spiritual censure; that they would vote for Dr. Kitchlew and for no other person."

The Commissioners however could not find in the definition of 'undue influence' any basis for the proposition that unless Feroze-ud-Din Ahmed had compelled voters to take these oaths, the offence of undue influence was not complete ob-serving:

"That definition, as is obvious, gives a very wide scope of the meaning of 'undue influence' Evidently the offence includes such interference or attempt to interfere by any method, and one, possible method is the method of inducement, which is proved to have been practised in this case. In fact the word 'induces' occurs in the second proviso to the definition of 'undue influence' reproduced above. Further, we have seen that the inducement was of a very powerful type, supported as it was by references to the demolition of the Shahidganj Mosque and the deaths of Muslims which resulted from the firing during the ensuing disturbances in regard to which the feeling among the rank and file of the Muslim community is undoubtedly very deep."

In Amritsar City (Mohammadan) Constituency Case No. 2, (1935-50) 2 Doabia's E. C. 150, D/- 28-9-1938 the meaning of undue influence under the Corrupt Practices Order, 1936 again fell to be considered. There a question arose as to whether certain news items and posters in which the unsuccessful person was wrongly and falsely described as standing as a candidate on a Muslim League ticket would fall within the mischief of the Order. In their report the Commissioners stated (at p. 157):

"There is no proper evidence of actual interference before us, and as regards the attempt, we have to see if there was the deliberate intent to mislead voters and thus make them exercise their electoral right under the wrong impression that the respondent had been set up as a candidate by the Muslim League."

The case for the petitioner there was that one Maulana Zaffar Ali Khan by making an appeal to the voters restricted their choice to Mohammad Sadiq under pain of spiritual penalties and even otherwise and

thereby exercised undue influence in the free exercise of their right to vote. In the opinion of the Commissioners an inducement could not amount to undue influence unless it was of such a powerful type as would leave no free will to the voter in the exercise of his choice. In Lyallapur and Jhang General Constituency Case No. 2 (1864-1935) 2 Doabia's E. C. 243 at p. 256 one of the questions canvassed was whether fraud was a corrupt practice within the meaning of Government of India (Provincial Legislative Assemblies) Order 1936, paragraph 4-B. According to the Commissioners fraud may in some cases come within the ambit of the corrupt practice of undue influence. Referring to the definition of undue influence in the said order the Commissioners observed:

"It is obvious that the definition of undue influence is very widely worded and covers all kinds of fraudulent acts or omissions which, in any way directly or indirectly interfere with the exercise of any electoral right. The definition in the English Act specifically makes a fraudulent device or contrivance a type of undue influence. As devices based on fraud which interfere with the exercise of electoral right, are not mentioned by name in the definition given in Schedule I, it has been intentionally framed in very general terms so as to cover all kinds of such devices."

(1953) 7 Ele LR 457 (Ele. Tri. Kotah) was a case in which there were two candidates, one a jagirdar and the other a Congressman. The Congress committee published a poster containing the picture of a tenant tied up to a tree and a well dressed jagirdar asking another who had a waving whip in his hand, to flog the tenant and the tenant's wife was shown lying prostrate on the ground. It was held that the publication of the poster amounted to the exercise of undue influence on the voters who were mostly illiterate villagers and the case fell under Section 123 (2) of the Representation of the People Act.

307. In (1956) 12 Ele LR 378 at p. 415 (Ele. Tri. Lucknow) one of the questions before the Election Tribunal was whether the shouting of a slogan in various villages and bazars that people who vote in a particular way would be given a shoe-beating amounted to exercise of undue influence. Relying on the observations of Norfolk (Northern case) (1869) 1 O'M & H 236 at p. 242 that before a threat can

be considered to amount to undue influence, a question must be put, 'was it a serious and deliberate threat uttered with the intention of carrying it into effect?' Applying that test, the Election Commissioners held that they had no difficulty in coming to the conclusion that the shouting of the slogan could not amount to undue influence inasmuch as it was shouted for several months before the election was held and not a single instance was brought on record in which the threat contained in the slogan was carried out. On the facts of the case, it was held that none of the parties could be said to have uttered slogans for the purpose of directly or indirectly interfering with any person's free exercise of his electoral right. Reference was also made to the fact that there was no evidence that any complaint even had been made about the shouting of the slogans to the agents of the petitioners.

308. In (1958) 18 Ele LR 209 (Ele. Tri. Delhi) one of the questions which engaged the attention of the election Tribunal was whether a false statement in a daily newspaper to the effect that the respondent Smt. Sucheta Kriplani was going to be taken as a Rehabilitation Minister in the forthcoming Union Cabinet after the election thereby giving currency to the rumour amounted to undue influence as contemplated under Section 123 (2) of the Representation of the People Act. The view taken by the Tribunal was that (p. 252):

"The so-called device namely, that some one from Lucknow sent the news as a rumour or opinion of the member of the Congress High Command, does not fall within the ambit of the definition" in Section 123 (2). It was said that though the definition was no doubt in general terms it has an element of compulsion and it was an abuse of influence that would constitute undue influence.

309. In (1958) 18 Ele LR 403 (Ele. Tri. Surat) an appeal was made to Maharashtrais not to vote for the Congress candidate as the Congress Government had resorted to firing and killing Maharashtrian leaders for demanding a separate Maharashtra State and photographs of martyrs who had been killed were attached to the appeal and it was even stated that the ballot box of the Congress Party was filled with the blood of Maharashtrian martyrs. Negating the plea of undue influence sought to be raised in the above appeal, the Tribunal stated that although the expression 'undue influence' was wide

enough to cover any interference with the exercise of the electoral right, there is in it an element of compulsion so as to give way to free thinking in the exercise of the electoral right of the voters.

310. In (1958) 19 Ele LR 203 (Ele. Tri. Orissa) a case of undue influence was sought to be made out inter alia by the publication of a booklet which had in its cover page a photograph of one S. who had been killed during the police firing with the caption "Do not vote for the Congress who had killed S". In the judgment in appeal from the Election Tribunal Barman, J., remarked (at p. 217):

"A voter must be able to freely exercise his electoral right. He must be a free agent. All influences are not necessarily undue or unlawful. Legitimate exercise of influence by a political party or association or even an individual should not be confused with undue influence. Persuasion may be quite legitimate and may be fairly pressed on the voters. On the other hand, pressure of whatever character, whether acting on the fears, threat, etc., if so exercised as to overpower the volition without convincing the judgment is a species of restraint which interferes with the free exercise of electoral right. In such an atmosphere, the free play of the elector's judgment, discretion or wishes is overborne and this will constitute undue influence though no force is either used or threatened. It is not necessary to establish that actual violence had been used or even threatened. Methods of inducement which are so powerful as to leave no free will to the voter in the exercise of his choice may amount to undue influence. Imaginary terror may have been created sufficient to deprive him of free agency."

310-A. With regard to the poster with the picture, the learned Judge said (at p. 219):

"It was an artful device to catch the imagination of the voters. It terrorised the voters and was likely to create in their mind a feeling of terror, fear, hatred or strong prejudice against the Congress. It at least did create or was likely to create or had the tendency to create terror and an unknown fear in the mind of the voters. The picture of the dead boy with the caption frightened the voters or was likely to frighten them and it was intended to overawe voters which interfered or was likely to interfere or had the tendency to interfere with the free exercise of electoral right of the voters."

310-B. The learned Judge was in favour of allowing the appeal but his colleague, Rao, J., expressed a different view. According to him (p. 234):

"The picture simply represents Sunil De after being shot at by the police firing with the caption underneath 'Do not vote for the Congress who killed Sahid Sunil.' It does not say that if the voters give their votes for the Congress all the voters or some of them would be shot as Sunil De."

311. The matter was referred to Das, J., by the Chief Justice in view of difference of opinion between Barman and Rao, JJ. According to this Judge no undue influence was exercised because nothing had been stated in the photo Ex. 3 relating to the picture and there was no statement that if the voters gave their votes to the Congress, they would be shot at as Sunil and accordingly

"respondent No. 1 could not have intended to cause any fear in the minds of the voters by the above publication to constitute interference with the free exercise of the electoral right of the voters."

312. In AIR 1959 Orissa 188 an unsuccessful candidate charged the returned candidate along with other persons with having committed undue influence by publication of a pamphlet in which it was alleged that deliberate false statements of facts in relation to his personal conduct and character had been made. In hearing the appeal Das, J., who delivered the judgment of the Court referred to the definition in Section 123 (2) of the Representation of the People Act and said:

"There is nothing in the definition that such interference or attempt at interference should be by any method of compulsion. Evidently, the offence includes such interference or attempt to interfere by any method, and it definitely includes the method of inducement wherein there may not be any compulsion at all. The inducement again must be of such powerful type as would leave no free will to the voter in the exercise of his electoral right."

312-A. On the evidence the learned Judge held (at p. 193) that there was admission by the respondent himself and it was abundantly clear that the returned candidate had acted conjointly with his agent in publishing and circulating Ex. 5 as a result of which the election of the petitioner was materially affected. In

1959 Supp (2) SCR 748 = (AIR 1962 SC 835) a question arose as to whether a command from Shri Sat Guru Sacha Padshah to the Namdharis Halqa — Sirsa that every Namdhari should vote for the success of Ram Dayal Vaid, it being a primary duty to make him successful in the election amounted to the exercise of undue influence. No doubt the command was from a person who was a religious leader and as such had a great influence on the Namdharis. The Court expressed the view that the religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him, and has the right freely to express his opinion on the comparative merits of the contesting candidate and to canvass for such of them as he considers worthy of confidence of the electors. Such a course of conduct on his part, would amount to an abuse of his great influence if the words used in a document, or utterances in his speeches leave no choice to the person addressed by him in the exercise of his electoral right. Incidentally it may be noted that the learned Judges stressed what was material under the Indian law was not the actual effect produced but the doing of such acts as were calculated to interfere with the free exercise of an electoral right.

313. In 1962 Supp (3) SCR 114 = (AIR 1962 SC 1156) the charge against the returned candidate was that he had been guilty of the exercise of undue influence inasmuch as a pamphlet containing a false statement that the respondent No. 2 was "purchaser of the opponents of the Congress by means of money" was issued by the agent of the respondent with his consent. Respondent No. 1 contended that the statement related to the public or political character of respondent No. 2 and not to his private character. In his judgment, *Gajendragadkar, J., said* (p. 122 of SCR Supp) = (at p. 1159 of AIR):

"Circulation of false statements about the private or personal character of the candidate during the period preceding elections is likely to work against the freedom of election itself inasmuch as the effect created by false statements cannot be met by denials in proper time and so the constituency has to be protected against the circulation of such false statements which are likely to affect the voting of the electors."

With regard to the allegation in the pamphlet already mentioned the Court took

the view that:

"In plain terms, the statement amounts to an allegation that respondent No. 2 buys by offering bribes the votes of the opponents of the Congress.: Offering a bribe in an election introduces an element of moral turpitude and it cannot be denied that a person who offers bribe loses reputation as an individual in the eyes of the public."

The scope of Section 171-C, Indian Penal Code was considered in the recent decision of (1968) 2 SCR 133 = (AIR 1968 SC 904). This case is not an authority directly in point but some observations made by Wanchoo, C. J., may not be out of place. Delivering the judgment of the Court his Lordship remarked (p. 145) (of SCR) = (at p. 911 of AIR) that:

"..... the gist of undue influence at an election consists in voluntary interference or attempt at interference with the free exercise of any electoral right. Any voluntary action which interferes with or attempts to interfere with such free exercise of electoral right would amount to undue influence. But even though the definition in sub-section (1) of Sec. 171-C is wide in terms it cannot take in mere canvassing in favour of a candidate at an election. If that were so, it would be impossible to run democratic elections. Further sub-section (2) of Section 171-C shows what the nature of undue influence is though of course it does not cut down the generality of the provisions contained in sub-section (1). Where any threat is held out to any candidate or voter or any person in whom a candidate or voter is interested and the threat is of injury of any kind, that would amount to voluntary interference or attempt at interference with the free exercise of electoral right and would be undue influence. What is contained in sub-section (2) of Section 171-C is merely illustrative. It is difficult to lay down in general terms where mere canvassing ends and interference or attempt at interference with the free exercise of any electoral right begins. This is a matter to be determined in each case."

The question which primarily engaged the attention of this Court in the above case was, whether a letter addressed by the Prime Minister to all the electors in which she commended Dr. Zakir Husain and requested the electors to vote for him amounted to the exercise of undue influence and on the facts of the case the answer was in the negative.

314. The above citation of the cases is in our view sufficient to reject the contention of Mr. Daphtary that in order to establish undue influence it must be shown that there was some threat to a voter or at least an element of compulsion in the appeal to him. The cases also show that it would be futile to attempt to lay down a simple test applicable to all sets of facts and circumstances where undue influence is alleged to have been exercised. It can however be said that an attempt on the part of anybody to deflect a voter's will away from a particular candidate by creating prejudice against or hatred for him, as for instance by casting false aspersions on his personal character and conduct whether by spoken words or in writing may be sufficient for the purpose of establishing the commission of undue influence. Much would however depend on the nature of the attempt, the position of the person making it and the manner in which it is made. The mere publication by postal despatch of an anonymous but scurrilous pamphlet regarding the personal character of a candidate to voters all and sundry might attract the operation of Sec. 171-G of the Indian Penal Code but would fall short of Section 171-C. But if such a pamphlet is pressed upon voters and methods of inducement applied to them, specially by others who are equally interested in the election different considerations may well arise. In such a case a court of law may legitimately hold that the disseminators of the pamphlet were attempting to canalise or force the will of others away from the person whose character was assailed. Few would take any serious notice of an anonymous pamphlet however scurrilous it may be, if it were pasted on the walls of houses within the constituency where the election is to be held. Similar would be the fate of such a pamphlet disseminated by post. Persons who receive such a pamphlet would either throw it away or express surprise that such aspersions were being made against a person like Shri. Sanjeeva Reddy who has held high offices. I do not think that such dissemination, although mean and ignoble, would have any effect on the minds of persons who belong to the electoral college for the election of a person to the office of the President of India. But if the disseminators of such pamphlets were persons holding responsible offices or persons who belonged to the same category as the recipients and tried to induce the latter

to take a particular line of action in a forthcoming election on a personal appeal based on such pamphlets, it would not be difficult to hold that their influence was being exercised unduly and corruptly and an offence committed within the meaning of Section 171-C. Mere dissemination of such pamphlets even by hand of well-placed persons would not be enough for such purpose. The pamphlet in this case plumbs depths of filth and meanness seldom reached. It was not a mere attempt to dub Sri Sanjeeva Reddy as a man generally devoid of good principles. It accused him of conduct wholly unbecoming a gentleman not to speak of a person who aspired for election to the high office of the President of India and charged him with acts of misdemeanour towards members of the other sex giving instances and in most cases mentioning the occasions at which he is said to have committed the indecent acts imputed to him. It was calculated to engender strong prejudice in the minds of electors against Sri Sanjeeva Reddy both in his personal capacity and as being the nominee of a group of persons described as usurpers of power in the Congress Party. It is difficult to find suitable words to condemn the making and publication of such a vile pamphlet in an election to the highest office in the land and it is certainly a great pity that the authors thereof have not been tracked or suitably dealt with.

315. Having concluded that the use of scurrilous pamphlet of the type disclosed in this (sic) (Case?) may be a step in the commission of undue influence within the meaning of Section 171-C of the Penal Code, I have to consider the evidence adduced to find out the extent of its publication and the manner in which it was published and used before it can be held that undue influence was in fact brought to bear upon the minds of certain electors. One has next to ascertain whether the offence of undue influence was committed by the respondent or by any of his workers with his connivance. If neither of these be proved, we have to sift the evidence to see whether the offence was committed by others to an extent which materially affected the result of the election.

316. Counsel for the parties argued at some length on the question as to the standard of proof required to establish the commission of the offence of undue influence. As the malpractice is an offence

under the Indian Penal Code and attracts punishment by way of imprisonment, Mr. Daphtary argued that the standard of proof required is a much higher one than in ordinary civil cases. According to him the charge must be well and truly laid in the petition and its particulars and evidence adduced in proof thereof as would leave no scope for any reasonable doubt that the offence has been committed by the persons charged therewith. Mr. Daphtary laid great stress on the production of evidence strictly following the pleadings and contended that no deviation therefrom was permissible. The petitioners according to him could not be allowed to abandon or jettison the case raised in the pleadings and ask the Court to hold on the evidence adduced that the offence of undue influence has been committed by some persons although the manner of commission as laid down in the pleadings was not borne out by the evidence. He also argued that as these persons were not parties to the proceedings they were under no compulsion to come and give evidence in Court and the respondent owed no duty to call all or any of them to disprove the charges levelled against them. Mr. Daphtary's argument seemed to suggest that the petition and the particulars thereof supplied later were to be considered in the same light as the first information report in a criminal case and the Court should weigh the evidence given at the hearing in the same way as in a criminal trial and if there was a significant departure in the evidence from the charges levelled in the petition, hold that the commission of the offence pleaded was not established.

317. Counsel for the petitioners argued that the paramount duty of the Court in such cases was to uphold the validity of an election only if it was pure and although the Court should be slow in upsetting the result of an election on mere trivialities or irregularities it should not hesitate to do so when the evidence disclosed commission of corrupt practice on a large scale merely because of the deviation of the evidence from the pleading. It was further suggested that although the charges savoured of criminality they were not investigated as in a criminal case but the hearing of the election petition was more akin to that in a civil proceeding and the Court should come to its conclusion on the issues framed and the evidence adduced not on the balance

of probabilities but on the strength of the direct evidence adduced.

318. This question has engaged the attention of this Court on prior occasions and reference may be made to some of them to see the views expressed therein. In *Mohan Singh v. Bhanvarlal*, (1964) 5 SCR 12 = (AIR 1964 SC 1366) where charges of corrupt practice had been levelled it was said:

"The onus of establishing a corrupt practice is undoubtedly on the person who sets it up, and the onus is not discharged on proof of mere preponderance of probability, as in the trial of a civil suit; the corrupt practice must be established beyond reasonable doubt by evidence which is clear and unambiguous."

319. Much to the same effect was the decision of this Court in *Jagdev Singh v. Pratap Singh*, AIR 1965 SC 183.

320. In *Samant N. Balakrishna v. George Fernandez*, (1969) 3 SCR 603 = (AIR 1969 SC 1201) it was said (see at p. 637) (of SCR) = (at p. 1221 of AIR):

"Although the trial of an election petition is made in accordance with the Code of Civil Procedure, it has been laid down that a corrupt practice must be proved in the same way as a criminal charge is proved. In other words, the election petitioner must exclude every hypothesis except that of guilt on the part of the returned candidate or his election agent."

All the three cases mentioned above were tried under the Representation of the People Act, 1951 the relevant provisions of which are somewhat different from those in the Act of 1952. Under the 1951 Act an election can be declared to be void, if, *inter alia* the High Court is of opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent. Section 123 of the Act of 1951 specifies what are the corrupt practices for the purposes of the Act. Section 99 of the Act of 1951 makes it incumbent upon the High Court when it declares the election of a returned candidate to be void on the basis of a charge made in the petition of any corrupt practice having been committed at the election, to record a finding whether any corrupt practice has or has not been proved to have been committed; but a person who is not a party to the petition is not to be named by the High Court under this section unless he has been given notice to appear before

the High Court and to show cause why he should not be so named. Liberty is also given to him in case he appears in pursuance of the notice to cross-examine any witness who has already been examined by the High Court and calling evidence in his defence and of being heard. The Act of 1952 does not contain any similar provision.

321. There can be no doubt that a charge of undue influence is in the nature of a criminal charge and must be proved by cogent and reliable evidence not on the mere ground of balance of probability but on reasonable certainty that the persons charged therewith have committed the offence on the strength of evidence which leaves no scope for doubt as to whether they had or had not done so. It must also be remembered that even if there be no provision in the Act of 1952 of giving notice to the persons who are charged with having committed undue influence or of impleading them as parties, it is the duty of the election petitioners to lead direct evidence on the point and the respondent cannot take shelter behind the plea that he owes no duty to call them or to disprove the allegations made against them if he is to have his election maintained by the Court. There is a special provision in the Act of 1952 which is absent from the Act of 1951 in that an election may be set aside on the ground of the commission of undue influence by persons who are not agents of the returned candidate and whose action has not been connived at by him if the Court finds that the result of the election has been materially affected by the commission of undue influence by outsiders and complete strangers to the election. The analogy of the trial of an election petition with that of a criminal charge cannot be pushed too far. There are inherent differences between the two in the matter of investigation. The vital point of identity in the two trials is that the Court must be able to come to a conclusion beyond any reasonable doubt as to the commission of a corrupt practice. The Court looks for reliable independent evidence to establish charges of a criminal nature but unfortunately such evidence is found to be lacking in a great many cases. It is well known that even in cases where persons are charged with murder, independent witnesses fight shy of the witness box and are not called to support the prosecution case; the Judge hearing such a case has to make up his

mind on this evidence of witnesses who are partisan in the sense that they are related to the victim and sift the same carefully to make up his mind whether the charge is established. The same is the case in the trial of most of the election petitions. Election petitioners nearly always examine persons who are their supporters, while the returned candidate follows the same course. This takes place in particular where charges of undue influence and bribery are levelled. However onerous the task of the Court may be because of the partisan nature of the witnesses, it cannot reject the oral evidence adduced merely on that ground, but it has to examine the same carefully and come to a conclusion whether the evidence establishes the corrupt practice beyond reasonable doubt. Even in a criminal trial the Court can hold a person guilty of a crime on the strength of evidence of partisan witnesses if they are found to be reliable although there may be no independent corroboration thereof and I see no reason to depart from that principle in the trial of an election petition where charges of offences culpable under the Indian Penal Code are levelled.

322. In this case no less than 116 witnesses were examined, 55 on the side of the petitioners and 61 on the side of the respondent. A good many of the witnesses are persons who have held or still hold high offices. Excluding a few nearly all of them are elected representatives of the people either to the Houses of Parliament or to the Legislative Assemblies of the States. They are men whose evidence in the ordinary course of things should carry great weight but unfortunately a good many of them are members of two hostile camps who came to Court resolved to do their best for one side or the other. It is well known that the old Congress Party is no longer united and that there has been a sharp cleavage among its members and before the hearing of the election petitions one group came to be known as Congress (O) and the other Congress (R). The cleavage is referred to in the petition itself. Persons who have figured as witnesses but do not belong to either of these parties generally but not universally have their affinity for one side or the other. It has also come out in evidence that the split in the Congress Party originated back in April 1969 when there was a meeting of the A.I.C.C. at Faridabad. The difference of opinion seemed to stem from opposite views held

by some leading members about the steps to be taken for the economic progress of the country. It came out clearly in the evidence of Sri Shankar Dayal Sharma (a witness for the respondent) and a member of Madhya Pradesh Legislative Assembly who had been in public life for about 32 years. He became a member of the All India Congress Working Committee in January 1968 and was appointed General Secretary of the Indian National Congress in April 1968. He continued in that post till the 1st November, 1969, when he submitted his resignation at the request of the then Congress President, Sri Nijalingappa. His evidence which was not challenged in cross-examination shows that at Faridabad session a new procedure was adopted for splitting the A. I. C. C. into three panels. In the economic panel serious differences arose between the members specially between the Chairman, Sri Morarji Desai and some of its members and no report could be finalised. According to the witness there was a demand for nationalisation of banks by some members which was resisted by the Chairman and some others. It is not necessary to mention the various points of difference between the members of the panel but according to this witness the Prime Minister and Sri Morarji Desai held contrary views on this point.

323. According to Sri Nijalingappa who figured as a witness for the petitioners the question of selecting a person fit for the office of the President arose very soon after the demise of Dr. Zakir Hussain early in May 1969. He claimed to have sounded the Prime Minister on more than one occasion in the months of May and June to fix upon a proper person for the office but nothing resulted. When they met at Bangalore in July 1969 the question cropped up again. The Prime Minister told him at the meeting of the 12th July that she had the respondent in her mind but she found no encouraging response to her proposal. Sri Nijalingappa then said that members might suggest other names whereupon the Prime Minister proposed the name of Sri Jagjivan Ram and Sri S. K. Patil suggested the name of Sri Sanjeeva Reddy. As no agreement could be arrived at, the matter was put to vote and Sri S. K. Patil, Sri Morarji Desai, Sri Chavan and Sri Kamaraj Nadar were in favour of Sri Sanjeeva Reddy while the Prime Minister and Sri Fakhruddin Ali Ahmed supported Sri Jagjivan Ram. Neither Sri Jagjivan Ram nor Sri Nijalingappa ex-

pressed any opinion. According to Sri Nijalingappa, the Prime Minister expressed unhappiness over it and said that serious consequences may follow.

324. It is the case of the petitioners as brought out in the evidence that although the Prime Minister signed the nomination paper of Sri Sanjeeva Reddy within a few days thereafter she did not take any other step to ensure his success at the election. It is also in evidence — and is a matter of common knowledge — that immediately after the conclusion of the Bangalore Session the portfolio of Finance was withdrawn from Sri Morarji Desai and the Bank Nationalisation Ordinance was promulgated just before the meeting of Parliament in July 1969. The split in the party which had been dormant before came to limelight soon afterwards. Although the two conflicting groups came to be known as Congress (O) and Congress (R) some time thereafter, there can be little doubt that the seed of dissemination was bearing fruit and mutual suspicion between the members of the two groups came to the surface. The Presidential election which was held on 16th August, 1969, was in the offing but it seemed to have been made the venue for clash of ideologies and test of strength. According to Sri I. K. Gujral a witness for the respondent, the undercurrent of difference between the parties since the Bangalore Session of the Congress came to the surface early in August 1969, the decisive factor being Smt. Tarkeshwari Sinha's article in the Search Light suggesting a move to throw out the Prime Minister. According to Sri Gujral many people were of the view that the Congress President Sri Nijalingappa had tried to make a deal with Sri Ranga of the Swatantra Party and Jan Sangh for a coalition Government and the election of Sri Sanjeeva Reddy as President was considered to be a step in that direction.

325. That there was a sharp difference of opinion and the arraying of members into two warring camps at or about that time admits of no doubt or dispute. Whoever be the authors or the printers of it, the distribution of the pamphlet started round about 9th or 10th August. From the 11th August correspondence started between Sri Jagjiwan Ram and Sri Fakhruddin Ali Ahmed on the one side and Sri Nijalingappa on the other, as well as between the Prime Minister and Sri Nijalingappa. As a matter of fact the cor-

respondence between the Prime Minister and Sri Nijalingappa had started as early as 16th July. In the letter of that date (Ex. P-41) the Prime Minister complained that she was deeply distressed by the stories in the Press attributing all kinds of motives to her and said that newspaper speculations about her alleged reaction to the decision of the Parliamentary Board were wholly misconceived and inspired by interested elements. On August 11, 1969 Sri Jagjivan Ram and Sri Fakhruddin Ali Ahmed wrote to Sri Nijalingappa:

"Considerable confusion exists in the minds of numerous members of our Parliamentary Board regarding the talks made on your own initiative with some of the leaders of the Jan Sangh and Swatantra Party and that it was claimed that as a direct result of your talks the Jan Sangh Executive has decided to support Sanjeeva Reddy."

The writers complained that the members of the Congress Party were considerably agitated over this and ugly rumours were afloat and the situation had worsened because those whom Sri Nijalingappa had approached and their representatives had openly demanded the removal of the Prime Minister. They ended the letter by saying:

"Unless the whole position was fully clarified and the basis of Sri Nijalingappa's talks and the readiness of the other parties to support Shri Sanjeeva Reddy were satisfactorily disclosed it might have great repercussions on the Presidential election."

To this Sri Nijalingappa replied on August 13th saying that although he had met the writers the day before the points raised in the letter had never been canvassed. Sri Nijalingappa further stated that he had been approaching every party for its support and requesting every voter for his vote in favour of Sri Sanjeeva Reddy in accordance with past traditions. Correspondence went on in the same vein upto the 18th August, even after the taking of the poll. According to Sri Nijalingappa's letter to the Prime Minister dated the 15th August, the members of the Parliamentary Board had agreed on the 1st August that he might contact all parties and voters to seek for their support and he had reported to the Congress Parliamentary Board meeting held on the 5th about his talks with the opposition parties. Further there never was any understanding with Jan Sangh or the Swatantra Party beyond

seeking their support at the Presidential Election and the demand for a free vote which had already been raised was in fact a claim of right to vote for the respondent, a candidate nominated by the Communists and Communalists.

326. No useful purpose will be served by referring to the said correspondence in detail and mention has been briefly made of the same only to bring out in sharp focus the difference between the two groups. Members of the two groups who have appeared as witnesses in this case had definitely taken sides some days before the date of the poll. According to some witnesses examined on behalf of the respondent, the manner of selection of Sri Sajeewa Reddy was against all past traditions of the Congress as no attempt at consensus was made before the matter was put to vote. Some even felt that the Prime Minister should not have been over-borne in the way she has done on the 12th July. Whatever might be the individual reactions of the members of the two groups, there is no gainsaying that there was a strong current of opposition to the election of Sri Sanjeeva Reddy as President of India and more than one witness for the respondent including Sri Yunus Saleem admitted that there was a campaign for getting signatures of members of Parliament on a document demanding the right to vote freely in the election. This in effect meant the right to vote against the party affiliation although it was termed a right to vote according to conscience.

327. I now proceed to consider the contents of the pamphlet in detail and then examine the evidence adduced to find out whether any and if so, what use was made of it by any one in a manner which could be said to amount to an attempt to interfere with the free exercise of any person's electoral right within the meaning of Section 171-C of the Indian Penal Code. It is also necessary to scrutinise the evidence to see whether the charge levelled by the petitioners that the pamphlet was the work of a group of people supporting the Prime Minister and secretly working for the success of the respondent is borne out. -

328. Although the pamphlet on the face of it was anonymous, there are certain indications in it to show its probable origin. The document purports to be addressed to "Fellow Congress Members of Parliament and the Vidhan Sabhas" by

"Congress Workers Committee to combat the Syndicate" and bears the date 9th August. It starts off thus:

"Our great Party (obviously referring to the Congress Party) which led the entire nation in the struggle against British rule and had the glory of bringing independence for our motherland, has to-day fallen into a slur of despondence and demoralisation. Into its leadership have crept in men whose record shows that they have sold their conscience to the rich and the corrupt, who are seeking to destroy all attempts of harnessing the Congress once again to the service of the common people."

It then goes on to charge that:

"Self-seekers infiltrated into this great organisation . . . After Panditji's death it is a small clik of unscrupulous persons who landed themselves into what is called the Syndicate and have tried to become virtual dictators."

It ascribes the heavy defeat suffered by the Congress Party in the general election of 1967 to the management of its affairs by evil men. The reference seems to be to Sri S. K. Patil, Sri Atulya Ghosh and Sri Kamaraj. It then proceeds to state (a) that at the then recent Bangalore session of All India Congress Committee the Prime Minister set out a programme for immediate reforms in the economy of the country, (b) this not being to the liking of a small coterie described as gangster politicians they decided to set up one of their men, a corrupt and immoral person, Sanjeeva Reddy as the Congress candidate for the august post of President of India" and (c) this selection was made not only against the wishes of the Prime Minister of India but also without caring to consult the Congress Working Committee, Pradesh Congress leaders and the addressees. The pamphlet then seeks to analyse the reason behind this choice. To quote the words of the pamphlet itself:

"That is because Sanjeeva Reddy himself belongs to this gang. Also the syndicate's plan is that if Sanjeeva Reddy could be made President of India then it will be easier to block all enlightened measures; as President he will obstruct the present Government at every step whenever any action is taken against corruption or in the interest of the common people. The syndicate's agents in Parliament have been openly saying that if Sanjeeva Reddy becomes the President, they will drive out Smt. Indira

Gandhi in a few weeks. They are all the more enraged at the nationalisation of the 14 big banks which were only helping big capitalists to profiteer and amass black money. The syndicate is scared that such measures would make Indira Gandhi more popular with the common man while they themselves have forfeited the confidence of the vast millions of our country. How panicky they are could be seen from the scurrilous writings of one of their lieutenants Tarakeshwari Sinha openly threatening that the syndicate will fight and defeat Indira Gandhi. These unscrupulous bosses prefer that the Congress should suffer a crushing defeat in next general elections in 1972 rather than that our Prime Minister becomes stronger. For they look upon Indira Gandhi as a thorn in their path; and they think the only way to corner her would be to make Sanjeeva Reddy the President.....

It is as part of this conspiracy of the syndicate that Nijalingappa, another syndicate boss (against whom there are many grave charges of corruption) has already approached the Swatantra Party and the Jan Sangh, secretly planning with those anti-national parties for a coalition government with the syndicate leaders."

329. The rest of the pamphlet is aimed at denigrating Sri Sanjeeva Reddy. It charges him with being a corrupt and unscrupulous politician whose misdeeds had been severely condemned by the High Court of Andhra Pradesh in 1964 and whose record as a Minister for Steel in the Central Cabinet had been so bad that he had to be dropped after the general election of 1967 and was put up as a Speaker of Lok Sabha on the pressure of the syndicate. The pamphlet proceeds to give instances of acts of misdemeanour committed by Sri Sanjeeva Reddy towards members of the other sex. It ends up with an exhortation to the addressees that if they have to carry forward the programme of the Congress in the service of the Indian people and to weed out corruption, nepotism and racketeering, they have to use their powers to defeat the syndicate inter alia by rejecting Sri Sanjeeva Reddy. The pamphlet winds up with the following:

"On each and every one of us lies the sacred responsibility of seeing to it that this living monument of moral depravity does not become the President of India. Remember this when you cast your vote in the ballot box on 16th August, 1969."

330. Although Mr. Daphtary put up a faint argument that this might be the work of any party or group opposing the Congress and interested in its decline and fall, one cannot unreasonably take the view that in all likelihood a group of disgruntled Congress members were at the back of it. It is to be noted that in the whole of the pamphlet which is a fairly long one, there is no reference to any other party excepting where Sri Nijalingappa is described as having approached the Swatantra and Jan Sangh for a coalition Government. There is no reference to the respondent or any other candidate at the election and there is no attempt to belittle or ridicule the members of any of the many other political parties in the country.

331. At or about this time there was frequent reference in the daily newspapers to a group in the Congress dubbed as syndicate and another group described as young Turks who were in open rebellion against the syndicate. The pamphlet shows that the authors thereof were of the view that the Prime Minister was attempting to give what according to them was a correct lead to the country and that she was sought to be thwarted by the members of the syndicate. So much so that the latter were said to have entered into a conspiracy to oust the Prime Minister from her position and set up a coalition government. This is sought to be supported by writing ascribed to Smt. Tarkeshwari Sinha as openly threatening the defeat of the Prime Minister by the syndicate. There are thus strong indications in the pamphlet to show where it could have come from and who were interested in the defeat of Sri Sanjeeva Reddy and the motive behind this move. It has come out in the evidence of a number of persons examined on behalf of the respondent some of whom admitted themselves to have been described in the press as young Turks, that their views about the management of the affairs of the Congress Party by some senior members of it described as syndicate was similar to that expressed in the pamphlet. Sri Krishna Kant (R. W. 32) admitted that he himself, Sri Chandrasekhar (R. W. 5) Sri Mohan Dharla (R. W. 17) Sri Santi Kothari (not examined) Sri Amrit Nahta (R. W. 3), Sri Sashi Bhushan (R. W. 38) Sri R. K. Sinha (R. W. 8) and others were described as young Turks and that the syndicate was composed, according to the press, of members like Sri Nijalingappa, Sri Atulya

Ghosh, Sri S. K. Patil and others. Sri Sanjeeva Reddy according to this witness was also considered to be a part of the Syndicate. Most of these persons when examined openly stated that they had decided to go against the selection of Sri Sanjeeva Reddy by the syndicate, that they were supporting the candidature of the respondent and that there was a signature campaign in favour of freedom of vote. Sri Krishna Kant himself admitted having been responsible for getting such signatures and so did Sri Yunus Saleem (R. W. 51). Sri Krishna Kant frankly admitted that when they could not support Sri Sanjeeva Reddy they could not possibly support Sri Deshmukh, another candidate at the election who was a Jan Sangh candidate which left only the respondent on the field. Evidence on much the same line was given by other witnesses examined on behalf of the respondent.

332. Shri R. K. Sinha (R. W. 8) stated that "the syndicate was taking the Congress to the funeral pyre in West Bengal, Madras and Kerala". He also said that the majority of the group known as young Turks had declared their support for the respondent. He admitted having made a public speech about this time to the effect that the members of the syndicate were opposed to the formation of Congress Socialist Party and had "planned to fill the political vacuum after Pandit Nehru". When his attention was drawn to the pamphlet Sri Sashi Bhushan (R. W. 38) approved of the statements made in the first three paragraphs namely that a set of self-seeking, corrupt and unscrupulous persons had grabbed power in the Congress organisation after the death of Pandit Nehru and it was because of their misdeeds that the party had suffered reverses in the election of 1967. It should be noted that Mohan Dhar's attitude in the Presidential election was somewhat different from that of the other young Turks. It would appear that the proclivity of this group of persons described as young Turks and their support for the Prime Minister and opposition to the senior members of the Congress fold like Sri S. K. Patil, Sri Kamaraj and others was sought to be utilised in the election petitions by openly averring that the supporters of the Prime Minister were behind the publication and dissemination of the impugned pamphlet. The evidence adduced does not bear this out.

333. The authorship of the pamphlet not being traced, we have to see whether

the dissemination of it in the manner deposed to was sufficient to establish the commission of undue influence. I have no doubt that if the statement contained in the pamphlet were made the subject of a verbal appeal by one member of the electoral college to another and particularly those in the Congress fold, a very strong case for the exercise of undue influence would be made out. There would not in my opinion be much difference between such an appeal and an appeal in writing signed by one elector to another. In such a case it could be said that the elector making the appeal was trying to misuse his position and seeking to influence the other and attempting to interfere with the free exercise of the other's electoral right. But the evidence adduced falls far short of the proof of any such case. It is the admitted case of the parties that the pamphlet was very widely disseminated through the post among members of Parliament and members of the Legislative Assemblies hailing mostly from U. P. but not being confined to that State alone. The case of the petitioners is that not only was the pamphlet broadcast by post but there was free distribution of it among members of both Houses of Parliament i. e., in the Central Hall of Parliament from the 9th to 15th August. Reference was made to the proceedings of the two Houses to show that complaints about the distribution of filthy pamphlets in the Central hall of Parliament bearing on the Presidential election were being made in the Lok Sabha. Although in the pleadings a specific case was made that some prominent members of the Congress Party supporting the Prime Minister like Shri Jagjivan Ram had gone to the residence of certain members of the electoral college for personal delivery of the copies of the pamphlet to them, practically no attempt was made to substantiate such allegation by oral evidence in court. As regards distribution of the pamphlet in the Central Hall of Parliament there was evidence given by the following witnesses for the petitioners, namely, Sri Kanwarlal Gupta (P. W. 2) Sri K. S. Chawda (P. W. 3) Sri N. P. C. Naidu (P. W. 6) Sri Shiv Narain (P. W. 12), Smt. J. B. Shah (P. W. 13) Sri N. N. Patel (P. W. 14) Sri Mohanlal Gautam (P. W. 27) Sri C. D. Pandey (P. W. 17) Sri D. N. Deb (P. W. 18) Sri Hukumchand Kachwai (P. W. 20) Sri M. Rampura (P. W. 23) Smt. Pushpa Mehta (P. W. 24) Sri Morarji Desai (P. W. 27), Sri Rab Kishan Gupta (P. W. 30) Sri D.

S. Raju (P. W. 35), Sri Patil Putappa (P. W. 36) Sri Sher Khan (P. W. 37) Sri Choudhuri A. Mohamed (P. W. 38) Sri C. M. Kedaria (P. W. 39) Sri N. Ramreddy (P. W. 40) and Sri Abdul Ghani Dar (P. W. 41). On the other hand a substantial number of witnesses examined by the respondent numbering no less than twenty gave evidence to the effect that they never saw any such distribution. Effort was made by counsel for the respondent to establish by cross-examination that such distribution of the pamphlet would not have been allowed by the Watch and Ward department of the Houses of Parliament. Among the persons who were supposed to have been responsible for the distribution in the Central Hall of Parliament the prominent figures were Sri Yunus Saleem, Sri Chandrasekhar, Sri Sashi Bhushan, Sri Mohan Dharia and some others. It is somewhat strange that most of these people when examined not only denied having participated in the distribution but went to the length of stating that they had never seen the pamphlet before they came to court, although some admitted having heard discussion between members regarding it. According to some witnesses for the petitioners prominent among whom were Sri Morarji Desai, Sri S. K. Patil and some others, the pamphlet was the talk of the town for days and the Central hall of Parliament was full of it.

334. There is thus a direct conflict of testimony about the distribution of the pamphlet but there can be little doubt that the pamphlet did find its way in the Central hall and I have no doubt that quite a few copies of it had been distributed in the hall itself. That there was a good deal of talk among the members and discussion over the pamphlet admits of no doubt. It is difficult to believe that unless the pamphlet was there in the Central hall people would be discussing the contents of it in the abstract. No witness suggested that he himself had taken a copy of it to the Central hall. The obvious inference from all this is that there was some distribution in that hall although probably the petitioners were trying to exaggerate the extent of the distribution while witnesses for the respondent were equally interested in denying it wholesale. Hardly any witness came to the witness box to state that he was not only given a copy of the pamphlet in the Central hall but approached and appealed to personally carry out

the mandate contained in the concluding portion thereof. The substantial evidence of the witnesses for the petitioners was merely to the effect that copies were being distributed in much the same fashion as hand-bills are distributed by advertising agents of tradesmen on the street.

[Then after discussing evidence (paras 335 to 338) His Lordship proceeded.]

339. In my view the evidence falls far short of any personal appeal through the means of the pamphlet and I cannot hold that the offence of undue influence was committed by some people by merely distributing the same. Such distribution may attract culpability under S. 171-G of the Indian Penal Code but would not per se attract Section 171-C.

340. I do not, therefore, find it necessary to refer to the evidence of witnesses for the respondent on the question of the exercise of undue influence by distribution of the pamphlet. While I find myself unable to say that they were all speaking the truth when they said that they had not seen the distribution of it in the Central Hall or that they had not seen a copy of the pamphlet before they came to the witness-box, I cannot hold in favour of the petitioners merely because some of the witnesses for the respondent were not witnesses of truth. It would be unprofitable to examine the evidence closely to find out where they lied or the extent of untruth uttered by them. Such an analysis might have become necessary if I had come to the conclusion that there was a prima facie case made out by the petitioners about the exercise of undue influence by mere dissemination of the pamphlet which could be contradicted by the respondent's witnesses.

341. The above being my view on the question of the exercise of undue influence by means of the publication of the pamphlet and the dissemination of it, the question of the respondent's conniving at it does not arise. I may however indicate shortly the respective cases of the parties. It was the case of the petitioners that the pamphlet originated from the camp of the Prime Minister and her supporters who were actively helping the respondent in his election campaign and it was these supporters who had taken

to the mean trick of publication of the pamphlet at the eleventh hour before the election so that there could be no effective counter-action to the wild propaganda. Whatever the charges raised against the Prime Minister in the petition, no evidence was adduced to show that she was helping the respondent although it may be said that she did not help the cause of Sri Sanjeeva Reddy in the way she had done in the case of Dr. Zakir Hussain. Three witnesses for the petitioners stated in their examination that they had been to the respondent's house in Defence Colony after the commencement of the publication of the pamphlet requesting him to make a statement himself in contradiction of the allegations contained therein and making it clear that he himself had nothing to do with it. It is difficult to appreciate what led these persons to think that the respondent had anything to do with the pamphlet or that he was the proper person to issue a contradiction to the imputations therein made against Sri Sanjeeva Reddy. As I have already noted, the name of the respondent does not occur at all in the pamphlet nor is there any remote reference to him in it. The respondent was not the only other contestant for the office. Shri Madhu Limaye, P.W. 8, and some witnesses for the respondent thought that it was the work of enemies of the respondent. Any statement of the respondent disowning the pamphlet or even asking the electors to ignore it would only excite suspicion against him as involved in its publication. Sri N. P. C. Naidu, P.W. 17 who claimed to have a copy of the pamphlet from Sri Yunus Saleem on the 11th or 12th August, said that he had gone to the respondent's house in Defence Colony to get a contradiction to the pamphlet but could not meet him, as a result of the talk he had with the respondent's supporters who were there and later wrote a letter to him asking him to counteract the propaganda in the pamphlet. The respondent, however, denied having received any such letter. Smt. Tarkeshwari Sinha, P.W. 34, said that she had gone to the respondent's house in Defence Colony on the 14th August and had met him in a verandah and shown the pamphlet to him and asked him to repudiate the contents thereof when the respondent had said "What

can I do about it?". As the respondent was unresponsive she had to come away. Not only was this visit openly disputed by the respondent but several witnesses were examined to show that she had not gone there. The security man said to have been posted in the respondent's house deposed to the effect that he knew Smt. Tarkeshwari Sinha and was positive that she had not gone there on the 14th August. The respondent himself said that the suggestion that in the month of August a visitor of the position of Smt. Tarkeshwari Sinha would have been received by him not in the air-conditioned drawing-room where he was sitting but outside in the uncomfortably hot verandah was fantastic. The respondent's son-in-law also gave evidence to the same effect. Sri R. K. Gupta, P.R. 43, said that he had met the respondent two or three days before the date of the poll and told him that the pamphlet should be contradicted by his party when the respondent gave him the same reply as he had done to Smt. Tarkeshwari Sinha. Again, this evidence was denied by the respondent as well as by his son-in-law. The evidence adduced on the two sides is directly contradictory to each other and it would have been the duty of the Court to analyse the same in greater detail and indicate the reasons for accepting one version and rejecting the other if the Court was to take the view that there was exercise of undue influence by the mere dissemination of a sordid pamphlet. In the circumstances of the case it would be useless to go into the question any further.

342. Another allied question which loomed large during the examination of the witnesses was whether the respondent had in his election campaign gone to Lucknow and addressed members of the Legislative Assembly there and canvassed their support in his favour, basing his claim on the support of the Prime Minister. This was deposed to in a general way by Sri Ram Singh, P.W. 19, while Sri Mumtaz Mohammad Khan, P.W. 44, went further and said that the respondent had told people at Lucknow openly that Sri Sanjeeva Reddy was not a suitable candidate and that there were many stains on his character. Both these witnesses as also Sri Bansidhar Pandey, P.W. 18, Sri Jagdish Prasad, P.W. 20,

Sri Rajendraprasad Singh, P.W. 21, Sri Basant Lal Sharma, P.W. 22, Sri Rampyare Panika, P.W. 37 and Sri Abdul Saleem Shah, P.W. 38, deposed to the effect that two or three days after the visit of the respondent to Lucknow, Sri Dinesh Singh, the External Affairs Minister, had also gone there, met the members of the Legislative Assembly in groups of four or five in their hostel known as Darul-Shafa and openly told them that the respondent was the candidate of the Prime Minister and that if the addressées did not support his candidature they would lose all the patronage of the Prime Minister in the future. Some even said that Sri Dinesh Singh had threatened them with refusal of party tickets in future elections if they were to go against the wishes of the Prime Minister. So far as the part imputed to Sri Dinesh Singh is concerned, he denied having moved out of Delhi between the 1st and 16th August and said that his first visit to Lucknow about this time was on 22nd August after the poll had taken place. It was put to him in his examination-in-chief as to whether he did go to Lucknow on the 9th, 10th or 11th August and his answer was in the negative and he averred that so far as he could recollect he had not gone to Lucknow before the 22nd. Sri Dinesh Singh was subjected to prolonged cross-examination and the diaries of his engagements maintained by his secretaries were made the subject of close scrutiny before the Court. The evidence of Sri Dinesh Singh and of several other witnesses for the respondent was to the effect that whenever Sri Dinesh Singh left Delhi a tour programme would be issued for the guidance of officers in places to be visited by him and no such tour programme was issued in the month of August before the 22nd. Sri Dinesh Singh further stated that he had attended an invitation to a party at Mysore House given by Sri G. S. Pathak the then Governor of Mysore. In this he was supported by Sri I. K. Gujral who produced a letter of invitation confirming the throwing out of a party at the Mysore Home by Sri G. S. Pathak on the 10th August and invitation to him thereat and stated that he distinctly remembered having met Sri Dinesh Singh in that party. Quite a number of witnesses examined on behalf of the respondent gave evidence to the effect

that if Sri Dinesh Singh had gone to Lucknow between the 1st and 16th August they would have come to know of it and so far as their recollection went Sri Dinesh Singh did not go there during that period. While it is true that the diaries produced by the Secretaries of Sri Dinesh Singh were not as full or complete as regards his engagements as one might expect them to be, I have no hesitation in holding that Sri Dinesh Singh did speak the truth in that he did not go to Lucknow during the period 1st to 16th August. It has come out in evidence that Sri Abdul Ghani Dar was preparing to launch an election petition against the respondent practically immediately after the declaration of the result and that he was busy collecting evidence in support of his petition. Apart from the absence of any tour programme of Sri Dinesh Singh it should not have been difficult for the petitioners to produce evidence either from the records of the railways or the Indian Airlines to show that some reservation of accommodation had been made for Sri Dinesh Singh's journey to Lucknow and back at or about this time. No attempt was made to produce any such records. Counsel for the petitioners even went to the length of suggesting to Sri Dinesh Singh in cross-examination that it was possible for him to have travelled to Lucknow from Delhi by road and come back the same way so as to leave no record of reservation either by rail or by air. In my view, the suggestion is of little value. After all even according to the evidence of witnesses for the petitioners Sri Dinesh Singh's visit was not a secret one. He is supposed to have gone there to meet people in order to canvass support for the respondent from a large number of members of the U. P. Legislative Assembly and there was no reason why he should try and avoid a more comfortable journey by rail or air rather than undertake motor-car journeys of over 300 miles each way. My definite conclusion is that Sri Dinesh Singh did not go to Lucknow as alleged by some of the witnesses for the petitioners at or about the time alleged and consequently he did not canvass support in favour of the respondent as imputed to him.

343. As regards the evidence of the two witnesses about the respondent

addressing members of the Legislative Assembly of U.P. in his own support by saying that he was the candidate of the Prime Minister or that Sri Sanjeeva Reddy was not a fit person for election to the high office of the President of India, I have no hesitation in holding that it cannot be true. According to the evidence of Sri Mumtaz Mohammad Khan, P.W. 44, the persons present at the time when the respondent was castigating Sri Sanjeeva Reddy were Sri Basant Lal Sharma, Sri Abdul Saleem Shah and Sri Kalpanath Singh. Sri Kalpanath Singh was not examined but the other two were and neither of them had anything to say on this subject. According to Sri Abdul Saleem Shah it was Sri Dinesh Singh who had told the members of the Legislative Assembly at Darul-Shafa that Sri Sanjeeva Reddy and his group were working in collusion with Jan Sangh and it would not be proper to vote for him. Sri Dinesh Singh is also alleged to have said that Sri Fakhrudin Ali Ahmed wanted that no Muslim should vote for Sri Sanjeeva Reddy as he and his supporters were anti-Muslim. As I have held that Sri Dinesh Singh did not go to Lucknow at the time alleged he could not have canvassed support for the respondent as deposed to by the witnesses.

344. In his evidence the respondent stated that he had not spoken to the Prime Minister or any other Minister before announcing his candidature for the office of the President of India. He had nothing to do with the Congress Party after 1957. After demitting office of the Vice-President of India working as the President, he had left Rashtrapati Bhavan and gone to his son-in-law's place in Defence Colony. He had been out of Delhi from the 28th July to 13th August going round to the different States; he had come back to Delhi on the 10th August only for a few hours. He admitted having gone to Lucknow on his tour but he did not meet the legislators there in groups as suggested by some of the witnesses but had spoken to them at a fairly well-attended meeting. He denied ever having referred to Sri Sanjeeva Reddy in his speech or said anything about his character. He denied having any knowledge of the distribution of the pamphlet and stated expressly that nobody had ever complained to him that a pamphlet

against the personal conduct and character of Sri Sanjeeva Reddy was being distributed. He did not see Sri Abdul Ghani Dar's letter alleged to have been written to him on the 11th August. He did not meet the Prime Minister between the 20th July and 16th Aug. He said that he had published a programme of his intended tour to the capitals of the different States like Lucknow, Patna, Calcutta, etc. and had informed some of his friends who were taking interest in him about his proposed visits. He stated further that although he had toured the States fairly extensively he did not approach the members of Parliament in Delhi personally as he was fairly well known to them.

345. Counsel for petitioners tried to make out a case that the respondent did not do any canvassing in his own support in Delhi because he was aware that others were effectively doing it. It was even suggested that some sort of arrangement must have been arrived at in July 1969 that if his name was not acceptable to the Congress Parliamentary Board he would immediately announce his own candidature for the office of the President. The respondent stoutly denied this and said there was no truth in it.

346. In my view the charges levelled against the respondent as mentioned above were not borne out by the evidence.

347. Another aspect of the case of the petitioners under the heading of undue influence was that an attempt was made by a number of persons supporting the respondent to raise a scare to the effect that a vote in favour of Sri Sanjeeva Reddy would be against the interest of persons professing the Muhamedan faith.

[After discussing evidence (Paras 347 to 353) His Lordship proceeded.]

354. Inasmuch as I have come to the conclusion that the evidence adduced does not establish the exercise of undue influence in the election in any of the forms raised in the petition, the question of the result of the election being materially affected thereby does not arise. But I may point out that in order to substantiate such a ground for setting aside an election is not enough for witnesses to come and say that they were shocked or pained by reading the pamphlet as most of

them gave out. Only two witnesses came to the witness box and said that they had changed their minds to vote for Sri Sanjeeva Reddy after perusal of the pamphlet. Mr. Daphary argued that there was nothing in the Act of 1952 which forbade a person from disclosing in his evidence which way he had voted and that it was open to witnesses to come and state the reaction of the pamphlet on their minds and express how it had affected their conduct at the poll. While I do not think it necessary to express any opinion on this it can be safely held that even if the exercise of undue influence had been proved the evidence of only two witnesses to show that their electoral right had been interfered with thereby would not have been enough for the purpose of setting aside the election.

355. My conclusion, therefore, on the issues regarding undue influence may be summed up as follows. There was a fair amount of circulation of the pamphlet, in the Central Hall of Parliament among members of the electoral college by a number of them. Undeniably there was considerable publication of it by post both to electors in Delhi and outside. The mere dissemination of the pamphlet did not amount to exercise of any undue influence or interference with any electoral right. It had to be followed up either by a personal verbal appeal or an appeal in writing but there was no evidence thereof in this case. There was no appeal to Muslim members on grounds of religion to vote in favour of the respondent in preference to Sri Sanjeeva Reddy. There was no evidence of exercise of undue influence by Central Ministers over any members of the electoral college by any threat that in case they failed to vote for the respondent they would lose the patronage of the Prime Minister. The offence of undue influence was not committed by the respondent or any of his workers. The respondent himself was not guilty of any such commission. There was no commission of the offence of undue influence by anybody with the connivance of the respondent and the result of the election was not materially affected as a result of any commission of the offence of undue influence.

356. As regards issue 4 (a) in Election Petitions Nos. 4 and 5 of 1969 my view is that some of the allegations

made in the paragraphs 8 (3) and (13) of the petition would be sufficient pleading of commission of undue influence under Section 18 (1) (a) of the Presidential and Vice-Presidential Elections Act, 1952. As regards issue 4 (b), the only allegation which was substantiated was a fair amount of publication and dissemination of the scurrilous pamphlet which by itself did not amount to the exercise of undue influence. Sri Abdul Ghani Dar's evidence on this point is wholly unacceptable. My answer to issue 4 (c) in all its branches is in the negative.

357. We indicated on the 11th May 1970 that we would not award any costs to either side. As the respondent has succeeded in the petition normally he could expect to get an award of costs in his favour. But one cannot overlook the fact that the bulk of the oral evidence in this case centred round the question as to whether there was publication of the scurrilous pamphlet in the Central Hall of Parliament. A very large number of petitioner's witnesses came to give evidence in support of it while the respondent examined a host of witnesses to disprove this fact. Although in the view I have taken it was not necessary to name the persons who were guilty of such publication, I have already indicated that quite a number of members of Parliament was responsible for it. The hearing of this case was protracted unreasonably by the examination of witnesses on this one question and as the respondent has not succeeded in disproving dissemination of the pamphlet in the Central Hall it would not be right to make an award of costs in his favour. The litigation was not one of an ordinary type and it was conducted with great zeal on either side. It has divulged a sad lack of responsibility and uprightness in the elected representatives of the people figuring either as witnesses for the petitioners or as witnesses for the respondent. In a case like this, where both sides are responsible for putting into the witness-box a large number of persons who deliberately gave evidence which was not true, the proper course is not to award costs even to the successful party.

Petitions dismissed.

AIR 1970 SUPREME COURT 2178
(V 57 C 447)

M. HIDAYATULLAH, C. J., J. C.
SHAH, K. S. HEGDE, A. N.
GROVER, A. N. RAY
AND I. D. DUA, JJ.

Ganga Ram and others, Petitioners
v. The Union of India and others, Res-
pondents.

Writ Petn. No. 124 of 1967, D/-2-2-
1970.

Constitution of India, Arts. 14, 16—
Equality before law and equality of
opportunity in matters of public em-
ployment — Determination of senior-
ity of Grade I Accounts Clerks of
Railway Establishment — Procedure
for, contained in provisions of Indian
Railways Establishment Manual is not
violative of Arts. 14 and 16.

The procedure for determining seni-
ority of Gr. I Accounts Clerks as con-
tained in Indian Railways Establish-
ment Manual, by which seniority of
direct recruits to Grade I is deter-
mined on the basis of their appoint-
ment whereas seniority of promotees
from Grade II is determined with re-
ference to their substantive or basic
seniority in Grade II irrespective of
dates they qualify for promotion
by passing the examination prescribed
for the purpose does not violate Arti-
cles 14 and 16. (Para 3)

No right to immediate promotion is
conferred on those Grade II clerks
who pass the qualifying examination
and the only benefit which accrues to
them is that they become eligible for
being considered for promotion. The
qualifying examination is considered
to be a continuous examination and
success at this examination does not
constitute the basis of seniority which
continues to be dependent on the sub-
stantive or basic seniority in Grade II.
The direct recruits and the promotees
from Grade II clearly constitute differ-
ent classes and this classification is
sustainable on intelligible differentia
which has a reasonable connection
with the object of efficiency sought to
be achieved. Promotion to Grade I
is guided by the consideration of seni-
ority-cum-merit. Hence, no fault can
be found with the provisions which
place in one group all those Grade II
clerks who have qualified by passing
the qualifying examination. The fact
that the promotees from Grade II who

have officiated for some time are not
given the credit of this period when
a permanent vacancy arises also does
not attract the prohibition contained
in Arts. 14 and 16. It does not consti-
tute any hostile discrimination and is
neither arbitrary nor unreasonable. It
applies uniformly to all members of
Grade II clerks who have qualified
and become eligible. (Para 3)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 52 (V 54) —
(1966) 3 SCR 600, Mervyn
Continho v. Collector of Cus-
toms, Bombay 4

M/s. S. K. Mehta and K. L. Mehta,
Advocates of M/s. K. L. Mehta and Co.,
for Petitioners; Mr. N. S. Bindra,
Senior Advocate (Mr. S. P. Nayar, Ad-
vocate with him), for Nos. 1 to 3 and
Mr. Harbans Singh, Advocate, for Res-
pondents.

The following Judgment of the Court
was delivered by

DUA, J.: Out of the five petitioners
in this petition under Art. 32 of the
Constitution, Kashmiri Lal, petitioner
No. 5 having since retired, is no longer
interested in the result of these pro-
ceedings. The claim of only 4 peti-
tioners thus survives for considera-
tion. They are officiating clerks, Grade
I, in the office of Deputy Chief Ac-
counts Officer (Traffic Accounts Br.),
Northern Railway. They were pro-
moted from Grade II after passing the
departmental qualifying examination
described as Appendix 2 examination.
They claim that their seniority should
be determined as from the date of
their appointment as officiating clerks,
Grade I, and not on the basis of their
position in the gradation list of Clerks,
Grade II. Their grievance is that they
were appointed as officiating clerks,
Grade I, after passing the Appendix 2
examination long before respondents
4 to 6 and 11 but these four respon-
dents are shown as senior to the peti-
tioners on the ground of their seni-
ority in Grade II. The petitioners seek
to support their claim by relying on
Arts. 14 and 16 of the Constitution.
The seniority of the direct recruits to
Grade I, the petitioners complain, is
determined on the basis of their ap-
pointment, whereas the seniority of
the petitioners, who are promotees
from Grade II to officiate in Grade I,
continues to be determined on the
basis of their seniority in Grade II. It

is emphasised that both the direct recruits and the promotees, like the petitioners, have to pass the Appendix 2 examination. But their seniority is determined by different methods. It is further complained that Grade II clerks who pass the qualifying Appendix 2 examination are not promoted immediately. They have to wait till a vacancy occurs and even at the time of filling the vacancy the senior-most qualified clerk is selected for promotion without giving any preference to those who have qualified earlier in point of time. Again, when a permanent post falls vacant, all the eligible clerks in Grade II are considered at par without giving any credit or preference to those who have already officiated as Clerks, Grade I. A junior clerk, Grade II, qualifying earlier, according to the petitioners' grievance, continues to remain junior for the purpose of promotion and confirmation in the permanent post in Grade I and a senior clerk, Grade II, qualifying later retains his seniority for this purpose. Similarly, in filling leave vacancies it is complained that if a clerk is appointed to officiate in short term leave vacancy, then on the return of the incumbent of the post, instead of reverting the clerk so appointed to officiate, the juniormost according to the gradation list in Grade II, officiating in Grade I, is reverted even though he may have qualified earlier than the former and may also have officiated for some time against a regular post in Grade I. The petitioners' right of equality before the law and equality of opportunity in matters of public employment is stated thus to have been violated.

2. The right of equality is guaranteed by Arts. 14 to 16 of our Constitution. The petitioners rely on Arts. 14 and 16 (1). Article 14 is an injunction to both the legislative and the executive organs of the State and other subordinate authorities not to deny to any person equality before the law or the equal protection of the laws. Article 16 is only an instance of the general rule of equality laid in Art. 14. Sub-article (1) of Art. 16 guarantees to every citizen equality of opportunity in matters of public employment thereby serving to give effect to the equality before the law guaranteed by Art. 14. The equality of opportunity in the matter of services un-

doubtedly takes within its fold all stages of service from initial appointment to its termination including promotion but it does not prohibit the prescription of reasonable rules for selection and promotion, applicable to all members of a classified group. Mere production of inequality is not enough to attract the constitutional inhibition because every classification is likely in some degree to produce some inequality. The State is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not be scientifically perfect or logically complete. In applying the wide language of Arts. 14 and 16 to concrete cases a doctrinaire approach should be avoided and the matter considered in a practical way, of course, without whittling down the equality clauses. The classification, in order to be outside the vice of inequality, must, however, be founded on an intelligible differentia which on rational grounds distinguishes persons grouped together from those left out. The differences which warrant a classification must be real and substantial and must bear a just and reasonable relation to the object sought to be achieved. If this test is satisfied, then the classification cannot be hit by the vice of inequality. It is in the background of this broad principle that the petitioners' grievance is to be considered.

3. The relevant provisions in the Indian Railways Establishment Manual directly applicable to the petitioner's case may now be seen. They are contained in paras 48 and 49, Chapter I, Section B and paras 16 and 20 (b) of Chapter II. As the petitioners also rely upon paras 17 to 19 and 21 of Chapter II in support of the argument that para 20 (b) is discriminatory it is desirable to reproduce all these paragraphs.

"48. The classes included in this group and the normal channel of their promotion are as under:—
(For chart showing promotion etc., see page 2180)

Directly recruited Clerks, Grade I, will be on probation for one year and will be eligible for confirmation only after passing the prescribed departmental examination in Appendix 2. Necessary facilities will be given to them to enable them to acquire a

Clerks, Grade II (110—180)
Clerks, Grade I (Rs. 130—300)

Sub-Heads (Rs. 210—380)

Stock Verifiers (Rs. 210—380)

Junior Accountants
(Rs. 270—435)

Jr. Inspectors
of Station Ac/s
(Rs. 270—435)

Jr. Inspectors of
Store Accounts
(Rs. 270—435)

Sr. Accountants
(Rs. 435—575)

Sr. Inspectors of
Station Ac/s
(Rs. 435—575)

Sr. Inspectors of
Stores Ac/s
(Rs. 435—575)

Recruitment.—Initially in the grade of Clerks, Grade II Direct recruitment for 20 per cent. vacancies in the grade of Clerks, Grade I.

Qualifications.—

(a) Age

(i) For clerks, Grade II 18—21

(ii) For clerks, Grade I 18—25

(b) Education

For clerks, Grade II, Matriculation,
till replaced by Higher Secondary.

For clerks, Grade I University
Degree, preference being given to
persons with I and II Division
Honours and Master's Degree.

working knowledge of the rules and procedure.

49. Such of the Clerks, Grade II, as qualify in the departmental examination as prescribed in Appendix 2 or those who may have been permanently exempted from passing the said examination will be eligible for promotion as Clerks, Grade I, and sub-heads. They will be eligible for a minimum starting pay of Rs. 150 per month or will be granted four advance increments on promotion to Grade I after their pay has been fixed under the ordinary rules. Promotion to the grade of sub-heads will be by seniority-cum-suitability."

Chapter II:

"17. Subject to what is stated in paragraphs 18 and 19 below, where the passing of a departmental examination or trade test has been prescribed as a condition precedent to the promotion to a particular non-selection post, the relative seniority of the railway servants passing the examination/test in their due turn and on the same date or different dates which are treated as one continuous examination, as the case may be, shall be determined with reference to their substantive or basic seniority.

18. A railway servant who, for reasons beyond his control, is unable to appear in the examination/test in his turn along with others, shall be given the examination/test immediately he is available and if he passes the same,

he shall be entitled for promotion to the post as if he had passed the examination/test in his turn.

19. Seniority for promotion as Junior Accountants, Junior Inspectors of Station or Stores Accounts.—Seniority for promotion to the rank of junior accountant or junior inspector of Station or Stores Accounts should count entirely according to the date of passing the examination qualifying for promotion to those ranks. Candidates who pass the examination in a year are *ipso facto* senior to those who qualify in subsequent years irrespective of their relative seniority before passing the examination. In the case of staff of ex-Company Railways, who are exempted from passing the examination, the date on which they are declared fit for promotion to the rank of Accountant or Inspector should be considered as the date of their passing. On receipt of the result of the above examination each railway administration should immediately hold a selection test of the candidates declared successful along with any eligible ex-Company or ex-State Railway staff, who may be asked to appear before the selection board in accordance with the procedure laid down by the Railway Board from time to time. While the selection board will determine in the case of the ex-Company or ex-State Railway staff, their suitability for promotion as Accountant/Inspector

tor before placing them on the panel, no candidate who has qualified in the said examination will be declared ineligible for promotion as a junior Accountant/Inspector, the selection board only assigning a suitable place to each such candidate in order of merit. The staff placed on the panel in any year will rank senior to those empanelled in subsequent years.

20. Date of passing the departmental examination/test to regulate seniority:

(a) Except as provided for in subparagraph (b) below, seniority of two or more railway servants, who pass the departmental examination/test on different dates, not treated as one continuous examination, will be regulated entirely by the date of passing the examination or test.

(b) The seniority of Accounts Clerks, Grade I and Stock Verifiers is to be determined with reference to their substantive or basic seniority in Grade II irrespective of the dates they qualify for promotion as Clerks, Grade I, by passing the examination prescribed for the purpose.

21. Seniority on Promotion to Non-selection posts. — Promotion to non-selection posts shall be on the basis of seniority-cum-suitability being judged by the authority competent to fill the post, by oral and/or written test or a departmental examination as considered necessary and the record of service. The only exception to this would be in cases where for administrative convenience, which should be recorded in writing, the competent authority considers it necessary to appoint a railway servant other than the senior-most suitable railway servant to officiate in a short term vacancy not exceeding two months as a rule and 4 months in any case. This will, however, not give the railway servant any advantage not otherwise due to him."

Appendix 2, in addition to the syllabus for the examination, provides:

"3. The examination will be conducted by the Head of each office, who will also decide the intervals at which it should be held.

4. (a) Normally no railway servant will be permitted to take the examination more than three, but the Financial Adviser and Chief Accounts Officer may in deserving cases permit a candidate to take the examination for a fourth time, and in very exceptional cases, the General Manager may per-

mit a candidate to take the examination for the fifth and the last time.

(b) No railway servant, who has less than six months' service in a Railway Accounts Office or who had not a reasonable chance of passing the examination will be allowed to appear in the examination prescribed in this Appendix.

In exceptional circumstances, the condition regarding six months' minimum service may be waived by the General Manager.

(c) Temporary railway servants may be permitted to sit for the examination but it should be clearly understood that the passing of this examination will not give them a claim for absorption in the permanent cadre.

(d) A candidate who fails in the examination but shows marked excellence by obtaining not less than 50 per cent in any subject may be exempted from further examination in that subject in subsequent examination."

It is quite clear that para 49 does not confer any right to immediate promotion on those Grade II clerks who pass the qualifying Appendix 2 examination. The only benefit which accrues to them is that one hurdle is removed from their way and they become eligible for being considered for promotion to Grade I. This promotion is governed by the test of seniority-cum-suitability. All those who qualify for promotion are treated at par for this purpose and they are grouped together as constituting one class. The fact that one person has qualified earlier in point of time does not by itself clothe him with a preferential claim to promotion as against those who qualify later. This examination is considered to be a continuous examination and as is clear from para 17, success at this examination does not constitute the basis of seniority which continues to be dependent on the substantive or basic seniority in Grade II. The question which directly arises for determination is: does the procedure laid down in these instructions violate the petitioners' right as guaranteed by Arts. 14 and 16? The State which encounters diverse problems arising from a variety of circumstances is entitled to lay down conditions of efficiency and other qualifications for securing the

best service for being eligible for promotion in its different departments. In the present case the object which is sought to be achieved by the provisions reproduced earlier is the requisite efficiency in the Accounts Department of the Railway Establishment. The departmental authority is the proper judge of its requirements. The direct recruits and the promotees like the petitioners, in our opinion, clearly constitute different classes and this classification is sustainable on intelligible differentia which has a reasonable connection with the object of efficiency sought to be achieved. Promotion to Grade I is guided by the consideration of seniority-cum-merit. It is, therefore, difficult to find fault with the provision which places in one group all those Grade II clerks who have qualified by passing the Appendix 2 examination. The fact that the promotees from Grade II who have officiated for some time are not given the credit of this period when a permanent vacancy arises also does not attract the prohibition contained in Arts. 14 and 16. It does not constitute any hostile discrimination and is neither arbitrary nor unreasonable. It applies uniformly to all members of Grade II clerks who have qualified and become eligible. The onus in this case is on the petitioners to establish discrimination by showing that the classification does not rest upon any just and reasonable basis. The difference emphasised on behalf of the petitioners is too tenuous to form the basis of a serious argument. Their challenge, therefore, fails.

4. The decision in *Mervyn Continho v. Collector of Customs, Bombay*, 1966-3 SCR 600 = (AIR 1967 SC 52), on which reliance has been placed on behalf of the petitioners dealt with a different problem though the principle of law laid down there seems to go against the petitioners' submission. It was expressly observed there that there is no inherent vice in the principle of fixing seniority by rotation in a case when a service is composed in fixed proportion of direct recruits and promotees. The distinction between direct recruits and promotees as two sources of recruitment being a recognised difference, not obnoxious to the equality clauses, the provisions which concern us cannot be struck down on the ratio of this decision.

5. The petition accordingly fails and is dismissed but without costs.

Petition dismissed.

AIR 1970 SUPREME COURT 2182 (V 57 C 448)

(From Punjab: AIR 1966 Punj 232)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Municipal Committee, Amritsar and others, Appellants v. The State of Punjab and another, Respondents.

Civil Appeal No. 1321 of 1966, D/12-9-1969.

(A) Education—Punjab Local Authorities (Aided Schools) Act (22 of 1959) Ss. 3, 6 — Taking over Government Aided Schools of Local Bodies — This is nothing short of compulsory acquisition — Art. 31 (2) must be satisfied — Section 3 (2) and amendments in respect of Ss. 52 (1) (g) and 59 of Punjab Municipal Act are void. AIR 1966 Punj 232, Reversed.

Power under S. 5 to take over aided schools can be done only after the local authority has been given a reasonable opportunity for showing cause against the proposed action. The proviso, however, arms the State Government with powers in case of emergency and in the interests of students to take over the management straightway after publication of a notification to that effect. The amendments which are effected in Sections 52 and 59 of the Punjab Municipal Act vest in the State not only the management of the schools taken over but also all interests in the lands, buildings etc., of the school along with the movable properties pertaining thereto which shall be deemed to have been transferred to the State. There is no provision whatsoever for an automatic retransfer of these properties after a lapse of period of 10 years for which the taking over of the schools can be effective. This means that the action taken under Section 5 is nothing short of compulsory acquisition within the meaning of Article 31 (2) of the Constitution. There is no provision in the Act or in the amendment of Section 59 of the Punjab Municipal Act made by the Act for payment of any compensa-

tion which is essential under Art. 31 (2). On the assumption that taking over of the property for a period of 10 years would be an act of requisitioning, the requirements of Art. 31 (2) must be satisfied to sustain the validity of the law. Property cannot be acquired while taking over management and control under Art. 31A (1) (b) in complete negation and contravention of Art. 31 (2) of the Constitution.

Section 3 (2) of the Act and the amendments which would become operative under Section 6 in respect of Sections 52 (1) and 59 of the Punjab Municipal Act are void and unconstitutional. AIR 1966 Punj 232, Reversed. (Paras 14, 15)

(B) Education—Punjab Local Authorities (Aided Schools) Act (22 of 1959), Sec. 5 — For applicability of Sec. 5 there must be emergency — Actual emergency which had arisen need not be mentioned in notification — State need not show by placing material before Court that it was a case of emergency justifying action under proviso to Section 5 where no foundation for this has been laid in this behalf in writ petition. AIR 1966 Punj 232, Affirmed. (Para 8)

(C) Education—Punjab Local Authorities (Aided Schools) Act (22 of 1959), Section 5 — Notification D/- 26-9-1960 of Government has no retrospective effect. AIR 1966 Punj 232, Reversed.

The mere fact that the Act in terms was retrospective would not make the notifications issued under the proviso to Sec. 5 retrospective in the absence of express words or appropriate language from which retrospectivity would be implied. Where all that the notification says is that the Governor of Punjab is taking over for a period of 10 years the management of the schools of the Committee in exercise of the powers conferred by the proviso to Section 5 of the Act, it clearly means that the management is taken over from the date of the notification and not from any prior date. It would follow that whatever was done before the date of the notification regarding the assumption of management and vesting of the Committee's properties was wholly void and illegal. AIR 1966 Punj 232, Reversed. (Para 10)

(D) Education—Punjab Local Authorities (Aided Schools) Act (22 of 1959), Sec. 5 — Notification not retrospective — Amendment of Sections 52 and 59 Punjab Municipal Act would be effective only after date of notification — Provisions of Section 52 (1) (g) Punjab Municipal Act are however void.

Under Section 6 of the Act it is only after the local authority has passed a resolution under Section 3 or the State Government has taken over management of the aided schools under Sec. 5 that Sections 52 and 59 of the Punjab Municipal Act would be deemed to have been amended in the manner specified in the schedule with effect from October 1, 1957, or from the date aided schools are taken over as the case may be. Where the notification under Section 5 dated September 26, 1960, could not be given retrospective operation the amendments in the aforesaid provisions of the Punjab Municipal Act would be effective only after the date of the notification and not for the prior period. Thus even on the assumption that the provisions of the Act are valid the State could not ask for any contribution. (Para 11)

(E) Municipalities — Punjab Municipal Act (3 of 1911), Sec. 52 (1) (g) — Clause (g) inserted by S. 6 of Punjab Local Authorities (Aided Schools) Act (22 of 1959) is void as contravening Art. 31 (2) of Constitution.

Clause (g) which has now been inserted in Section 52 (1) of Punjab Municipal Act by means of Sec. 6 of the Act 22 of 1959 has to be tested by the guarantees in Part III of the Constitution. By asking the Committee to make contributions from its funds to the cost of the schools which have been taken over by the State part of its funds are being compulsorily acquired by the State. This is something which could not be done except in accordance with the provisions contained in Art. 31 (2) of the Constitution. Clause (g), therefore, which has been inserted in Section 52 of the Punjab Municipal Act is void and illegal as it contravenes Art. 31 (2) of the Constitution. AIR 1969 SC 1100, Rel. on. (Para 12)

(F) Constitution of India, Article 31 (2) — Taking over aided schools of local bodies — It is compulsory acquisition — Article must be satisfied — Section 3 (2) of Punjab Local Autho-

rities (Aided Schools) Act (22 of 1959) and S. 52 (1) (g) of Punjab Municipal Act are void. AIR 1966 Punj 232, Reversed. (Paras 14, 15)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 1100 (V 56) =
Writ Petn. No. 295 of 1968, D/-
30-1-1969, Municipal Com-
mittee, Amritsar v. State of
Punjab 12
- (1954) AIR 1954 SC 119 (V 41) =
1954 SCR 674, Dwarkadas
Shrinivas v. Sholapur Spinning
and Weaving Co., Ltd. 7
- (1951) AIR 1951 SC 41 (V 38) =
1950 SCR 869, Charanjit Lal
Chowdhury v. Union of India 7

Mr. Niren De, Attorney-General for India, (Mr. Naunit Lal, Advocate with him), for Appellants; M/s. Hardev Singh and R. N. Sachthey, Advocates, for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.—This is an appeal by special leave from a judgment of the Punjab High Court dismissing a petition under Articles 226 and 227 of the Constitution which had been filed by the appellant Municipal Committee challenging the taking over by the State of all the schools which were being run by it together with all the buildings in which the schools were functioning and other movable and immovable properties connected with these institutions which belonged to the Committee. The order of the State for payment of an annual contribution which upto the date of the filing of the writ petition i.e., May 10, 1964 and reached the figure of 53 lakhs was also challenged.

2. The appellant Committee is a first class Municipal Committee and has been in existence from a long time. It has been managing its local affairs through the elected representatives from the city who are called Municipal Commissioners. It is constituted and functions under the provisions of the Punjab Municipal Act, 1911. A number of primary schools were being run by the Committee within the municipal limits of the town of Amritsar for which it was getting grant-in-aid from the Punjab Government. It was, however, running schools upto

the middle and high standards for girls and boys for which all the expenses were incurred by itself without any grant from the Government. The primary liability, however, for incurring the extra expenditure even in connection with the aided schools was of the Committee. The Punjab Government took an administrative decision to provincialise all the schools run by all local bodies in the State with effect from October 1, 1957. This information was conveyed by means of a letter dated July 19, 1957 by the Secretary to the Government, Education Department, through the Deputy Commissioners in Jullundur and Ambala Divisions. At a meeting of the appellant Committee held on July 31, 1957 a resolution was passed that a strong representation be made to the Government against the decision to provincialise the schools run by the local bodies. On September, 26, 1957 the Assistant Director of Schools wrote to the District Inspector that "as the local body schools are being provincialised with effect from October 1, 1957 the tuition fees etc., to be realized in such schools after that date should be credited to the Government in the treasury under the head.....". Without enacting any legislation the State took over all the schools run by the local bodies on October 1, 1957. A memorandum from the Director of Public Instructions, Punjab to the District Inspector of Schools sent on October 5, 1957 conveyed the following direction:

"All the erstwhile Local Body Schools which have been provincialised with effect from the 1st October, 1957 will henceforth be known as Government High/Middle/Primary Schools for Boys or Girls as the case may be". The Executive Officer of the appellant Committee (appointed under the Punjab Municipal Executive Officers Act 1931) wrote to the Deputy Commissioner, Amritsar on November 21, 1957 that no formal orders had been received from the Government requiring the Committee to give up possession of the schools and it appeared that no procedure had so far been devised in that behalf or for the settlement of terms and conditions on which the buildings, furniture, fittings and other materials were to be transferred. He pressed for proper steps being taken. The Secretary to the Government

Punjab, Health and Local Government Department sent a memorandum dated September 10, 1958 to all the Deputy Commissioners saying that the work of proper maintenance of the buildings of the provincialised schools of the local bodies would be entrusted to the Public Works Department, Buildings and Roads. A letter was addressed by the same authority dated September 30/October 4, 1958 to the Deputy Commissioners requesting them to supply immediate information showing the contributions actually deposited into the treasuries by the local bodies in respect of the provincialisation of the schools. This was followed by the memorandum dated December 12, 1958 to the effect that all local bodies "be advised to execute the transfer notes in respect of the school buildings etc., by their respective Engineering Establishments in favour of the Superintending Engineers concerned". By means of another memorandum dated December 26, 1958, orders of the Government were conveyed that immediate steps should be taken for getting the contribution from local bodies and also for obtaining transfer of buildings and equipment. The Deputy Commissioners were requested to get the requisite resolutions passed by the local bodies in the prescribed form. The appellant Committee at its meeting held on January 10, 1959 decided not to pay any contribution for the time being. It was also resolved that the Committee was not in favour of transferring the property rights in movable and immovable property which was in possession of the schools.

3. It appears that up-till June 17, 1959 the State continued the process of provincialisation of the schools mentioned before without any authority of law. There was no statutory provision which entitled the State to take over the schools of the local bodies including the buildings in which the schools were being run as also furniture etc., which belonged to the local bodies. Moreover the extraordinary step of demanding annual contribution was also taken without any sanction or authority of law. The appellant Committee which is one of the biggest Committees in the State seems to have resisted the attempt on the part of the Government to take over the schools and acquire and requisition its properties in the manner in which

it was done. Legislation was for the first time enacted in the shape of the Punjab Local Authorities (Aided Schools) Act 1959, (Act No. XXII of 1959), hereinafter called the Act. It received the assent of the President on June 9, 1959. According to the preamble the Act was enacted to provide for the management and control of local authorities' schools receiving grants in aid from the State of Punjab. By a deeming provision the Act was to come into force with effect from October 1, 1957. Section 2 gave the definitions of "aided schools", "local authority", and "school". "School" has been defined to include lands, buildings, playgrounds and hostels of the school and the movable property such as furniture, books, apparatus, maps and equipment pertaining to the school. The following provisions of the Act as amended may be reproduced:

S. 3. "Power of local authorities to transfer management and control of aided schools to State Government.—(1) A local authority may pass a resolution to transfer the management and control of aided school to the State Government and communicate the same to the State Government.

(2) On receiving such a resolution, the State Government may direct that the aided schools shall be taken over under its management and control and thereafter all rights and interests including the right of maintenance, management and control shall be transferred to and vest in the State Government and the rights and interests of the local authority in respect of such schools shall cease."

S. 4. "Power to withdraw grant-in-aid.—The State Government may withdraw the grant-in-aid from any local authority in respect of aided schools if the resolution mentioned in Sec. 3, has not been passed and communicated to the State Government within a period of three months from the date on which this Act is published in the Official Gazette."

S. 5. "Power to take over aided schools where local authority neglects to perform duty.—(1) Wherever the State Government is satisfied that a local authority has neglected to perform its duties in respect of aided schools or that it is necessary in public interest to take over their manage-

ment for a period not exceeding ten years, it may, after giving the local authority a reasonable opportunity for showing cause against the proposed action, make an order to take over the management:

Provided that in cases of emergency, where the State Government is satisfied that such a course is necessary in the interests of the students, it may, without giving such notice, take over the management of such schools after publication of a notification to that effect in the Official Gazette."

(2) and (3)

S. 6. "Amendment of Punjab Acts No. III of 1911 and No. XX of 1883.—Where a local authority has passed a resolution under Sec. 3 or the State Government has taken over management of aided schools of a local authority under Sec. 5, the Punjab Municipal Act, 1911, and the Punjab District Boards Act, 1883, shall be deemed to have been amended in the manner specified in the Schedule appended to this Act with effect from the 1st October, 1957."

Section 52 (1) of the Punjab Municipal Act, relates to the setting apart of the municipal funds and apply the same for different purposes as mentioned in clauses (a) to (f). By means of the Schedule to the Act after clause (f) of sub-section (1), clause (g) was added which is in the following terms:

"(g) seventhly, such sum to be paid annually by the committee to the State Government by way of contribution as is equivalent to:—

(i) the total provision made in the budget for the year 1957-58 under the main head 'Education' excluding educational grants and the provision made for 'original works' relating to schools; and

(ii) a sum representing one per centum of the total income from its own resources for the year 1957-58, in lieu of the deductions made for 'original works' made under clause (i):

Provided that in respect of the financial year 1957-58 the committee shall make a payment to the State Government of the sums which have remained unexpended on 31st March, 1958, out of the provisions under the head "Education" in the budget of 1957-58". Section 59 of the Punjab Municipal Act provides that the Committee may with the sanction of the State Government

transfer to the Government any property vesting in the Committee under Section 56 or Section 57 but not so as to affect any trusts or public rights subject to which the property is held. A proviso was added to the section by the Schedule which was as follows:—

"Provided that where a committee has passed a resolution under Section 3 of the Punjab Local Authorities (Aided Schools) Act, 1959, or the State Government has taken over the management of aided schools of a committee under Section 5 of that Act, all rights and interests in the establishment, maintenance and management of the aforesaid schools immediately before the 1st October, 1957, including all interests in the lands, buildings, playgrounds, hostels of the said schools as also in the movable properties like furniture, books, apparatus, maps and equipment pertaining thereto shall be deemed to have been transferred to the State Government on that date, and all unspent balances in respect of grants and contributions received for the maintenance and promotion of these schools shall be deemed to have been surrendered to the State Government."

After the promulgation of the above legislation the appellant Committee passed a resolution on February 24, 1960 reiterating the decision taken in the Local Bodies Conference held at Jullundur and its own decision to request the Punjab Government to restore the schools run by the local bodies to them. At another meeting held on June 9, 1960 the appellant Committee decided not to pass the resolution under Section 3 of the Act transferring its schools and property to the State Government. The Punjab Government, however, issued a notification dated September 26, 1960 saying that the Governor was satisfied that it was necessary in the interests of the students to take over for a period of ten years the management of the schools specified in the Schedule and administered by the Municipal Committee, Amritsar, and therefore in exercise of the powers conferred by the proviso to Section 5 of the Act the Government took over for a period of ten years the management of the said schools. The schedule contained the list of 42 such schools. The question of the payment of the contribution which was being demanded by the

Government came up for consideration at a meeting of the Appellant Committee on January 3, 1962. It was decided that the payment be made on the basis of a formula laid down by State Government in that behalf with effect from October 1, 1957 but that the proprietary rights of the Committee in the school buildings be retained and the use of these buildings free of charge be allowed to the Government for the purpose of running the schools. At a subsequent meeting held on March 28, 1963, the appellant Committee, however, revised its previous decision in view of a resolution passed in the meeting of the Standing Committee of Urban Local Bodies Conference held on June 21, 1962. It was decided that the State Government was not entitled to charge contributions from the Municipal Committee. On April 10, 1964 the Deputy Commissioner, Amritsar, made an order in exercise of the powers vested in him under Section 234 (1) of the Punjab Municipal Act requiring the appellant committee to pay an amount of Rs. 53,66,146 on account of contribution for the maintenance of the provincialised schools for the period 1957-58 to 1963-64 failing which realization was to be made under sub-section (2) of that section. Thereupon the petition under Articles 226 and 227 of the Constitution was filed by the appellant Committee in which apart from other matters the validity and constitutionality of the Act were challenged. In the return filed on behalf of the State reliance was placed on the provisions of the Act, the resolution passed by the Committee itself on January 3, 1962 agreeing to pay the contribution and allow the use of school buildings to the Government free of charge and the notification which had been issued under Section 5 of the Act on September 26, 1960 whereby the management of the schools of the Committee had been taken over for a period of 10 years.

4. The High Court was of the view that since the Government had taken over the control and management of the aided schools it was considered necessary that the property in possession of these institutions should also be taken over and managed for a limited period of 10 years. Since no compensation was being paid for what may be called compulsory acquisition the legis-

lation could be struck down as being in contravention of Article 31 (2) of the Constitution. In the present case, however, the management of the property in possession of the schools was being taken over for a period of 10 years in the public interest by virtue of the provisions of Article 31-A (1) (b) and the contravention of Article 31 (2) was of no consequence. The argument raised on behalf of the State that the resolution of the appellant Committee dated January 3, 1962 consenting to the payment of the contribution with effect from October 1, 1957 had been passed in terms of Section 3 of the Act was refuted. As regards the notification issued on September 26, 1960 under the Act the High Court was of the opinion that although it did not contain any provision for retrospective operation it should be considered that it had retrospective effect since the Act itself had been enforced from October 1, 1957. It was conceded before the High Court that the notification did not apply to those schools which did not receive any aid from the Government.

5. The learned Attorney General for the appellant Committee raised the following main contentions: (1) The material provisions of the Act were ultra vires Article 31 (2) of the Constitution. (2) The taking over of movable and immovable property of the Committee could not possibly fall within Article 31-A (1) (b) and such action was in direct contravention of Article 31 (2). (3) The notification dated September 26, 1960 could not have been issued under the proviso to Section 5 because there was no question of any emergency nor such an emergency has been pleaded or proved by the State. (4) The said notification could not and did not validate the action taken prior to the date when it was issued nor Section 6 of the Act could be attracted which effected amendments of the provisions of the Punjab Municipal Act as per the Schedule. (5) The annual contributions which were being demanded from the appellant Committee were wholly illegal and could not be levied on account of legislative incompetence.

6. Now the scheme of the Act is that it is initially left to the local authority to pass a resolution to transfer the management and control of aided schools to the State Government.

In order to employ compulsive persuasion the State Government can withdraw the grant-in-aid from any local authority in respect of aided schools if such authority does not pass a resolution in terms of Section 3 within a period of three months from the date of enactment of the Act (vide Section 4). Section 5 gives the power to the State Government to take over aided schools where the local authority neglects to perform the duty but that can be done only after the local authority has been given a reasonable opportunity for showing cause against the proposed action and also if it is considered necessary in public interest to take over the management for a period not exceeding 10 years. The proviso, however, arms the State Government with powers in case of emergency and in the interests of students to take over the management straightway after publication of a notification to that effect. The amendments which are effected in Sections 52 and 59 of the Punjab Municipal Act enable the State Government to get an annual contribution from the local bodies and further to vest in the State not only the management of the school taken over but also all interests in the lands, buildings etc. of the school along with the movable properties pertaining thereto which shall be deemed to have been transferred to the State. There is no provision whatsoever for an automatic re-transfer of these properties after a lapse of a period of 10 years for which the taking over of the schools can be effective. This means that once action is taken under S. 5 which can be done pursuant to a resolution passed under Section 3 or after giving a notice to the local authority or without giving such notice in case of emergency all the properties movable and immovable belonging to the local body pertaining to the schools taken over become the property of the State. This is nothing short of compulsory acquisition within the meaning of Article 31 (2) of the Constitution. Under that Article no property can be so acquired or requisitioned unless it is under an authority of law which either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined and given. There is no provision in the Act or in

the amendment of Section 59 of the Punjab Municipal Act made by the Act for payment of any compensation. On the assumption that taking over of the property for a period of 10 years would be an act of requisitioning, the requirements of Article 31 (2) must be satisfied to sustain the validity of the law. The High Court entertained no doubt that under that Article property could not be acquired or requisitioned without complying with its provisions but it fell into an error in applying Article 31-A (1) (b) to the provisions under consideration.

7. Under the above Article it is only the management of any property which can be taken over for a limited period either in the public interest or in order to secure its proper management. According to the High Court the Committee was indisputably the owner of the property which was being taken over by the State but P. C. Pandit, J., who delivered the judgment of the Division Bench proceeded to say:

"In the present case, the management of the property in possession of the schools was being taken over for ten years in public interest and, as such, by virtue of the provisions of Article 31-A (1) (b), the contravention of Article 31 (2) was of no consequence. Learned Counsel for the petitioner submits that Article 31-A (1) (b) does not apply to the facts of the instant case, because here the management and control of an institution namely, the school, was being taken over by the Government, whereas this Article applied where the management of any property was being taken over by the Government for a limited period in the public interest. This argument is without any merit, because the property may belong to anybody, whether it be an individual, or a Committee or an industrial or commercial undertaking or any kind of other institution. In all these cases, where the management of the property is taken over for a limited period in public interest, this Article would be attracted and the legislation would not be hit by the provisions of Article 31 of the Constitution".

Clause (b) in Article 31-A (1) came to be inserted for the first time by the Constitution (Fourth Amendment) Act, 1955. It was intended apparently to counteract the effect of the decisions in

the two Sholapur cases: Charanjit Lal Chowdhury v. Union of India, 1950 SCR 869 = (AIR 1951 SC 41) and Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd., 1954 SCR 674 = (AIR 1954 SC 119). The purpose, therefore, of inserting this provision was to remove any legislation from the pale of attack on the ground of contravention not only of Article 31 but also of Articles 14 and 19. Although management and control of the aided schools under the impugned legislation could be taken over for a limited period in the public interest it is not possible to understand how even the proprietary interests in the movable and immovable property pertaining to the schools, which have been found to belong to the Committee, could have been acquired under Cl. (b) of Art. 31-A (1). With all deference to the High Court we have not been able to properly appreciate the decision on this point given in the paragraph extracted above. The High Court did not consider the true import and effect of the amendment made in Section 59 of the Punjab Municipal Act, by virtue of which all rights and interests in the lands, buildings, playgrounds, hostels of the schools as also in the movable property like furniture, books, apparatus, maps and equipment pertaining thereto shall be deemed to have been transferred to the State Government with effect from October 1, 1957. We are, therefore, unable to uphold the view which leads to the result that property can be acquired while taking over management and control under Article 31-A (1) (b) in complete negation and contravention of Article 31 (2) of the Constitution.

8. The next question is whether there was due compliance with the provisions of the proviso to Section 5 of the Act. In the notification which was issued on September 26, 1960 there is no indication that the management of the schools was being taken over because of certain emergency having arisen. If any emergency existed it was the creation of the government itself which had proceeded to take over the management and control of the aided schools along with the properties pertaining to them without any authority of law prior to the enactment of the Act. That was the reason why the Act had to be given retrospective

operation. According to the High Court the moment the State Government was satisfied that it was in the interest of the students to take over the management of the schools it became a case of emergency. It also relied on the principle that it was not necessary to mention the actual emergency which had arisen in the notification itself or to make a recital that an emergency had arisen. The State could not show by placing material before the Court that it was a case of emergency justifying the action under the proviso to Section 5 because no foundation in this behalf had been laid in the writ petition. The third point pressed by the learned Attorney General, therefore, cannot be acceded to.

9. The fourth point of the learned Attorney General may now be considered. There was some argument before the High Court and the same has been repeated before us on behalf of the State that the question of validity of the notification and the action taken thereunder did not arise because the Committee itself had passed a resolution on January 3, 1962 which should be regarded as having been passed under the provisions of Section 3 transferring the management and control of the schools to the Government and agreeing to pay the contribution with effect from October 1, 1957. The High Court has rightly pointed out that a reading of the resolution would show that the Committee agreed to the payment of contribution with effect from October 1, 1957, in accordance with the formula laid down by the State Government. It was, however, made clear that the proprietary rights of the Committee in the movable and immovable property pertaining to the schools would be retained by it. The Committee had subsequently passed several resolutions which had the effect of almost rescinding the previous resolution. The submission on behalf of the State that the resolution dated January 3, 1962, passed by the Committee fell within the first part of Section 3 of the Act is wholly devoid of merit and has rightly not been accepted.

10. As regards the notification having retrospective operation we are unable to agree with the High Court that any such effect could be given to it. There is nothing to indicate in the

notification that it was intended to operate retrospectively. The mere fact that the Act in terms was retrospective would not make the notification issued under the proviso to Section 5 retrospective in the absence of express words or appropriate language from which retrospectivity would be implied. All that the notification says is that the Governor of Punjab is taking over for a period of 10 years the management of the schools of the Committee in exercise of the powers conferred by the proviso to Section 5 of the Act. This clearly means that the management is taken over from the date of the notification and not from any prior date. It would follow that whatever was done before the date of the notification regarding the assumption of management and vesting of the Committee's properties was wholly void and illegal.

11. Under Section 6 of the Act it is only after the local authority has passed a resolution under Section 3 or the State Government has taken over management of the aided schools under Section 5 that Sections 52 and 59 of the Punjab Municipal Act would be deemed to have been amended in the manner specified in the schedule with effect from October 1, 1957, or from the date aided schools are taken over as the case may be. If the notification dated September 26, 1960 could not be given retrospective operation, the amendments in the aforesaid provisions of the Punjab Municipal Act would be effective only after the date of the notification and not for the prior period. Thus even on the assumption that the provisions of the Act are valid the State could not ask for any contribution from the Committee for the period prior to the date of the notification. But the addition of Clause (g) after Clause (f) in sub-section (1) of Section 52 of the Punjab Municipal Act is void and wholly ineffective for the reasons which will be presently noticed.

12. Chapter IV of the Punjab Municipal Act relates to municipal fund and property. Section 51 deals with the constitution of the municipal fund. Section 52 provides for the application of the fund. Before the amendment made by the Act sub-section (1) had six clauses containing the provisions for the application of the

fund. It is noteworthy that although the State Government has been empowered to require the Committee to make contributions but in each case that is confined to an eventuality or a situation where certain cost has been incurred by the Government which had to be defrayed by the Committee e.g., Clauses (b), (d) and (f). According to Clause (e), however, the Committee may be required by the State Government to contribute towards the maintenance of pauper lunatics or lepers sent from any place in the State to mental hospitals or public asylums whether in or outside the State. Sub-section (2) says that subject to the charges specified in sub-section (1) the municipal fund shall be applicable to the payment of the matters set out in Clauses (a) to (l). Clause (c) is in these terms:

"the constitution, establishment and maintenance of schools, hospitals and dispensaries, and other institutions for the promotion of education or for the benefit of the public health

In the context of Section 52 it is difficult to envisage that the municipal fund of a particular Committee could be diverted to such institutions which had no connection with the Committee. We are, however, not called upon to pronounce upon the true scope, ambit and validity of all the provisions in Section 52. Clause (g) which has now been inserted by means of Section 6 of the Act has to be tested by the guarantees in Part III of the Constitution. By asking the Committee to make contributions from its funds to the cost of the schools which have been taken over by the State part of its funds are being compulsorily acquired by the State. This is something which could not be done except in accordance with the provisions contained in Art. 31(2) of the Constitution. In Writ Petn. No. 295 of 1968, D/- 30-1-1969 = (reported in AIR 1969 SC 1100), Municipal Committee, Amritsar v. State of Punjab in which the provisions of the Punjab Cattle Fairs (Regulation) Act, 1968, came up for examination, it was laid down by this Court that the State was incompetent to declare land belonging to the Municipal Committee as falling within the fair area and to take possession of that land in exercise of the power conferred by the Act without

providing for payment of compensation guaranteed by Article 31 (2). Clause (g), therefore, which has been inserted in Section 52 of the Punjab Municipal Act is void and illegal as it contravenes Article 31 (2) of the Constitution.

13. It may be mentioned that the learned Attorney General has also pointed out that the State legislature did not have the competence, under any of the entries in List II of the Seventh Schedule, to enact legislation of the nature embodied in Clause (g) which was inserted in Section 52 relating to compulsory contribution by the Committee to the State Government. Counsel for the State has sought to rely on Entries 5 and 11 in List II which relate to local Government and education. It is unnecessary to decide this matter since it has been held by us that the impugned provisions with regard to contribution contravene Article 31 (2) of the Constitution.

14. We may now determine the provisions of the Act which are unconstitutional and invalid. There is nothing in Sections 3 (1), 4 and 5 of the Act per se which would bring them into conflict with the constitutional provisions, particularly, in view of Article 31-A (1) (b) under which the management of the schools could be taken over by the State for a limited period in public interest. But the difficulty arises about Sections 3 (2) and 6 which have to be read together. When the State Government makes a direction under Section 3 (2) that the aided schools shall be taken over all rights and interests of the Committee including the rights of maintenance, management and control shall be transferred to and vest in the State Government. This essentially has reference to proprietary and ownership rights apart from the rights pertaining to management and control. Section 6 comes into operation as soon as a local authority has passed a resolution under Section 3 or the State Government has taken over management under Section 5. Then the provisions relating to acquisition of property of the Committee as also of its funds by way of contribution come immediately into operation by virtue of the amendments effected in Sections 52 (1) and 59 of Punjab Municipal Act. These provisions are clearly unconstitutional

as they contravene Article 31 (2) of the Constitution.

15. In the result the appeal is allowed with costs and the judgment of the High Court is set aside. It is declared that Section 3 (2) of the Act and the amendments which would become operative under Section 6 in respect of Sections 52 (1) and 59 of the Punjab Municipal Act are void and unconstitutional. The orders by which the movable and immovable property of the Committee have been transferred to the State are hereby quashed and such transfers are declared to be wholly void. The respondents are further directed not to recover any contribution in accordance with Cl. (g) of Section 52 of the Punjab Municipal Act as also the sum of Rs. 53 lakhs mentioned in the order of the Deputy Commissioner dated April 10, 1964, form the appellant Committee. Appropriate writs and directions shall issue in this behalf.

Appeal allowed.

AIR 1970 SUPREME COURT 2191
(V 57 C 449)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

State of U. P. and others, Appellants v. Sushil Chandra and another, Respondents.

Civil Appeals Nos. 1303 and 1304 of 1970, D/- 10-8-1970.

Constitution of India, Articles 136 and 226 — Appeal to Supreme Court — Ad interim injunction granted by High Court in petition challenging validity of order of State Government regarding sale of liquor — High Court reserving liberty of State to move High Court for vacating order — Petition by State for vacating order — High Court directing all remaining applications in proceedings to be listed for hearing and confirming its previous order granting stay — Held that the order of the High Court granting ad interim injunction was purely temporary made with a view to investigate whether the petitioners had right to the relief claimed and the appeal by the State Government was not maintainable. (Para 4)

IN/IN/D948/70/MVJ/F

The following Judgment of the Court was delivered by

SHAH, J.—In our judgment these two appeals are frivolous. They should never have been brought to this Court.

2. The High Court of Allahabad made an order on April 24, 1970 in a writ petition (challenging the validity of certain order of the State of Uttar Pradesh) issuing an ad interim injunction restraining the State of U. P. and its officers from interfering with the sale of country liquor at their country liquor shop by the respondents in this appeal. The Court however reserved liberty to the State and its officers to move for vacating the order "if and when the occasion arose". It was also directed that the State and its officers will not prevent the respondents from "lifting their quota of country liquor."

3. On April 30, 1970, an application was submitted on behalf of the State for vacating the order pursuant to the liberty reserved by the Court. The High Court made another order on May 7, 1970 by which the previous order dated April 24, 1970 was confirmed.

4. It is urged on behalf of the State that the second order was made on the application dated April 30 1970. That contention appears to be wholly unsustainable. It is clear from the terms of the order that the High Court had directed that all the remaining applications which were filed in the proceedings should be listed for hearing on May 14, 1970, and that in the meantime the State and its officers will comply with the previous order dated April 24, 1970. The High Court had, with a view to investigate the question as to whether the respondents had right to the relief claimed, given ad interim relief staying the operation of an order challenged by the respondents. The order was purely temporary. The matter was going to be dealt with by the High Court. We fail to see any reason why the State should have rushed to this Court and asked this Court to entertain the proceedings and to grant a stay of the proceedings.

5. The appeals are dismissed with costs. One hearing fee.

Appeals dismissed.

END

ever, the Fifth Amendment was offended in Lookretis precisely because the defendant had succumbed to the statutory compulsion by furnishing the requested incriminatory information. Knox does not claim that his prosecution is based upon any incriminatory information contained in the forms he filed, nor that he is being prosecuted for a failure to supply incriminatory information. He has taken a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take.

6. This is not to deny that the presence of Ss. 4412 and 7203 injected an element of pressure into Knox's predicament at the time he filed the forms. At that time, this Court's decisions in *United States v. Kahriger*, (1953) 345 US 22=97 L Ed 754=73 S Ct 510, and *Lewis v. United States*, (1955) 348 US 419=99 L Ed 475=75 S Ct 415, established that the Fifth Amendment did not bar prosecution for failure to file a form such as 11-C. But when Knox responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion. Knox's ground for complaint is not that his false information inculpated him for a prior or subsequent criminal act; rather, it is that under the compulsion of Ss. 4412 and 7203 he committed a criminal act, that of giving false information to the Government. If the compulsion was unlawful under *Marchetti*,⁽⁶⁾ Knox may have a defense to this prosecution under the traditional doctrine that a person is not criminally responsible for an act committed under duress. See generally Model Penal Code Ss. 2.09, 3.02 (Proposed Official Draft, 1962); *id.*, S. 2.09, Comment (Tent Draft No. 10, 1960). It is only in this sense that there is any relevance to Knox's attempted distinction of this case from *Dennis*,

6. We stressed in *Marchetti* "that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with these requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes." 390 US, at 61, 19 L Ed 2d at 905. Nothing before us indicates that the hazard of incrimination faced by Knox was less substantial than that faced by *Marchetti*, or that Knox would have been disqualified for any other reason from asserting the privilege in defense of a prosecution for failure to comply with S. 4412.

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Bryson, and their predecessors, *United States v. Kapp*, (1937) 302 US 214=82 L Ed 205=58 S Ct 182, and *Kay v. United States*, (1938) 303 US 1=82 L Ed 607=58 S Ct 468, on the ground that in those cases the false statements were voluntarily filed for the purpose of obtaining benefits from the Government.

7. Knox argues that the criminal sanction for failure to file, coupled with the danger of incrimination if he filed truthfully, was more coercive in its effect than, for example, the prospect that the petitioners in *Dennis* would lose their jobs as union officers unless they filed non-Communist affidavits. While this may be so, the question whether Knox's predicament contains the seeds of a "duress" defense, or perhaps whether his false statement was not made "willfully" as required by S. 1001, is one that must be determined initially at his trial.⁽⁷⁾ It is not before us on this appeal from dismissal of the indictment, and we intimate no view on the matter.

8. The judgment of the District Court is

Reversed.

SEPARATE OPINION

Mr. JUSTICE DOUGLAS, with whom Mr. JUSTICE BLACK concurs, dissenting.

9. In this case, as in *ante*, (1969) 24 L Ed 2d p. 264, the relevant inquiry is whether "constitutionally speaking it was 'within the jurisdiction'" of a Government agency to require the filing of certain information. *Id.*, (1969) 24 L Ed 2d 264 at 272 (dissenting opinion). In (1968) 390 US 39, 61=19 L Ed 2d 889, 905=88 S Ct 697 we held that the statutory requirement of filing Internal Revenue Service Form 11-C is not unconstitutional *per se*. It is clear, however, that under *Marchetti*, (1968) 390 US 39=19 L Ed 2d 889 (*supra*) and (1968) 390 US 62=19 L Ed 2d 906=88 S Ct 709, the "jurisdiction" of the Internal Revenue Service to require this form to be filed is subject to the Fifth Amendment privilege against self-incrimination.

10. This is not a case where an individual, with knowledge that he has a right to refuse to provide information, nonetheless provides false information. Under the decisions in (1953) 345 US 22=97 L Ed 754=73 S Ct 510 and (1955) 348 US 419=99 L Ed 475=75 S Ct 415,

7. Rule 12(b) (1) of the Federal Rules of Criminal Procedure, which cautions the trial judge that he may consider on a motion to dismiss the indictment only those objections that are "capable of determination without trial of the general issue," indicates that evidentiary questions of this type should not be determined on such a motion.

which were controlling at the time Knox filed his wagering form, Knox faced prosecution under 26 USC S. 7203 for failure to file the form, despite claims of self-incrimination. The Government's requirement to file the wagering form was unconditional. The majority argues that by the terms of Marchetti the Government is not prohibited from requesting the form, but is only prohibited from prosecuting an individual for his failure to comply with the request. Ante, n. 3, (1969) 24 L Ed 2d at 264, 279. The question in this case, however, is not whether the Government has the power to request the form to be filed, but whether it has the power to require the form to be filed. If Knox had merely been requested to file the form and, with full knowledge of his right to silence under the Fifth Amendment, had done so voluntarily, we would have quite a different case. That is not this case. Under the scheme then in effect, the Government demanded unconditionally that Knox file the form, regardless of the fact that it would incriminate him. Heavy penalties were placed on a failure to file the form.

11. Marchetti and Grosso held that those in Knox's position have the Fifth Amendment right to remain silent irrespective of the statutory command that they submit forms which could incriminate them. Had Knox asserted his right of silence under the Fifth Amendment, it is clear that the Internal Revenue Service could not, consistent with Marchetti and Grosso, have required him to file the wagering form.* Thus any argument that the Internal Revenue Service did have "jurisdiction" to require the form to be filed in this case would have to rest on a theory that Knox had "waived" his Fifth Amendment right by not asserting it in lieu of filing the form. A similar claim was made in Grosso, where the petitioner had not asserted his Fifth Amendment right as to certain counts which concerned his failure to pay the special occupational tax imposed by 26 USC S. 4411. The Court there said: "Given the decisions of this Court in Kahriger and Lewis, supra, which were on the books at the time of petitioner's trial, and left untouched by *Albertson v. SACB* [(1965) 382 US 70=15 L Ed 2d 165 =85 S Ct 194], we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." (1968) 390 US, 62 at 71=19 L Ed 2d 906 at 913, 914.

*As the majority opinion states: "Nothing before us indicates that the hazard of incrimination faced by Knox was less substantial than that faced by Marchetti, or that Knox would have been disqualified for any other reason from asserting the privilege." Ante, at —, n. 6, 24 L Ed 2d at 280.

That reasoning is equally applicable here, for Kahriger and Lewis were still on the books at the time Knox filed his form. And see *Leary v. United States*, (1969) 395 US 6, 27-29=23 L Ed 2d 57, 76-78=89 S Ct 1532.

12. For the reasons stated in my dissent in Bryson, ante, (1969) 24 L Ed 2d 264 and in Mr. Justice Black's dissent in (1968) 384 US 855, 875=16 L Ed 2d 973, 987=86 S Ct 1840, if the Internal Revenue Service had no constitutional authority to require Knox to file any wagering form at all, his filing of a form which included false information in no way prejudiced the Government and is not, in my view, a matter "within the jurisdiction" of the Internal Revenue Service.

13. I would affirm the judgment below.

AIR 1970 U.S.S.C. 82 (V 57 C 12)
(1969-24 L Ed 2d 610)*

James Turner, Petitioner v. United States, Respondent.

(No. 190) Decided on 20-1-1970.

†Evidence Act (1872), Sec. 114, Illus. (a) — Case from America — Illegal possession of heroin and cocaine in large quantities — Presumption as to illegal importation — (Customs Act (1862), Section 135) — (Constitution of India, Article 20 (3)) — (Dangerous Drugs Act (1930), Section 32).

Where the accused were charged with knowingly receiving, concealing and transporting heroin and cocaine which he knew had been illegally imported and knowingly purchasing, dispensing and distributing heroin and cocaine, because all or nearly all heroin consumed in the United States is illegally imported, in the absence of explanation as to possession, the Jury can properly infer that the heroin in the possession of the accused had been illegally imported and that he had knowledge of illegal importation. Evidence of the possession by the accused of a great quantity of heroin is sufficient to support conviction for distributing such heroin. Drawing of such an inference does not violate the accused's right to be convicted only on a finding of guilt beyond reasonable doubt. Drawing of inference "unless the defendant explains the possession satisfactorily" does not place impermissible pressure on the accused to testify in his own defence. (Paras 5, 6)

As regards charge of possession of cocaine, however, no presumption of illegal importation can be drawn, since it is lawfully produced in greater quantities in the United States than is illegally imported. (Para 22)

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†Reference is given to a parallel Indian provision for the convenience of Indian lawyers.

GN/GN/C489/70/RGD/T

Cases Referred:	Chronological	Paras
(1969) 395 US 6 = 23 L Ed 2d 57 = 89 S Ct 1532, <i>Leary v. United States</i>	3, 18, 19, 42	
(1965) 382 US 136 = 15 L Ed 2d 210 = 86 S Ct 279, <i>United States v. Romano</i>	4, 25	
(1965) 380 US 63 = 13 L Ed 2d 658 = 85 S Ct 754, <i>United States v. Gainey</i>	42, 43	
(1965) 380 US 609 = 14 L Ed 2d 106 = 85 S Ct 1229, <i>Griffin v. California</i>	43	
(1964) 378 US 1 = 12 L Ed 2d 653, <i>Malloy v. Hogan</i>	43	
(1963) 323 F 2d 674, <i>Erwing v. United States</i>	21	
(1960) 362 US 199 = 4 L Ed 2d 654 = 80 S Ct 624 = 80 ALR 2d 1355, <i>Thompson v. Louisville</i>	60	
(1959) 359 US 19 = 3 L Ed 2d 597 = 79 S Ct 560, <i>Harris v. United States</i>	6	
(1957) 353 US 53 = 1 L Ed 2d 639 = 77 S Ct 623, <i>Roviaro v. United States</i>	4	
(1955) 350 US 11 = 100 L Ed 8 = 76 S Ct 1, <i>United States Ex rel. Toth v. Quarles</i>	39, 42	
(1947) 330 US 160 = 91 L Ed 818 = 67 S Ct 645, <i>Bozza v. United States</i>	69	
(1943) 319 US 463 = 87 L Ed 1519 = 63 S Ct 1241, <i>Tot v. United States</i>	4, 25	
(1925) 268 US 178 = 69 L Ed 934 = 45 S Ct 470, <i>Yee Hem v. United States</i>	4	
(1928) 276 US 413 = 72 L Ed 632 = 48 S Ct 373, <i>Casey v. United States</i>	4	
(1910) 219 US 35 = 55 L Ed 78 = 31 S Ct 136, <i>Mobile J. and K. C. R. v. Turnipseed</i>	10	
Josiah E. DuBois, Jr., for Petitioner; Lawrence G. Wallace, for Respondent; Steven R. Rivkin, for Cleveland Burgess as amicus curiae.		

SUMMARY

The defendant, tried before a jury in the United States District Court for the District of New Jersey, was charged with (1) knowingly receiving, concealing, and transporting heroin and cocaine which he knew had been illegally imported, and (2) knowingly purchasing, dispensing, and distributing heroin and cocaine which were not in or from the original stamped package. The evidence indicated that the defendant had been in possession of a 14.68-gram package containing a cocaine and sugar mixture and a 48.25-gram containing 275 bags of heroin, and that no federal stamps were affixed to the packages. No evidence was presented as to the origin of the cocaine or heroin, and the defendant did not testify. The trial judge instructed the jury, in accordance with the language of certain federal statutory provisions, that (1) the defendant's unexplained

possession of the heroin and cocaine would support an inference that he knew that they had been illegally imported, and (2) the defendant's possession of heroin and cocaine which were not in a stamped package constituted prima facie evidence that he knowingly purchased, dispensed, or distributed such heroin and cocaine. The jury found the defendant guilty on all counts, and the Court of Appeals for the Third Circuit affirmed (404 F2d 782).

On certiorari, the United States Supreme Court affirmed in part and reversed in part. In an opinion by WHITE, J., expressing the views of five members of the court, the convictions involving heroin were affirmed and it was held that (1) because all or nearly all heroin consumed in the United States is illegally imported, the jury could properly infer, as authorized by statute, that the heroin in the defendant's possession had been illegally imported and that the defendant had knowledge of its illegal importation, (2) evidence of the defendant's possession of 275 bags of heroin was sufficient to support his conviction for distributing such heroin, and (3) because it was extremely unlikely that a package containing heroin would be legally stamped, and because most persons in possession of heroin could be presumed to have obtained it by purchase, the defendant was properly convicted for purchasing heroin which was not in or from the original stamped package; but the convictions involving cocaine were reversed and it was held that (1) because much more cocaine is lawfully produced in the United States than is illegally imported, the statutory presumption was invalid to the extent that it authorized the jury to infer that the cocaine in the defendant's possession had been illegally imported and that the defendant had knowledge of its illegal importation, (2) because the defendant's possession of 14.68 grams of a cocaine and sugar mixture might have been exclusively for his personal use, evidence of such possession was insufficient to support his conviction for distributing cocaine, and (3) because there was a reasonable possibility that the defendant had stolen the cocaine himself or had obtained it from a stamped package in the possession of the actual thief, the statutory presumption was invalid to the extent that it authorized the jury to infer that the defendant had purchased the cocaine other than in or from the original stamped package.

MARSHALL, J., while concurring in the court's judgment, dissented from that part of the opinion which affirmed the defendant's conviction on the ground of his having purchased heroin.

BLACK, J., joined by DOUGLAS, J., dissenting, would reverse all of the defendant's convictions because (1) the trial judge's instructions impermissibly interfered with the defendant's constitutional right to have the jury determine when evidence is sufficient to

justify a finding of guilt beyond a reasonable doubt, and (2) the statutory presumptions unconstitutionally deprived the defendant of the presumption of innocence, cast upon him the burden of proving that he was not guilty, and by obligating him to rebut the presumptions, tended to compel him to testify in violation of his privilege against self-incrimination.

OPINION OF THE COURT

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner was found guilty by a jury on four counts charging violations of the federal narcotics laws. The issue before us is the validity of the provisions of 21 USC S. 174 and 26 USC S. 4704 (a) which authorize an inference of guilt from the fact of possession of narcotic drugs, in this case heroin and cocaine.

The charges arose from seizures by federal narcotics agents of two packages of narcotics. On June 1, 1967, Turner and two companions were arrested in Weehawken, New Jersey, shortly after their automobile emerged from the Lincoln Tunnel. While the companions were being searched but before Turner was searched, the arresting agents saw Turner throw a package to the top of a nearby wall. The package was retrieved and was found to be a foil package weighing 14.68 grams and containing a mixture of cocaine hydrochloride and sugar 5% of which was cocaine. Government agents thereafter found a tinfoil package containing heroin under the front seat of the car. This package weighed 48.25 grams and contained a mixture of heroin, cinchonin alkaloid, mannitol, and sugar, 15.2% of the mixture being heroin. Unlike the cocaine mixture, the heroin mixture was packaged within the tinfoil wrapping in small double glassine bags; in the single tinfoil package there were 11 bundles of bags, each bundle containing 25 bags (a total of 275 bags). There were no federal tax stamps affixed to the package containing the cocaine or to the glassine bags or outer wrapper enclosing the heroine.

Petitioner was indicted on two counts relating to the heroin and two counts relating to the cocaine. The first count charged that Turner violated 21 USC S. 174(i) by receiv-

ing, concealing, and facilitating the transportation and concealment of heroin while knowing that the heroin had been unlawfully imported into the United States. The third count charged the same offense with regard to the cocaine seized. The second count charged that petitioner purchased, possessed, dispensed, and distributed heroin not in or from the original stamped package in violation of 26 USC S. 4704 (a)(ii). The fourth count made the same charge with regard to the cocaine.

2. At the trial, the Government presented the evidence of the seizure of the packages containing heroin and cocaine but presented no evidence on the origin of the drugs possessed by petitioner. Petitioner did not testify. With regard to Counts 1 and 3, the trial judge charged the jury in accord with the statute that the jury could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew that the drugs he possessed had been unlawfully imported. With regard to Counts 2 and 4, the trial judge read to the jury the statutory provision making possession of drugs not in a stamped package "prima facie evidence" that the defendant purchased, sold, dispensed or distributed the drugs not in or from a stamped package. The jury returned a verdict of guilty on each count. Petitioner was sentenced to consecutive terms of 10 years' imprisonment on the first and third counts; a five year term on the second count was to run concurrently with the term on the first count and a five-year term on the fourth count was to run concurrently with the term on the third count.

3. On appeal to the Court of Appeals for the Third Circuit, petitioner argued that the trial court's instructions on the inferences

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Heroin, a derivative of opium, and cocaine, a product of coca leaves, are within the meaning of the term "narcotic drug" as used in 21 USC S. 174. 21 USC S. 171, referring to Int Rev Code of 1939, c 27, S. 3228 (g) added by Act of August 8, 1953, c. 394, S. 1, 67 Stat 505 (now 26 USC S. 4731 (a)).

(ii) "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

The term "narcotic drugs" is defined to include derivatives of opium and products of coca leaves. 26 USC S. 4731 (a).

(i) Insofar as here relevant, this section provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned....."

that the jury might draw from unexplained possession of the drugs constituted violations of his privilege against self-incrimination by penalizing him for not testifying about his possession of the drugs. The Court of Appeals rejected this claim and affirmed, finding that the inferences from possession authorized by the statutes were permissible under prior decisions of this Court and that therefore there was no impermissible penalty imposed on petitioner's exercise of his right not to testify. (1968) 404 F2d 782. After the Court of Appeals' decision in this case, this Court held that a similar statutory presumption applicable to the possession of marihuana was unconstitutional as not having a sufficient rational basis. *Leary v. United States*, (1969) 395 US 6 = 23 L Ed 2d 57 = 89 S Ct 1532. We granted a writ of certiorari in this case to reconsider in light of our decision in *Leary* whether the inferences authorized by the statutes here at issue are constitutionally permissible when applied to the possession of heroin and cocaine.

4. The statutory inference created by S. 174 has been upheld by this Court with respect to opium and heroin. *Yee Hem v. United States*, (1925) 268 US 178 = 69 L Ed 904 = 45 S Ct 470; *Roviaro v. United States*, (1957) 353 US 53 = 1 L Ed 2d 639 = 77 S Ct 623 as well as by an unbroken line of cases in the courts of appeals.⁽ⁱⁱⁱ⁾ Similarly, in a case involving morphine, this Court has rejected a constitutional challenge to the inference authorized by S. 4704 (a). *Casey v. United States*, (1928) 276 US 413 = 72 L Ed 632 = 48 S Ct 373. (1969) 395 US 6 = 23 L Ed 2d 57 = 89 S Ct 1532 (*supra*), dealt with a statute,

(iii) Decisions of the Court of Appeals accepting application of the presumption to persons found in possession of opium, morphine or heroin include *Gee Woe v. United States*, 250 F 428 (CCA5th Cir), cert denied, 248 US 562, 63 L Ed 422, 39 S Ct 8 (1918) (smoking opium); *Charley Toy v. United States*, 266 F 326 (CCA2d Cir), cert denied, 254 US 639, 65 L Ed 452, 41 S Ct 13 (1920) (smoking opium); *Copperthwaite v. United States*, 37 F2d 846 (CCA6th Cir 1930) (morphine); *United States v. Moe Liss*, 105 F2d 144 (CCA2d Cir 1939) (morphine); *Dear Check Quong v. United States*, 82 US App DC 8, 160 F2d 251 (1947) (unspecified narcotics); *Cellino v. United States*, 276 F2d 941 (CA9th Cir 1960) (heroin); *Walker v. United States*, 285 F2d 52 (CA5th Cir 1960) (heroin); *United States v. Savage*, 292 F2d 264 (CA 2d Cir), cert denied, 368 US 850, 7 L Ed 2d 80, 82 S Ct 129 (1961) (heroin); *United States v. Gibson*, 310 F2d 79 (CA2d Cir 1962) (heroin); *Lucero v. United States*, 311 F2d 457 (CA10th Cir 1962), cert denied sub nom *Maestas v. United States*, 372 US 936, 9 L Ed 2d 767, 83 S Ct 883 (1963) (heroin); *Garcia v. United States*, 373 F2d 806 (CA10th Cir 1967) (heroin).

21 USC S. 176 (a), providing that possession of marihuana, unless explained to the jury's satisfaction, "shall be deemed sufficient evidence to authorize conviction" for smuggling, receiving, concealing, buying, selling, or facilitating the transportation, concealment or sale of the drug, knowing that it had been illegally imported. Referring to prior cases (iv) holding that a statute authorizing the inference of one fact from the proof of another in criminal cases must be subjected to scrutiny by the courts to prevent "conviction upon insufficient proof," (1969) 395 US 6 at p. 37 = 23 L Ed 2d 57 at 82, the Court read those cases as requiring the invalidation of the statutorily authorized inference "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (1969) 395 US, 6 at p. 36 = 23 L Ed 2d 57 at 82. Since, judged by this standard, the inference drawn from the possession of marihuana was invalid, it was unnecessary to "reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." (1969) 395 US, 6 at 36 n 64 = 23 L Ed 2d 57 at 82.

We affirm Turner's convictions under Ss 174 and 4704 (a) with respect to heroin (Counts 1 and 2) but reverse the convictions under these sections with respect to cocaine (Counts 3 and 4).

5. We turn first to the conviction for trafficking in heroin in violation of S. 174. Count 1 charged Turner with (1) knowingly receiving, concealing and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. See *Harris v. United States*, (1959) 359 US 19 = 23, 3 L Ed 2d 597, 599 = 79 S Ct 560. For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt. The jury was so instructed and Turner was found guilty.

6. The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here,^(v) he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case. The trial judge noting that there was no other evidence of importation or of Turner's knowledge that his heroin had come from abroad, followed the usual practice and

(iv) Especially *Tot v. United States*, 319 US 463, 87 L Ed 1519, 63 S Ct 1241 (1943), *United States v. Gainey*, 380 US 63, 13 L Ed 2d 658, 85 S Ct 754 (1965), and *United States v. Romano*, 382 US 136, 15 L Ed 2d 210, 86 S Ct 279 (1965).

(v) See *infra*, nn. 12, 13.

instructed the jury — as S. 174 permits but does not require — that possession of a narcotic drug sufficient evidence to justify conviction of the crime defined in S. 174.(vi)

7. The jury, however, even if it believed Turner had possessed heroin, was not required by the instructions to find him guilty. The jury was instructed that it was the sole judge of the facts and the inferences to be drawn therefrom, that all elements of the crime must be proved beyond a reasonable doubt and that the inference authorized by the statute did not require the defendant to present evidence. To convict, the jury was informed, it "must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant " The jury was obligated by its instructions to assess for itself the probative force of possession and the weight, if any, to be accorded the statutory inference. If it is true, as the Government contends, that heroin is not produced in the United States and that any heroin possessed here must have originated abroad, the jury, based on its own

(vi) Under prior decisions, principally *United States v. Gainey*, 380 US 63, 13 L Ed 2d 658, 85 S Ct 754 (1965), such statutory provisions authorize but do not require the trial judge to submit the case to the jury when the Government relies on possession alone, authorize but do not require an instruction to the jury based on the statute and authorize but do not require the jury to convict based on possession alone. The defendant is free to challenge either the inference of illegal importation or the inference of his knowledge of that fact, or both. *Harris v. United States*, 359 US 19, 23, 3 L Ed 2d 597, 599, 79 S Ct 530 (1959); *Roviaro v. United States*, 353 US 53, 63, 1 L Ed 2d 639, 646, 77 S Ct 623 (1957); *Yee Hem v. United States*, 268 US 178, 185, 69 L Ed 904, 906, 45 S Ct 470 (1925); *United States v. Peeples*, 377 F2d 205 (CA2d Cir 1967); *Chavez v. United States*, 345 F2d 85 (CA 9th Cir 1965); *Griego v. United States*, 298 F2d 845 (CA10th Cir 1962). Even when the defendant challenges the validity of the inference as applied to his case, the instruction on the statutory inference is normally given. See, e. g., *McIntyre v. United States*, 350 F2d 746 (CA9th Cir), cert denied, 389 US 952, 19 L Ed 2d 360, 88 S Ct 334 (1967); *United States v. Peeples supra*; *Vick v. United States*, 113 US App DC 12, 364 F2d 379 (1962); *Griego v. United States, supra*; *Walker v. United States*, 285 F2d 52 (CA5th Cir 1960); *Feinberg v. United States*, 123 F2d 425 (CCA7th Cir 1941), cert denied, 315 US 801, 86 L Ed 1201, 62 S Ct 626 (1942). See also *Erving v. United States*, 323 F2d 674 (CA9th Cir 1963); *Caudillo v. United States*, 253 F2d 313 (CA9th Cir), cert denied sub nom *Romero v. United States*, 337 US 931, 2 L Ed 2d 1373, 78 S Ct 1375 (1953).

store of knowledge, may well have shared this view and concluded that Turner was equally well informed. Alternatively, the jury may have been without its own information concerning the sources of heroin, and may have convicted Turner in reliance on the inference permitted by the statute, perhaps reasoning that the statute represented an official determination that heroin is not a domestic product.(vii)

8. Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from proof of possession alone. Since the jury might have relied heavily on the inferences authorized by the statute and included in the court's instructions, our primary focus is on the validity of the evidentiary rule contained in S. 174.(viii)

(vii) In *United States v. Peoples*, 377 F2d 205 (CA2d Cir 1967), the jury, after deliberating for a time, asked the judge about the percentage of heroin in the United States that is produced illegally in this country. "As there was no evidence in the record concerning areas of the world where heroin is produced, the judge declined to answer the inquiry" 377 F2d, at 208. The defendant was found guilty by the jury; however, the Court of Appeals reversed for reasons not directly related to the trial judge's treatment of the question about the origins of heroin possessed in this country.

(viii) See *Leary v. United States*, 395 US 6, 31-32, 23 L Ed 2d 57, 78, 79, 89 S Ct 1532 (1969); *United States v. Romano*, 382 US 136, 138-139, 15 L Ed 2d 210, 212, 213, 86 S Ct 279 (1965); *Bailey v. Alabama*, 219 US 219, 234-235, 55 L Ed 191, 198, 199, 31 S Ct 145 (1911).

Arguably, in declaring possession to be ample evidence to convict for trafficking in illegally imported drugs, Congress in effect has made possession itself a crime as an incident to its power over foreign commerce. Cf., *Ferry v. Ramsey*, 277 US 88, 72 L Ed 796, 48 S Ct 443 (1928). But the crime defined by the statute is not possession and the Court has rejected this basis for sustaining this and similar statutory inferences. *Leary v. United States, supra*, at 34, 37, 23 L Ed 2d at 80, 82; *United States v. Romano, supra*, at 142-144, 15 L Ed 2d at 214-216; *Harris v. United States*, 359 US 19, 23, 3 L Ed 2d 597, 599, 79 S Ct 560 (1959); *Roviaro v. United States*, 353 US 53, 62-63, 1 L Ed 2d 639, 646, 647, 77 S Ct 623 (1957); *Tot v. United States*, 319 US 463, 472, 87 L Ed 1518, 1526, 63 S Ct 1241 (1943).

The Court has also refused to accept the suggestion that since the source of his drugs is perhaps more within the defendant's knowledge than the Government's, it violates no rights of the defendant to permit conviction based on possession alone when the defen-

9. We conclude first that the jury was wholly justified in accepting the legislative judgment — if in fact that is what the jury did—that possession of heroin is equivalent to possessing imported heroin. We have no reasonable doubt that at the present time heroin is not produced in this country and that therefore the heroin Turner had was smuggled heroin.

10. Section 174 or a similar provision has been the law since 1909 (ix). For 60 years defendants charged under the statute have known that the section authorizes an inference of guilt from possession alone, that the inference is rebuttable by evidence that their heroin originated here, and that the inference itself is subject to challenge for lack of sufficient connection between the proved fact of possession and the presumed fact that theirs was smuggled merchandise. *Mobile, J. and K. C. R. v. Turnipseed*, (1910) 219 US 35, 43 = 55 L Ed 78, 80 = 31 S Ct 136. Given the statutory inference and absent rebuttal evidence as far as a defendant is concerned the S. 174 crime is the knowing possession of heroin. Hence, if he is to avoid conviction, he faces the urgent necessity either to rebut or to challenge successfully the possession inference by demonstrating the fact or the likelihood of a domestic source for heroin, not necessarily by his

defendant refuses to demonstrate a legal source for his drugs. *Leary v. United States*, supra, at 32-34, 23 L Ed 2d at 79,81. See also *Tot v. United States* supra, at 469-470, 87 L Ed at 1525, 1526. The difficulties with the suggested approach are obvious: if the Government proves only possession and if possession is itself insufficient evidence of either importation or knowledge, but the statute nevertheless permits conviction where the defendant chooses not to explain, the Government is clearly relieved of its obligation to prove its case, unaided by the defendant, and the defendant is made to understand that if he fails to explain he can be convicted on less than sufficient evidence to constitute a *prima facie* case. See *Tot v. United States*, supra, at 469, 87 L Ed at 1525.

(ix) The original provision, applicable to opium and derivatives, was contained in the Act of February 9, 1909, c 100, S. 2, 35 Stat 614. It was revised and extended to cover cocaine and coca leaves by the Act of May 26, 1922, c 202, S 1, 42 Stat 596. The provision establishing the presumption was adopted without extended discussion or debate; it was consciously modelled on a provision of S. 3082 of the Revised Statutes (now 18 USC S. 545), originating in the Smuggling Act of 1866, c 201, S. 4, 14 Stat 179. See HR Rep No. 1878, 60th Cong, 2d Sess, 1-2 (1909) HR Rep No. 2003, 60th Cong, 2d Sess, 1 (1909). See also Sandler, *The Statutory Presumption in Federal Narcotics Prosecutions*, 57 J Crim L. C and P S 7 (1966).

own testimony but through the testimony of others who are familiar with the traffic in drugs, whether government agents or private experts. Over the years thousands of defendants, most of them represented by retained or appointed counsel, have been convicted under S. 174. Although there was opportunity in every case to challenge or rebut the inference based on possession, we are cited to no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light. Instead, the inference authorized by the section although frequently challenged, has been upheld in this Court and in countless cases in the district courts and courts of appeal, these cases implicitly reflecting the prevailing judicial view that heroin is not made in this country but rather is imported from abroad. If this view is erroneous and heroin is or has been produced in this country in commercial quantities, it is difficult to believe that resourceful lawyers with adversary proceedings at their disposal would not long since have discovered the truth and placed it on record.

11. This view is supported by other official sources. In 1956, after extensive hearings, the Senate Committee on the Judiciary found no evidence that heroin is produced commercially in this country. (x) *The Pre-*

(x) In 1955 the Sub committee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary held hearings throughout the country on the illicit narcotics traffic in this country. The subcommittee heard 345 witnesses, including government officials, law enforcement officers, and addicts and narcotics law violators; the testimony heard covers several thousand pages. Hearing on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong, 1st Sess (1955) (hereinafter cited as 1955 Senate Hearings). The evidence gathered in these hearings was the basis of S. 3760, 84th Cong, 2d Sess (1956). The Senate bill contained a section (proposed S. 1402, Tit 18) very similar to S. 174 but applicable exclusively to heroin; this proposed section included the S. 174 presumption. Another proposed section (proposed S. 1403, Tit 18, enacted with minor changes and now codified in 21 USC S. 176b) authorized special, severe penalties for the sale of unlawfully imported heroin to juveniles; this section contained a provision that possession of heroin was sufficient to prove that the heroin had been illegally imported. See S Rep No. 1997, 84th Cong, 2d Sess 30 (1956) (proposed SS. 1402, 1403). The presumption that heroin found in this country has been illegally imported was based on findings of the Committee that foreign sources supply all important quantities of heroin circulating in this country. S. Rep. No. 1997 84th Cong, 2d Sess 3-7 (1956); and this find-

sident's Commission on Law Enforcement and Administration of Justice stated in 1967 that "[a]ll the heroin that reaches the American user is smuggled into the country from abroad, the Middle East being the reputed primary point of origin." (xi)

12. The factors underlying these judgments may be summarized as follows: First, it is plain enough that it is illegal both to import heroin into this country (xii) and to manufacture it here; (xiii) heroin is contraband and is subject to seizure. (xiv)

13. Second, heroin is a derivative of opium and can be manufactured from opium or from morphine or codeine, which are also derived from opium. (xv) Whether heroin can

ing was in turn based on ample evidence presented to the Sub committee on Improvements in the Federal Criminal Code. See 1955 Senate Hearings 90 (testimony of Commissioner Anslinger of the Federal Bureau of Narcotics).

(xi) President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 3 (1967) (hereinafter cited as Task Force Report). See also U. N. Commission on Narcotic Drugs, Report of the Eighteenth Session 15 (1963); S. Jeffee, *Narcotics—An American Plan* 12-14, 63-71 (1966).

(xii) 21 USC S. 173 makes it unlawful to import any narcotic drug except amounts of crude opium and coca leaves necessary to provide for medical and legitimate uses. In addition, for more than 45 years, it has been unlawful to import opium for the purpose of manufacturing heroin. Act of June 7, 1924, c. 352, 43 Stat 657 (now codified in 21 USC S. 173). Though 21 USC S. 513 permits the Secretary of the Treasury to authorize the importation of any narcotic drug for delivery to governmental officials or to any person licensed to use the drugs for scientific purposes, the Secretary has never authorized the importation of any heroin under this provision. Brief for the United States 18, n. 12.

(xiii) the Narcotics Manufacturing Act of 1960, 21 USC Ss. 501-517, prohibits the manufacture of narcotic drugs except under a license issued by the Secretary of the Treasury for the production of an approved drug. Since heroin is not considered useful for medical purposes, no production for medical use has been authorized; heroin used in scientific experimentation is supplied entirely from quantities seized by law enforcement officials. Brief for the United States 17, n. 10.

(xiv) 21 USC S. 173. See S. Rep No. 1997 84th Cong. 2d Sess 7 (1956). In 1956, all heroin then lawfully outstanding was required to be surrendered. Act of July 18, 1956, c. 629, S. 201, 70 Stat 572 (codified as 18 USC S. 1402).

(xv) The clandestine manufacture of heroin from opium or morphine is said in one report to be "child's play". Vaille and Baillieu

be synthesized is disputed, but there is no evidence that it is being synthesized in this country. (xvi)

14. Third, opium is derived from the opium poppy which cannot be grown in this country without a license. (xvii) No licenses are outstanding for commercial cultivation (xviii) and there is no evidence that the opium poppy is illegally grown in the United States. (xix)

Clandestine Heroin Laboratories, 5 Bulletin on Narcotics, No. 4, Oct.-Dec. 1953 at 1, 6. The possibility of producing heroin from codeine (with a yield of about 22%) was first reported in Rapoport, Lovell and Tolbert, *The Preparation of Morphine-N-methyl-C-14* 73 J Am Chem Soc 5900 (1951), and was verified in Gates and Tschudi, *The Synthesis of Morphine*, 74 J Am Chem Soc 1109 (1952) The Bureau of Narcotics and Dangerous Drugs reports that conversion of codeine into morphine (from which heroin may be produced) is relatively simple and requires inexpensive equipment but produces an extremely noxious and penetrating odor which would make concealment of such conversion operations virtually impossible. Supplemental Memorandum for the United States 2.

(xvi) The Bureau of Narcotics and Dangerous Drugs reports that it knows of no case in which synthetic heroin has been produced; it reports that experiments indicate that production of synthetic morphine would be extremely difficult. Brief for the United States 20, n. 17. Amicus Burgess suggests the possibility of synthetic production of heroin but cites in support only a case involving an unsuccessful attempt to synthesize morphine, *United States v. Liss*, 137 F2d 995 (CCA2d Cir), cert denied, 320 US 773, 88 L Ed 462, 463, 64 S Ct 78, 79 (1943). Brief for Cleveland Burgess as Amicus Curiae 11.

(xvii) Opium Poppy Control Act of 1942, 21 USC Ss. 188-188n.

(xviii) The regulations provide that a license to produce opium poppies shall be issued only when it is determined by the Director of the Bureau of Narcotics and Dangerous Drugs that the medical and scientific needs of the country cannot be met by the importation of crude opium. 21 CFR S. 303.5(a). Imports of crude opium have been sufficient to meet all domestic medical and scientific needs and the United States is therefore not an opium-producing country. Blum and Braunstein, *Mind-Altering Drugs and Dangerous Behaviour: Narcotics*, in Task Force Report App A-2, at 40. See also Brief for the United States 23, n. 25.

(xix) The most recent reported case involving a prosecution for unlawful production of opium poppies is *Az Din v. United States*, 232 F2d 283 (CA9th Cir), cert denied, 352 US 827, 1 L Ed 2d 49, 77 S Ct 39 (1956). Unlike the case of marihuana, see Leary, supra, at 42-43, 23 L Ed 2d at 85, 86, there are no reports of the discovery in this coun-

15. Fourth, the law forbids the importation of any opium product except crude opium required for medical and scientific purposes;(xx) importation of crude opium for the purpose of making heroin is specifically forbidden.(xxi) Sizable amounts of crude opium are legally imported and used to make morphine and codeine.(xxii)

16. Fifth, the flow of legally imported opium and of legally manufactured morphine and codeine is controlled too tightly to permit any significant possibility that heroin is manufactured or distributed by those legally licensed to deal in opium, morphine, or codeine.(xxiii)

17. Sixth, there are recurring thefts of opium, morphine, and codeine from legal channels which could be used for the domestic, clandestine production of heroin.(xxiv) It is extremely unlikely that heroin would be made from codeine since the process involv-

try of fields of opium poppies requiring destruction. This fact together with the facts that opium poppies are hard to conceal because of their color and that the harvesting of opium is only economically feasible in countries with an abundant supply of cheap labor justifies a conclusion that little if any opium poppy production is going on in this country. See Brief for the United States 21-23.

(xx) 21 USC S. 173.

(xi) 21 USC S. 173. See supra, N. 12

(xxii) In 1966, the United States imported 173, 951 kilograms of crude opium; in the same year, 715 kilograms of morphine and 30,662 kilograms of codeine were produced from imported opium. U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967, at 41 (1968).

(xxiii) The manufacture of narcotic drugs is very carefully controlled and monitored under the Narcotics Manufacturing Act of 1960, 21 USC Ss. 501-517. The subsequent distribution of narcotic drugs is controlled and monitored under the laws enforcing the taxes imposed on those dealing in narcotic drugs. 26 USC SS. 4701-4707, 4721-4736, 4771-4776.

(xxiv) Because of the controls and reporting requirements applicable to those handling narcotic drugs, see supra, n. 23, the Bureau of Narcotics and Dangerous Drugs can compile accurate figures on the quantities of narcotic drugs stolen from legitimate channels. From 1964 through 1968 total thefts of medical opium per year ranged from 9.6 kilograms to 12.9 kilograms; thefts of morphine for the same period ranged from 6.7 kilograms to 10.2 kilograms per year; annual thefts of codeine for the same years ran between 30.0 kilograms and 81.8 kilograms. Brief for the United States 44. On the possibility of clandestine manufacture of heroin from opium, morphine, and codeine, see supra, n. 15.

ed produces an unmanageable, penetrating stench which it would be very difficult to conceal.(xxv) Clandestine manufacture of heroin from opium and morphine would not be subject to this difficulty; but, even on the extremely unlikely assumption that all opium and morphine stolen each year is used to manufacture heroin, the heroin so produced would amount to only a tiny fraction (less than 1%) of the illicit heroin illegally imported and marketed here.(xxvi) Moreover, a clandestine laboratory manufacturing heroin has not been discovered in many years. (xxvii)

(xxv) See supra, n. 15.

(xxvi) Using figures on the number of known addicts and the average daily dose, federal agencies estimate that roughly 1,500 kilograms of heroin are smuggled into the United States each year. Task Force Report 6. The Bureau of Narcotics and Dangerous Drugs estimates that no more than about one kilogram of heroin could have been produced if all the opium stolen in any recent year had been clandestinely converted into heroin. The largest total amount of morphine stolen in a recent year would have yielded about 10.2 kilograms of heroin if it had all been converted into heroin. Brief for the United States 19, n. 15.

If it were assumed that all stolen codeine is converted into heroin, the figure for the possible clandestine domestic production of heroin would be well over 1% of the total heroin marketed in this country. Codeine can be made to yield about 22% heroin. See supra, n. 15. Applying this conversion rate to the largest annual amount of codeine stolen in the last five years (81.8 kilograms, see supra, n. 24) would give a figure of about 18 kilograms for the maximum amount of heroin that might have been produced from stolen codeine in any recent year. On the assumption that all stolen opium, morphine, and codeine is converted into heroin, the amount of heroin domestically produced from stolen opium and its derivatives would amount to no more than about 30 kilograms, only about 2% of the 1500 kilograms of heroin estimated to be illegally imported each year. Whether such a percentage, rather than the figure of less than 1% obtained by excluding codeine from consideration, would alter our conclusions need not be discussed, for the fact that the conversion process creates a stench makes it unrealistic to assume that stolen codeine is clandestinely converted into heroin. See supra, n. 15.

(xxvii) Statement by the United States Delegation on the Illicit Traffic to the Twenty-third Session of the U. N. Commission on Narcotic Drugs, January 1969, at 3. One respected work on narcotics makes the claim, without further elaboration, that "recent information" leads to the conclusion that some illicit laboratories used for the conversion of opium or morphine into heroin are located in the United States. D. Maurer & Vogel, Nar-

18. Concededly, heroin could be made in this country, at least in tiny amounts. But the overwhelming evidence is that the heroin consumed in the United States is illegally imported. To possess heroin is to possess imported heroin. Whether judged by the more likely than not standard applied in (1969) 395 US 6 = 23 L Ed 2d 57 = 89 S Ct 1532, supra, or by the more exacting reasonable-doubt standard normally applicable in criminal cases, S. 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug. If the jury relied on the S. 174 instruction, it was entitled to do so.(xxviii)

19. Given the fact that little if any heroin is made in the United States, Turner doubtless knew that the heroin he had came from abroad. There is no proof that he had specific knowledge of who smuggled his heroin or when or how the smuggling was done, but we are confident that he was aware of the "high probability" that the heroin in his possession had originated in a foreign country supra, (1969) 395 US 6 at 45-53 = 23 L Ed 2d 57 at p. 86-92.(xxix)

20. It may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart.(xxx)

cotics and Narcotic Addiction 64 (3d ed 1967). However, the same statement, without elaboration, appears in the 1954 edition of the work, D. Maurer & V. Vogel, Narcotics and Narcotic Addiction 50 (1954), and this fact together with the absence of any cited basis for the claim and the lack of supporting evidence elsewhere in the literature leads us to believe that the statement, if it was ever correct, is no longer accurate.

(xxviii) It is, of course, possible for the situation to change either through the development of a simple method of synthesizing heroin or through the creation of substantial clandestine operations utilizing opium or morphine which has been illegally imported or which, though legally here, has been stolen.

(xxix) The Court in Leary, 395 US, at p. 46, n. 93, 23 L Ed 2d at p. 87, employed the definition of "knowledge" in Model Penal Code S. 2.02(7) (proposed official draft, 1962): "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

(xxx) Though the federal narcotics laws are in terms applicable to most possessors of illicit drugs regardless of whether the possessor is a user or a dealer, the enforcement efforts of the Bureau of Narcotics and Dangerous Drugs are directed to the development of evidence against "major sources of supply, wholesale peddlers, interstate and international violators." Hearings on the Narcotic Rehabilitation Act of 1966 before a Special

Sub-committee of the Senate Committee on the Judiciary, 89th Cong. 2d Sess 448 (1966) (hereinafter cited as 1966 Senate Hearings) (testimony of Commissioner Giordano of the Federal Bureau of Narcotics). The undisputed evidence that Turner possessed 275 glassine bags of heroin clearly shows that Turner was more than a mere user of heroin and was engaged in the distribution of the drug.

Such people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling process. The price, supply, and quality vary widely;(xxxi) the market fluctuates with the ability of smugglers to outwit customs and narcotics agents at home and abroad.(xxxii) The facts concerning heroin are available from many sources, frequently in the popular media. "Common sense," supra, (1969) 395 US 6 at 46 = 23 L Ed 2d 57 at p. 87, tells us that those who traffic in heroin(xxxiii) will inevitably become aware that the produce they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled.(xxxiv) We therefore have little doubt that the inference of knowledge from the fact of possessing smuggled heroin is a sound one; hence the court's instructions on the inference did not violate the right of Turner to be convicted only on a finding of guilt beyond a reasonable doubt and did not place impermissible pressure upon him to testify in his own defense.(xxxv)

cial Sub-committee of the Senate Committee on the Judiciary, 89th Cong. 2d Sess 448 (1966) (hereinafter cited as 1966 Senate Hearings) (testimony of Commissioner Giordano of the Federal Bureau of Narcotics). The undisputed evidence that Turner possessed 275 glassine bags of heroin clearly shows that Turner was more than a mere user of heroin and was engaged in the distribution of the drug.

(xxxi) See Task Force Report 3. See also 1935 Senate Hearings 3889, 4219.

(xxxii) For example, a seizure of a large amount of pure heroin in Montreal, Canada, caused a "panic" in New York City that lasted almost three months. 1966 Senate Hearings 87.

(xxxiii) Such a conclusion is also justified with regard to those users and addicts who frequently purchase supplies of heroin on the retail market. Such persons are of course aware of the variations in price and availability of the drug and of the fact that the success of anti-smuggling efforts of law enforcement officials affects the supply of heroin on the market. See supra at —, — and nn. 31, 32, 24 L Ed 2d at 673, 624.

(xxxiv) See Grigo v. United States, 298 F2d 845, 849 (CA 10th Cir 1962).

(xxxv) "The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." See Hem v. United States, 263 US 178, 185 = 69 L Ed 904, 907 = 45 S Ct 470 (1925).

His conviction on Count 1 must be affirmed.

III

21. Turning to the same S. 174 presumption with respect to cocaine, we reach a contrary result. In *Erwing v. United States*, 323 F2d 674 (CA 9th Cir 1963), a case involving a prosecution for dealing in cocaine, two experts had testified, one for the Government and one for the defense. It was apparent from the testimony that while it is illegal to import cocaine, coca leaves, from which cocaine is prepared, are legally imported for processing into cocaine to be used for medical purposes. There was no evidence that sizable amounts of cocaine are either legally imported or smuggled. The trial Court instructed on the S. 174 presumption and conviction followed, but the Court of Appeals for the Ninth Circuit reversed, finding the presumption insufficiently sound to permit conviction.

22. Supplementing the facts presented in *Erwing*, supra, the United States now asserts that substantial amounts of cocaine are smuggled into the United States. However, much more cocaine is lawfully produced in this country than is smuggled into this country.(xxxvi) The United States concedes that thefts from legal sources, though totaling considerably less than the total smuggled.(xxvii) are still sufficiently large to make the S. 174 presumption invalid as applied to Turner's possession of cocaine.(xxviii) Based on our own examination of the facts now before us, we reach the same conclusion. Applying the more likely than not standard employed in *Leary*, supra, we cannot be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did. The judgment on Count 3 must be reversed.(xxix)

(xxxvi) In 1966, 609 kilograms of cocaine were produced. U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the year Ended December 31, 1967, at 42 (1968), Annual seizures of cocaine at ports and borders for the years 1963 through 1967 ranged from 1.44 kilograms to 17.71 kilograms; the Bureau of Narcotics and Dangerous Drugs estimates that no more than about 10% of cocaine that is attempted to be smuggled into the United States is discovered and seized at ports and borders. Brief for the United States 31, n. 31.

(xxvii) From 1963 through 1968, the amount of cocaine stolen from legal channels annually ranged for 2.8 kilograms to 6.2 kilograms. Brief for the United States 44.

(xxviii) Brief for the United States 28-32.

(xxix) Since the illegal possessor's only source of domestic cocaine is that which is stolen, the United States urges that the S. 174 presumption may be valid with respect to sellers found with much larger amounts of cocaine than Turner had,

23. 26 USC S. 4704(a) (xl) makes it unlawful to purchase, sell, dispense or distribute a narcotic drug not in or from the original package bearing tax stamps. In this case, Count 2 charged that Turner knowingly purchased, dispensed and distributed heroin hydrochloride not in or from the original stamped package.(xli) Count 4 made the identical charge with respect to cocaine. Section 4704(a) also provides that the absence of appropriate tax stamps shall be *prima facie* evidence of a violation by the person in whose possession the drugs are found. This provision was read by the trial Judge to the jury.

24. The conviction on Count 2 with respect to heroin must be affirmed. Since the only evidence of a violation involving heroin was Turner's possession of the drug, the jury to convict must have believed this evidence. But part and parcel of the possession evidence and indivisibly linked with it, was the fact that Turner possessed some 275 glassine bags of heroin without revenue stamps attached. This evidence, without more, solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute. The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.(xlii) Here the evidence proved Turner was distributing heroin. The status of the case with respect to the other allegations is

amounts which, it is claimed, are too large to have been removed from legal channels and which must therefore have been smuggled. Brief for the United States 31. We find it unnecessary to deal with these problems and postpone their consideration to another day, hopefully until the facts are presented in an adversary context in the district Courts.

(xl) See supra, n. 2.

(xli) The indictment charged that Turner possessed heroin as well as purchasing, dispensing and distributing the drug. The instructions to the jury made the same error. No objection was made in the trial Court and the issue was not raised in the Court of Appeals or in this Court. The error was harmless in any event since the possession evidence proved that Turner was distributing heroin. See *infra*, at —, 24 L Ed 2d at 626.

(xlii) *Crain v. United States*, 162 US 625, 634-636 = 40 L Ed 1097, 1099, 1100 = 16 S Ct 952 (1896); *Smith v. United States*, 234 F2d 385, 389-390 (CA 5th Cir 1956); *Price v. United States*, 150 F2d 283 (CCA 5th Cir 1945), cert denied, 326 US 789 = 90 L Ed 479 = 66 S Ct 473 (1946). See also *Claassen v. United States*, 142 US 140, 35 L Ed 966 = 12 S Ct 169 (1891); *The Confiscation Cases*, 20 Wall 92, 104 = 22 L Ed 320, 322 (1874).

irrelevant to the validity of Turner's conviction. So, too, the instruction on the presumption is beside the point, since even if invalid, it was harmless error; the jury must have believed the possession evidence which in itself established a distribution barred by the statute.

25. Moreover, even if the evidence as to possession is viewed as not in itself proving that Turner was distributing heroin, his conviction must be affirmed. True, the statutory inference, which on this assumption would assume critical importance, could not be sustained insofar as it authorized an inference of dispensing or distributing (or of selling if that act had been charged), for the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts. (1943) 319 US 463 = 87 L. Ed 1519 = 63 S. Ct 1241 supra; (1965) 382 US 136 = 15 L. Ed 2d 210 = 86 S. Ct 279 supra. But the inference of purchasing in or from an unstamped package is another matter.

26. Those possessing heroin have secured it from some source. The act of possessing is itself sufficient proof that the possessor had not received it in or from the original stamped package, since it is so extremely unlikely that a package containing heroin would ever be legally stamped. All heroin found in this country, is illegally imported. Those handling narcotics must register, (xlii) registered persons do not deal in heroin and only registered importers and manufacturers are permitted to purchase stamps. (xlii) For heroin to be found in a stamped package, stamps would have to be stolen and fixed to the heroin container and even then the stamps would immunize the transactions in the drug only from prosecution under S. 4704 (a); all other laws against transactions in heroin would be unaffected by the presence of the stamps. There can thus be no reasonable doubt that one who possesses heroin did not obtain it from a stamped package.

27. Even so, obtaining heroin other than in the original stamped package is not a crime under S. 4704 (a). Of the various ways of acquiring heroin, e.g., by gift, theft, bailment or purchase, only purchasing is prescribed by the section. Since heroin is a high priced product, (xlii) it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. The same may be said for those who sell, dispense or distribute the drug. There is no reasonable doubt that a possessor of heroin who has purchased it, did not purchase the heroin in or from the original stamped package. We thus would sustain the conviction

on Count 2 on the basis of a purchase not in or from a stamped package even if the evidence of packaging did not point unequivocally to the conclusion that Turner was distributing heroin not in a stamped package.

28. Finally, we consider the validity of the S. 4704 (a) presumption with respect to cocaine. The evidence was that while in the custody of the police, Turner threw away a tinfoil package containing a mixture of cocaine and sugar, which, according to the Government, is not the form in which cocaine is distributed for medicinal purposes. (xlii) Unquestionably, possession was amply proved by the evidence, which the jury must have believed since it returned a verdict of guilty. But the evidence with respect to Turner's possession of cocaine does not so surely demonstrate that Turner was in the process of distributing this drug. Would the jury automatically and unequivocally know that Turner was distributing cocaine simply from the fact that he had 14.68 grams of a cocaine and sugar mixture? True his possession of heroin proved that he was dealing in drugs, but having a small quantity of a cocaine and sugar mixture is itself consistent with Turner's possessing the cocaine not for sale but exclusively for his personal use.

29. Since Turner's possession of cocaine did not comprise an act of purchasing, dispensing or distributing, the instruction on the statutory inference becomes critical. As in the case of heroin, bare possession of cocaine is an insufficient predicate for concluding that Turner was dispensing or distributing. As for the remaining possible violation, purchasing other than in or from the original stamped package, the presumption valid as to heroin is inapplicable as to cocaine.

30. While one can be confident that cocaine illegally manufactured from smuggled coca leaves or illegally imported after manufacturing would not appear in a stamped package at any time, cocaine, unlike heroin, is legally manufactured in this country; (xlii) and we have held that sufficient amounts of cocaine are stolen from legal channels to render invalid the inference authorized in S. 174 that any cocaine possessed in the United States is smuggled cocaine. Ante, at —, —, (1969) 24 L. Ed 2d 610 at pp. 624, 625 = (AIR 1970 USSC 82 at p. 91). Similar reasoning undermines the S. 4704(a) presumption that a defendant's possession of unstamped cocaine is prima facie evidence that the drug was purchased not in or from the original stamped container. The thief who steals cocaine very probably obtains it in or from a stamped package. There is a reasonable possibility that Turner either stole the cocaine himself or obtained it from a stamped package in possession of the actual

(xlii) 26 USC Ss. 4721, 4722. See also 26 USC S. 4702 (a) (2) (C).

(xlii) 26 CFR Ss. 151.130, 151.41.

(xlii) Heroin is reported to sell for around \$5 per "bag" or packet. Task Force Report 3.

(xlii) Brief for the United States 33.

(xlii) See supra, n. 36.

thief. The possibility is sufficiently real that a conviction resting on the S. 4704 (a) presumption cannot be deemed a conviction based on sufficient evidence. To the extent that *Casey v. United States*, supra, is read as giving general approval to the S. 4704(a) presumption, it is necessarily limited by our decision today. Turner's conviction on Count 4 must be reversed.

31. For the reasons stated above, we affirm the judgment of conviction as to Counts 1 and 2 and reverse the judgment of conviction as to Counts 3 and 4.

It is so ordered.

SEPARATE OPINIONS

MR. JUSTICE MARSHALL, concurring.

32. I concur in the judgment of the Court, affirming petitioner's conviction on Counts 1 and 2 and reversing his conviction on Counts 3 and 4. In so doing, however, I can agree with the majority on Count 2 only insofar as it concludes that evidence of possession of 275 glassine bags of heroin proved beyond a reasonable doubt that Turner was distributing heroin in violation of 26 USC S. 4704 (a). That same evidence does not establish that he had purchased the heroin in violation of that statute.

33. The opinion of the Court establishes convincingly the virtual certainty that the heroin in Turner's possession had been illegally imported into the country. It was thus proper with regard to Count 1 for the trial judge to instruct the jurors in effect that if they found that Turner did indeed possess the drug, they could infer that the heroin had been illegally imported and impute knowledge of that fact to Turner. However, the instruction that possession is prima facie evidence of a violation of S. 4704(a) is quite different. It may be true that most persons who possess heroin have purchased it not in or from a stamped package. However, Turner himself may well have obtained the heroin involved here in any of a number of ways—for example, by stealing it from another distributor, or by manufacturing or otherwise acquiring it abroad and smuggling it into this country. Given the dangers that are inherent in any statutory presumption or inference, some of which are set out in the dissenting opinion of Mr. Justice Black, I cannot agree with the wholly speculative and conjectural holding that because Turner possessed heroin he must have purchased it in violation of S. 4704(a).

Mr. JUSTICE BLACK, with whom Mr. JUSTICE DOUGLAS joins, dissenting.

34. Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in United States courts. Among the accused's Bill of Rights' guarantees which the Court today weakens are:

1. His right not to be compelled to answer for a capital or otherwise infamous

crime unless on a presentment or indictment of a grand jury;

2. The right to be informed of the nature and cause of the accusation against him;

3. The right not to be compelled to be a witness against himself;

4. The right not to be deprived of life, liberty, or property without due process of law;

5. The right to be confronted with the witnesses against him;

6. The right to compulsory process for obtaining witnesses for his defense;

7. The right to counsel;

8. The right to trial by an impartial jury.

35. The foregoing rights are among those which the Bill of Rights specifically spells out and which due process requires that a defendant charged with crime must be accorded. The Framers of our Constitution and Bill of Rights were too wise, too pragmatic, and too familiar with tyranny to attempt to safeguard personal liberty with broad, flexible words and phrases like "fair trial," "fundamental decency," and "reasonableness." Such stretchy, rubberlike terms would have left judges constitutionally free to try people charged with crime under will-o'-the-wisp standards improvised by different judges for different defendants. Neither the Due Process Clause nor any other constitutional language vests any judge with such power. Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind which brings new political administrations into temporary power. Rather our Constitution was fashioned to perpetuate liberty and justice by marking clear, explicit, and lasting constitutional boundaries for trials. One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law—that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" or "decent." I wholly, completely, and permanently reject the so-called "activist" philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of "fairness and decency" as they see it. This case and the Court's holding in it illustrate the dangers inherent in such an "activist" philosophy.

36. Commercial traffic in deadly mind, soul, and body-destroying drugs is beyond doubt one of the greatest evils of our time. It cripples intellects, dwarfs bodies, paralyzes the progress of a substantial segment of our society, and frequently makes hopeless and sometimes violent and murderous criminals of persons of all ages who become its victims. Such consequences call for the most

vigorous laws to suppress the traffic as well as the most powerful efforts to put these vigorous laws into effect. Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct. That is exactly the course I think the Court is sanctioning today. I shall now set out in more detail why I believe this to be true.

37. Count 1 of the indictment against Turner, as the Court's opinion asserts, and as I agree,

"charged Turner with (1) knowingly receiving, concealing and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt." Ante, (1969) 24 L Ed 2d 610 at p. 617 = (AIR 1970 USSC 82 at p. 85). The Court in the above statement is merely reaffirming the fundamental constitutional principle that the accused is presumed innocent until he is proven guilty and that the Government, before it can secure a conviction, must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense. This basic principle is clearly reflected in several provisions of the Bill of Rights. The Fifth and Sixth Amendments provide that as a part of due process of law a person held for criminal prosecution shall be charged on a presentment or indictment of a grand jury and that the defendant shall "be informed of the nature and cause of the accusation." The purpose of these requirements is obviously to compel the Government to state and define specifically what it must prove in order to convict the defendant so that he can intelligently prepare to defend himself on each of the essential elements of the charge. And to aid the accused in making his defense to the charges thus defined, the Bill of Rights provides the accused explicit guarantees—the privilege against self-incrimination, the right to counsel, the right to confront witnesses against him and to call witnesses in his own behalf—all designed to assure that the jury will as nearly as humanly possible be able to consider fully all the evidence and determine the truth of every case.

38. Having invoked the above principles, however, the Court then proceeds to uphold Turner's conviction under Count 1 despite the fact that the prosecution introduced absolutely no evidence at trial on two of the three essential elements of the crime. To show this I think one need look no further than the Court's own majority opinion. The Court says:

"The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here, he

was also chargeable with knowing that his heroin had an illegal source. For all practicable purposes, that was the Government's case." Ante, (1969) 24 L Ed 2d 610 at p. 617 = (AIR 1970 USSC 82 at p. 85):

"Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from the proof of possession alone." Ante, (1969) 24 L Ed 2d 610 at p. 618 = (AIR 1970 USSC 82 at p. 86). (Emphasis added).

These passages show that the Government wholly failed to meet its burden of proof at trial on two of the elements Congress deemed essential to the crime it defined. The prosecution introduced no evidence to prove either (1) that the heroin involved was illegally imported or (2) that Turner knew the heroin was illegally imported. The evidence showed only that Turner was found in possession of heroin.

39. I do not think a reviewing court should permit to stand a conviction as wholly lacking in evidentiary support as is Turner's conviction under Count 1. *Bozza v. United States*, (1947) 330 US 160, 91 L Ed 818, 67 S Ct 845. See also *Thompson v. Louisville*, (1960) 362 US 199 = 4 L Ed 2d 654 = 80 S Ct 624 = 80 ALR 2d 1355. When the evidence of a crime is insufficient as a matter of law as the evidence here plainly is, a reversal of the conviction is in accord with the historic principle that "independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have the power to set aside convictions." *United States ex rel. Toth v. Quarles*, (1955) 350 US 11, 19 = 100 L Ed 8, 15 = 78 S Ct 1. I would therefore reverse Turner's conviction under Count 1 without further ado. Moreover, as the majority opinion and the record in this case indicate, petitioner's convictions under Counts 3 and 4 are also based upon totally insufficient evidence, for as in Count 1 the prosecution failed to introduce any evidence to support certain essential elements of the crimes charge under these Counts. They, too, should be reversed for lack of evidence.

40. The Court attempts to take the stark nakedness of the evidence against Turner on these counts and clothe it in "presumptions" or "inferences" authorized by 21 USC S. 174 and 28 USC S. 4704(a). Apparently the Court feels that the Government can be relieved of the constitutional burden of proving the essential elements of its case by a mere congressional declaration that certain evidence shall be deemed sufficient to convict. Such an idea seems to me to be totally at variance with what the Constitution requires. Congress can undoubtedly create crimes and define their elements, but it cannot under our Constitution even partially remove from the prosecution the burden of

proving at trial each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the statutory presumptions of guilt found in 21 USC S. 174 and 26 USC S. 4704(a). And each of the weapons given by the Bill of Rights to the criminal accused to defend his innocence—the right to counsel, the right to confront the witnesses against him and to subpoena witnesses in his favor, the privilege against self-incrimination—is nullified to the extent that the Government to secure a conviction does not have to introduce any evidence to support essential allegations of the indictment it has brought. It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from governmental abuses if the Government could by some sleight-of-hand trick with presumptions make nullities of those precautions. Such a result would completely frustrate the purpose of the Founders to establish a system of criminal justice in which the accused—even the poorest and most humble—would be able to protect himself from wrongful charges by a big and powerful government. It is little less than fantastic even to imagine that those who wrote our Constitution and the Bill of Rights intended to have a government that could create crimes of several separate and independent parts and then relieve the government of proving a portion of them. Of course, within certain broad limits it is not necessary for Congress to define a crime to include any particular set of elements. But if it does, constitutional due process requires the Government to prove each element beyond a reasonable doubt before it can convict the accused of the crime it deliberately and clearly defined. Turner's trial therefore reminds me more of Daniel being cast into the lion's den than it does of a constitutional proceeding. The Bible tells us Daniel was saved by a miracle, but when this Court says its final word in this case today, we cannot expect a miracle to save petitioner Turner.

41. I would have more hesitation in setting aside these jury verdicts for insufficiency of the evidence were I confident that the jury had been allowed to make a free and unhampered determination of guilt or innocence as the jury trial provisions of Art. III of the Constitution and the Sixth Amendment require. The right to trial by jury includes the right to have the jury and the jury alone find the facts of the case, including the crucial fact of guilt or innocence. See, e. g., (1955) 350 US 11, 15-19 = 100 L Ed 8, 14-16 = 76 S Ct 1. This right to have the jury determine guilt or innocence necessarily includes the right to have that body decide whether the evidence presented at trial is sufficient to convict. Turner's conviction on each count were secured only after the jury had been explicitly instructed by the

trial judge that proof of Turner's mere possession of heroin and cocaine "shall be deemed sufficient evidence to authorize conviction" under 21 USC S. 174, and "shall be prima facie evidence of a violation" of 26 USC S. 4704(a). App., at 15-18. In my view, these instructions to the jury impermissibly interfered with the defendant's Sixth Amendment right to have the jury determine when evidence is sufficient to justify a finding of guilt beyond a reasonable doubt.

42. The instructions directing the jury to presume guilt in this case were not, of course the trial judge's own inspiration. Congress, in enacting the statutory presumptions purporting to define and limit the quantum of evidence necessary to convict, has injected its own views and controls into the guilt-determining, factfinding process vested by our Constitution exclusively in the Judicial Branch of our Government. The Fifth Amendment's command that cases be tried according to due process of law includes the accused's right to have his case tried by a judge and a jury in a court of law without legislative constraint or interference. These statutory presumptions clearly violate the command of that Amendment. Congress can declare a crime, but it must leave the trial of that crime to the courts. See (1969) 395 US 6, 55 = 23 L Ed 2d 57, 92 = 89 S Ct 1532 (concurring opinion); and *United States v. Gainey*, (1965) 380 US 63, 84-85 = 13 L Ed 2d 658, 670, 671 = 85 S Ct 754 (dissenting opinion).

43. It is my belief that these statutory presumptions are totally unconstitutional for yet another reason, and it is a critically important one. As discussed earlier, the Constitution requires that the defendant in a criminal case be presumed innocent and it places the burden of proving guilt squarely on the Government. Statutory presumptions such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving that he is not guilty. The presumption in 21 USC S. 174 makes this shift in the burden of proof explicit. It provides that possession of narcotic drugs shall be deemed sufficient evidence to justify a conviction "unless the defendant explains the possession to the satisfaction of the jury." However, so far as robbing the defendant of his presumption of innocence is concerned, it makes no difference whether the statute explicitly says the defendant can rebut the presumption of guilt (as does the provision of 21 USC S. 174 just quoted), or whether the statute simply uses the language of "prima facie case" and leaves implicit the possibility of the defendant's rebutting the presumption (as does 26 USC S. 4704(a)). Presumptions of both forms tend to coerce and compel the defendant into taking the witness stand in his own behalf, in clear violation of the accused's Fifth Amendment privilege against self-incrimination. This privi-

lege has been consistently interpreted to establish the defendant's absolute right not to testify at his own trial unless he freely chooses to do so. As we observed in *Malloy v. Hogan*, (1964) 378 US 1, 8 = 12 L. Ed 2d 653, 659 = 84 S Ct 1489 "the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will....." The defendant's right to free and unfettered choice in whether or not to testify is effectively destroyed by the coercive effect of the statutory presumptions found in 21 USC S. 174 and 26 USC S. 4704(a). See (1965) 380 US 63, 71-74, 87 = 13 L. Ed 2d 658, 664, 665, 672 = 85 Ct 754 (dissenting opinions). Moreover, when the defendant declines to testify and the trial judge states to the jury as he did in this case that evidence of possession of narcotics shall be deemed sufficient to convict "unless the defendant explains the possession to the satisfaction of the jury," such an instruction is nothing less than judicial comment upon the defendant's failure to testify, a practice which we held violative of the Self-Incrimination Clause in *Griffin v. California*, (1965) 380 US 609 = 14 L. Ed 2d 106 = 85 S Ct 1229.

44. How does the Court respond to the grave constitutional problems raised by these

presumptions of guilt? It says only that these presumptions are, in its view, "reasonable" or factually supportable "beyond a reasonable doubt." In other words, the Court has concluded that the presumptions are "fair" and apparently thinks that is a sufficient answer. It matters not to today's majority that the evidence which it cites to show the factual basis of the presumptions was never introduced at petitioner's trial, and that petitioner was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion. Nor does it apparently matter to the Court that the factfinding role it undertakes today is constitutionally vested not in this Court but in the jury. If Congress wants to make simple possession of narcotics an offense, I believe it has power to do so. But this Court has no such constitutional power. Nor has Congress the power to relieve the prosecution of the burden of proving all the facts which it as a legislative body deems crucial to the offenses it creates.

45. For the reasons stated here, I would without hesitation reverse petitioner's conviction under Counts 1, 2, 3 and 4.

E N D.

83. In my opinion there is no force in Civil Revision No. 619 of 1967, and it must be dismissed.

Connected Civil Revision No. 1269 of 1967.

84. In this connected revision also the same point arises for consideration. The plaintiff had filed a suit for the recovery of Rs. 324 as arrears of rent of a shop for the period 1st October, 1961 to 31st October, 1962, at the rate of Rs. 27 per month. The defendant had contested the suit on the allegation that the rate of rent was Rs. 16 per month. The Judge, Small Cause Court, accepted the plaintiff's contention and decreed the suit at Rs. 27 per month. The revision applications moved before the District Judge and also before the High Court were dismissed. Suit No. 144 of 1965, out of which this revision application arises, was instituted in the year 1965 for the recovery of Rs. 972 as the rent of that very shop at the rate of Rs. 27 per month from 1st December, 1960, to 30th November, 1963. Again the defendant contested the suit on the ground that the rate of rent was Rs. 16 per month only. But his defence was held to be barred by *res judicata* and the plaintiff's claim was decreed. The first appeal filed against the decision of the Munsif was dismissed. The revision application is directed against the order of the appellate court.

85. I have held in the connected revision No. 619 of 1967 that the court of small causes is not a court of exclusive jurisdiction and that it is a court of preferential jurisdiction only and that its decision will not bar reargitating the same question in any subsequent suit which the court of small causes was not competent to try. The fact that the revision application filed in the High Court against the judgment of the Small Cause Court was dismissed by the High Court will not make any difference. The matter can be reargitated in the civil court and could not be disposed of merely on the ground that the rate of rent had already been decided by the court of small causes.

86. The revision application must, therefore, be allowed, the decree of the trial court as well as of the appellate court must be set aside, and the case should be sent back to the court of the Munsif for disposal in accordance with law in the light of the observations made above.

SINHA, J. 87. I have the advantage of having read the judgments proposed by my learned brothers Khare and Tripathi, JJ. I find myself in agreement with the conclusions arrived at by my brother Khare J. I briefly give my reasons for the same.

88. Two points are involved for consideration in this case:

(1) Whether the Courts of Small causes created under the Provincial Small Cause Courts Act are courts of exclusive jurisdiction or they are courts of preferential jurisdiction?

(2) Whether a decision given by a Court of Small Causes in a suit for arrears of rent will operate as *res judicata* in a suit later filed in the court of Munsif for the recovery of arrears of rent for a different period and for ejection.

Point No. 1

39. My brother Khare, J. in his proposed judgment has already made a reference to the different provisions contained in the Provincial Small Cause Courts Act and to the relevant decisions to make out that a court of Small Causes is not a court of exclusive jurisdiction, but that it is only a court of preferential jurisdiction. Brother Tripathi, J. has, however, arrived at a contrary conclusion and reliance for that purpose has been placed by him particularly on Sections 15 and 16 of the Provincial Small Cause Courts Act. Section 15 reads thus:

"15. (1). A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the State Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order."

40. A perusal of the section, as reproduced above, would show that it is only an enabling provision and not a disabling provision. In other words, it only says that a Court of Small Causes shall have the jurisdiction to take cognizance of all suits of the nature specified in sub-clause (2) thereof. It does not say that no other court shall have jurisdiction to take cognizance of such suits. Therefore, so far as section 15 is concerned, in my view, it cannot form the basis of an argument that a Court of Small Causes is a court of exclusive jurisdiction.

41. Section 16 of the Provincial Small Cause Courts Act reads thus:

"16. Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable."

42. Now, a perusal of Section 16 of the Provincial Small Cause Courts Act, as reproduced above, would show that it starts with the words "Save as expressly provided by this Act or by any other enactment for the time being in force". The effect of the above words occurring in Section 16 is that a court other than a Court of Small Causes can also take cognizance of a suit cognizable by a Court of Small Causes if any provision

contained in the Provincial Small Cause Courts Act or in any other enactment for the time being in force permits it. Further, as has been pointed out by my brother Khare, J., in places where no Courts of Small Causes exist, the ordinary civil courts shall have the jurisdiction to take cognizance of the suits specified in Section 15 (2) of the Act.

43. Aid was sought to be taken before us from the marginal note of Section 16 for the contention that the Courts of Small Causes are courts of exclusive jurisdiction. Now, it is a well entrenched principle of interpretation of Statutes that when the language of a section is plain and unambiguous and leads to a certain conclusion, it is not permissible to take the aid of the marginal notes of the section to draw a different conclusion (See Legislation and Interpretation by Jagdish Swarup, I Edition, Pages 161-164, and Maxwell on Interpretation of Statutes, XII Edition, page 9).

44. Coming to the case law on the subject, I need not refer again to those Single Judge decisions which have already been noticed by my brothers Khare and Tripathi, JJ. in the judgments prepared by them. I would, however, add to that list the case of Smt. Anantamoni Dasi v. Bhola Nath, AIR 1911 Cal 104. In this case, a suit for rent had first been filed in the court of Small Causes. One of the contentions raised in that suit was whether the tenancy was governed by the Bengal Tenancy Act or by the Transfer of Property Act and the Court of Small Causes decided that it was governed by the Transfer of Property Act. In the subsequent suit, it was urged that the decision of the Court of Small Causes on that point operated (sic) (as a bar-Ed.) on the general principles of res judicata. Aid was sought to be taken for the contention from a Privy Council case. The contention was negatived with the following observation:—

"But, obviously, those decisions cannot be interpreted to mean that the provisions of Section 11 may be flouted or overridden or that the prohibitions or reservations express or implied in that section may be ignored. To adopt such an interpretation would lead to the impossible position where one would have to hold that the provisions of the Code have been abrogated by judicial decision."

Further on, it was said:

"None of the decisions referred to by the learned advocate for the appellant has laid down that the rule of res judicata could be invoked in a case when the Court which tried the first suit had not the jurisdiction to try the second suit."

45. For his conclusions, the learned Single Judge placed reliance on two decisions of the Privy Council in Gokul Mandar v. Pudmannd Singh, (1902) 29 Ind App 196 (PC) and Rajah Run Bahadur Singh v. Mt. Lachoo Koer, (1884) 12 Ind App 23 (PC).

46. It would thus appear that so far as Single Judge decisions are concerned, the consensus is in favour of the view that the Court of Small Causes is not a Court of exclusive jurisdiction and that the decision of that Court will not act as res judicata in a subsequent suit not cognizable by it.

47. As for the Bench decisions on this subject, it has been explicitly held in the case AIR 1959 Punj 420 that a Court of Small Causes is not a Court of exclusive jurisdiction, but that it is a Court of preferential jurisdiction.

48. Reference was, however, made before us to the Bench decision in case AIR 1954 Cal 506 in support of the contention that the decisions of a Court of Small Causes also act as res judicata. I have carefully gone through this case and I find that it is clearly distinguishable. In that case, the Court of Small Causes while giving its decision exercised a special jurisdiction under Section 16 of West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, which read as follows:—

"Notwithstanding anything contained in any other law, a suit by a landlord against a tenant in which recovery of possession of any premises to which this Act applies is claimed, shall lie to the Courts, as set out in Schedule B, and no other Court shall be competent to entertain or try such suit". (The underlining is by me.)

49. The underlined portion in Section 16, as reproduced above, would show that it imposed a blanket ban on the jurisdiction of every other court to take cognizance of suits specified therein. Section 16 of the Provincial Small Cause Courts Act is, however, differently worded. It starts with the words "Save as expressly provided by this Act or by any other enactment for the time being in force."

50. Because of the above words, occurring in Section 16 of the Provincial Small Cause Courts Act, the ban imposed by it on taking cognizance of the suits cognizable by the Courts other than Court of Small Causes is not as complete as that imposed by Section 16 of West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. The observations made in the case of AIR 1954 Cal 506 (supra) cannot, therefore, be applicable to the case before us.

51. The only other Bench decision to which reference had been made before us in support of the contention that the Court of Small Causes is a court of exclusive jurisdiction is the case AIR 1969 Madh Pra 56. A perusal thereof reveals that for the conclusion that the Court of Small Causes is a Court of exclusive jurisdiction, the Hon'ble Judges deciding the case relied on two earlier decisions of their own High Court. No reference has been made to any of other decisions. With respect I confess my inability to agree with the view expressed by

the Madhya Pradesh High Court in the said case.

52. Therefore, having given my careful thought to the relevant provisions of law and to the cases cited at the bar, I feel inclined to take the view that the Court of Small Causes is not a Court of exclusive jurisdiction. I am thus in total agreement with my brother Khare, J. on point No. 1.

Point No. 2

53. The principle that when both the cases are suits, general principles of res judicata cannot be made applicable to the previous decision finds support, in the first instance, from the case AIR 1953 SC 33. After taking into account various decisions on the subject it was observed:—

“A plea of res judicata on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction like revenue Courts, land acquisition Courts, administration Courts. etc.”

54. At an early stage, while commenting upon the view taken by the High Court, it was observed by the Supreme Court:

“The learned Judges posed certain questions and then attempted to answer them in view of the limited provisions of Section 11, Civil P. C., which in terms apply only to suits, forgetting for the moment, if we may say so with respect, that the doctrine of res judicata is based on general principles of jurisprudence.” (The underlining is by me).

55. From the two observations of the Supreme Court reproduced above, a conclusion can be culled to the effect that in the view of the Supreme Court when both the proceedings are suits, it is only Section 11, Civil P. C. which can be made use of and that a plea of res judicata on general principles cannot be invoked in that situation, but, if one of the two proceedings is not a suit or if both the proceedings are not suits then a plea of res judicata can be successfully taken in respect of courts of exclusive or competent jurisdiction.

56. This view further finds support from the case AIR 1962 SC 633 at p. 641. Both the cases were suits. The Supreme Court observed:

“Where Section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of res judicata. We are dealing with a suit and the only ground on which res judicata can be urged against such a suit can be the provisions of Section 11 and no other. In our opinion, therefore, there is no substance in the ground that the present suit is barred by res judicata.”

57. Another case relevant on the subject is AIR 1965 SC 1153. Reliance was placed on this case for the contention that the principles of res judicata will be applicable in that situation also where both the cases are suits. I have carefully gone through the report of this case and I confess my inability

to find anything therein lending support to such a contention. On the contrary, there are certain observations in that report of the case which clearly point to the conclusion that in the opinion of the Supreme Court, principles of res judicata cannot be invoked when both the proceedings are suits. In the case before the Supreme Court, the previous decision was given in writ proceedings and the subsequent proceedings were proceedings in suit. The main point for consideration before the Supreme Court was whether the decision given in writ proceedings could operate as res judicata in the subsequent proceedings in suit. The various observations contained in the judgment should be appreciated in this background.

58. The Supreme Court in this case mainly confined itself to a consideration of the point whether section 11, Civil P. C. is exhaustive and whether in a subsequent suit, general principles of res judicata can bar the consideration of matters decided in a previous proceeding other than suits. This would be borne out from the following observations (at page 1161):—

“We would limit the consideration of the contentions raised before us to two main points, whether Section 11, Civil P. C. is exhaustive with respect to the application of the principles of res judicata in a suit and whether in a subsequent suit general principles of res judicata can bar the consideration of matters directly in issue and identical with those which had been earlier and after full contest, decided on merits by a competent Court in any other proceeding including proceedings on a writ petition” (The underlining is by me).

Further on, while considering the above point in the context of the arguments raised, the Supreme Court said:

“It appears to us that the reason for the specific provisions of Section 11 is not that the Legislature intended to bar the application of the general principles of res judicata to suits when the previous decision is arrived at in proceedings other than suits. The legislature was providing in the Code of Civil Procedure for the trial of suits over which the Civil Court was given jurisdiction under the provisions of the Code” (The underlining is by me).

Then, after making a reference to a Privy Council case, the Supreme Court said:

“Whatever the reason may be, the provisions of Section 11 will govern a previous decision in a suit barring a subsequent suit with respect to the same matter in controversy and general principle as of res judicata in such particular circumstances will neither be available to bar a subsequent suit nor will be needed.” (The underlining is by me).

59. In the above observation, the Supreme Court appears to have explicitly said that when both the proceedings are suits, it is

only Section 11 which can be made use of and that general principles of *res judicata* cannot be made use of.

60. I am, therefore, of the view that the observations contained in the case AIR 1965 SC 1153 (supra) also lend support to the view that when both the proceedings are suits, the decision in the previous suit cannot operate as *res judicata* in a subsequent suit on general principles of *res judicata*.

61. Thus, on the second point also, my conclusion is the same as that of my learned brother Khare, J.

62. In the result, I am of the view that Civil Revision No. 619 of 1967 should fail and Civil Revision No. 1269 of 1967 should succeed.

TRIPATHI, J.: 63. I have read the order proposed by my learned brother Khare, J. I regret my inability to agree.

64. The facts of the case are detailed in the judgment of my learned brother and I do not propose to recount them.

65. In these revisions, the following questions fall for consideration:—

(1) What is the nature of the jurisdiction exercised by a court of Small Causes. Is it exclusive or preferential?

(2) Whether the general principles of *res judicata* can be invoked in the context of a subsequent suit when the conditions requisite for the applicability of Section 11 of the Code of Civil Procedure were not satisfied?

66. There is a divergence of judicial opinion on the first question. In a series of single Judge decisions observations have been made which indicate that a court of small causes cannot be regarded to be such a court as has exclusive jurisdiction to decide a particular matter, and therefore, its decision cannot operate as *res judicata* for the purposes of other suits not cognizable by it: AIR 1914 All 229, AIR 1922 All 241, AIR 1939 Nag 130, AIR 1959 Punj 420, AIR 1960 Pat 494.

67. There is another line of cases in which a contrary view has been expressed. In AIR 1937 Lah 346, AIR 1938 Lah 811 and AIR 1967 All 125, which are all single Judge decisions and in AIR 1954 Cal 506 and AIR 1969 Madh Pra 56 which are Division Bench cases, it has been held that a Court of Small Causes exercises exclusive jurisdiction.

68. I find myself in respectful agreement with the view propounded in the second category of cases for the reasons detailed below:

69. Courts of Small Causes are constituted in accordance with Section 5 of the Provincial Small Cause Courts Act of 1887. Section 15 of the Act provides that,

"A Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes.

Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits

of a civil nature of which the value does not exceed a particular amount shall be cognizable by a Court of Small Causes."

Section 16 reads:

"Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable." The marginal note of this section reads:

"Exclusive jurisdiction of Courts of Small Causes.

The provisions of Section 16 are imperative in terms and exclude the jurisdiction of other Courts from the suits cognizable by a Court of Small Causes. In other words, as is evident from the marginal note to this section, the jurisdiction exercised by the Courts of Small Causes is exclusive in nature and there is no apparent reason why it should be held otherwise when the legislature has termed it as exclusive jurisdiction in unequivocal terms.

70. Section 17 of the Act provides a special procedure for such a Court and the provisions of the Code of Civil Procedure have been made applicable only in an amended form as indicated in the aforesaid section. It is true that under Section 28 of the Act, the Court of Small Causes shall be subject to the administrative control of the District Court and to the superintendence of the High Court but that does not derogate from the fact that it is not a link in the regular hierarchy of the Civil Courts as is evident from Section 33 of the Act which provides that:

"A Court invested with the jurisdiction of a Court of Small Causes, with respect to the exercise of that jurisdiction, and the same Court, with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act and the Code of Civil Procedure be deemed to be different Courts."

71. It is true that Section 35 of the Act provides for the continuance of proceedings of abolished Courts but that is not in derogation of the special nature of the jurisdiction exercised by the Small Cause Courts. I am, therefore, of opinion that the jurisdiction exercised by the Small Cause Courts is not only preferential but exclusive in nature.

72. On the second question posed above, also, there is a conflict of judicial opinion but in view of the latest decision of the Supreme Court it is not necessary to notice each case on the point.

73. In 1966 All LJ 481 = (AIR 1967 All 28) and in 1967 All LJ 32 = (AIR 1967 All 442), two Division Benches of this Court have successively held that, where both the proceedings are civil suits, the general principles of *res judicata* have no application and the case must be confined to the four

corners of Section 11 of the Code of Civil Procedure.

74. In the case of AIR 1953 SC 33 it was, *inter alia*, observed:

"The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of *res judicata* by Section 11 of the Code and has application to suits alone. When a plea of *res judicata* is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of *res judicata* on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like revenue Courts, land acquisition Courts, administration Courts, etc. It is obvious that these Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute." This case was relied upon by a learned single Judge of this Court in 1966 All VR (HC) 782 = (AIR 1967 All 125) for holding that a decision by the Court of Small Causes will operate as *res judicata* by the application of the general doctrine governing the principles of *res judicata*.

75. In the case of Ramchandra Rao v. Ramachandra Rao, AIR 1922 PC 80 it was *inter alia* observed that,

"the importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute. The principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect."

76. In Janakirama Iyer's case, AIR 1962 SC 633 it was observed that:

"It has been fairly conceded that in terms Section 11 of the Code cannot apply because the present suit is filed by the creditors of the defendants 1 to 6 in their representative character and is conducted as a representative suit, under Order 1, Rule 8, and it cannot be said that defendants 1 to 6, who were plaintiffs in the earlier suit and the creditors who have brought the present suit, are the same parties or parties who claim through each other. Where Section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provisions of Section 11 and no other. In our opinion, therefore, there is no substance in the ground that the present suit is barred by *res judicata*."

77. In AIR 1965 SC 1153 the decision in Janakirama Iyer's case, AIR 1962 SC 633 (*supra*) was noticed and explained by Hon'ble Raghubar Dayal, J., who was delivering

the majority judgment, and it was, *inter alia*, held that:

"The judgment of a Court of exclusive jurisdiction is to be treated as *res judicata* upon the same matter in another Court which will not be a Court having jurisdiction over that matter....."

and further that,

"the provisions of Section 11, Civil P. C. are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata* any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial."

78. In this case the minority opinion was expressed by Hon'ble Mr. Justice Subba Rao who held that the observations in Janakirama Iyer's case, AIR 1962 SC 633 that,

"where Section 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata*. We are dealing with a suit and the only ground on which *res judicata* can be urged against such a suit can be the provision of Section 11 and no other",

correctly represented the law on the subject. In view of the majority decision in the aforesaid case it is obvious that on the general principles of *res judicata* a previous decision on a matter in controversy, decided after full contest, will operate as *res judicata* in a subsequent regular suit irrespective of the fact whether the Court deciding the matter formerly had or had not been competent to decide the subsequent suit.

79. The dispute between the parties in the Court of Small Causes was about the rate of rent. That dispute had been determined by that Court in a fair manner. In the subsequent suit out of which the revision applications arise, the plaintiffs, while praying for ejectment of the defendants, claimed rent for the period preceding the second suit on a different rate. In these circumstances the question arose whether the decision given by the Judge Small Cause Court about the rate of the rent will operate as *res judicata* in the subsequent suit filed before the Munsif for arrears of rent and ejectment. In the light of the principle laid down by the Supreme Court in the case of Gulabchand Chhotalal, AIR 1965 SC 1153 (*Supra*), I am of opinion that the decision of the Judge Small Cause Court shall operate as *res judicata* on the question of the rate

of rent both because it is a Court of exclusive jurisdiction and also on the basis of the general principles of res judicata.

80. I would, therefore, allow Civil Revision No. 619 of 1967, set aside the impugned order of the Munsif, but I will dismiss the connected Civil Revision No. 1269 of 1967.

BY THE COURT (in accordance with the opinion of the majority):

81. Civil Revision No. 619 of 1967 is dismissed.

82. Civil Revision No. 1269 of 1967 is allowed and it is directed that the case be sent back to the court of learned Munsif for decision in accordance with law in the light of the observations made by this Court.

83. We make no order as to costs in any of these revisions.

Order accordingly.

AIR 1970 ALLAHABAD 614 (V 57 C 88)
YASHODANANDAN AND H. N. SETH, JJ.

State of U. P., Appellant v. Kunji Lal,
Accused-Respondent.

Government Appeal No. 2665 of 1965,
D/- 7-4-1970 from order of Temporary S. J.
Mathura, in Criminal Appeal No. 369 of
1964.

Penal Code (1860), Section 292 — Obscenity — What constitutes — Tests laid down.

The test of obscenity is whether the tendency of the matter in question is to deprave and corrupt those whose minds are open to immoral influence and into whose hands a publication of the sort may fall. (1868) 3 QB 360, Rel. on. (Para 13)

If propagation of idea, opinion or information be for public interest or profit it would not be considered to be obscene though such a propagation in different context may be considered to be so. AIR 1965 SC 881, Rel. on. (Para 16)

In the present day society in India though great emphasis is being laid on family planning and therefore it has become absolutely necessary to impart education about sex to masses, even so the books dealing with sex matters are to be so composed that they do not cross the bounds of decency and do not tend to become pornographic. (Para 18)

Held though the books Kamasutra, Rati Rahasya, Anang Rang and Panch Sahayak published by the accused were alleged to be translations in Hindi of the works of old eminent writers, the inclusion of nude pictures of women in the books which had no connection with the subject matters discussed in the books and which were not in the original books was intended not to impart healthy sexual education to the masses but to obtain greater circulation by pandering to lascivious prurient or sexually pre-

cious minds. The accused was therefore guilty under Section 292. (Para 20)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 881 (V 52) =
1965 (2) Cri LJ 8, Ranjit D. Udeshi
v. State of Maharashtra 15, 17
(1959) AIR 1959 All 49 (V 46) =
1959 Cri LJ 9, State v. Thakur
Prasad 14
(1868) 3 QB 360 = 37 LJMC 89,
Queen v. Hicklin 13, 15

Govt. Advocate, for Appellant; R. P. Goyal,
for Respondent.

H. N. SETH, J.: This appeal has been filed on behalf of the State of U. P. against the order dated 10th September, 1965 passed by Temporary Sessions Judge, Mathura in Criminal Appeal No. 369 of 1964 acquitting the respondent Kunji Lal of an offence under Section 292, I. P. C.

2. Allegations on which the respondent was made to stand his trial under Sec. 292, I. P. C. were that he was the owner of Shyam Kashi Press and carried on the business of publication of books. On 16th of January, 1964 Sri Sarwan Singh of Police Station Kotwali reached his press and found 66 books which are alleged to be obscene. These 66 books were copies of those books which were exhibited in the case as Exs. 1 to 6. These six books were entitled:—

- (1) Kamsutra
- (2) Rati Rahasya,
- (3) Anang Rang
- (4) Panch Sahayak
- (5) Kamkala and
- (6) Suhagraat.

The respondent admitted recovery of these books. He contended that these books were not obscene. According to him they were scientific works meant to give healthy sex education to masses. They were works of eminent writers. He stated that book Ex. 1 was translation of the work of Vatsayan, Ex. 2 was translation of a book written by Koka, known as Rati Rahasya, Ex. 3 was translation of a book entitled Ananrang written by Poet Kalyan Mal, Ex. 4 Panch Sahayak was translation of a book written by Jyotishivcharya.

He stated that Vatsayan lived in the year 200 A.D. Koka in 200 A.D. Jyotishivcharya in 1200 A.D. and Kalyanmal in 1600 A.D. Works of these eminent writers have been translated in several languages. The books Exts. 1 to 4 were meant for married people and were to be used by private circulation. The language used in these books is terse and cannot be understood by children and ordinary persons. Object of these books is to remove the dissensions between husband and wife for proper reproduction of the progeny and to make the married life happy. The books Exs. 5 and 6 were also meant for married people only. According to him he forwarded copies of each of these books to the Collector as required by Press and Registration Act, and to the National

Library of Calcutta. Had the books been considered to be obscene an objection to this effect should have been raised by the authorities much earlier.

3. Only point that arises for consideration in this case is whether the books in question were obscene or not. If they are held to be obscene, it is conceded that all the ingredients for an offence under Section 292, I. P. C. would be made out and the respondent would be guilty of an offence under that section.

4. Learned Magistrate recorded the following findings in respect of each of the six books.

(1) Ex. I — Kamsutra. Its contents were not obscene except the pictures of nude women at pages 40, 41 and 80-81. These pictures are obscene and have no relevance to the text.

(2) Ex. II — Rati Rahasya. This book also contains pictures of nude women which has no relevance to the text and were obscene. Moreover at pages 127-130, 141-146 and 161-162, the author had discussed methods for subjugating woman, to increase the retention power in man during cohabitation. These passages were also obscene.

(3) Ex. III — Anang Rang. The book also contained pictures of nude women which had no relevance to the subject hence rendered the book obscene. These pictures were printed at pages 16-17, 48-49. At pages 51-60 the author had given some prescriptions which deal with increasing retention power of male during cohabitation, which was most unscientific. Any suggestion made in the book for making a woman reach her climax before the man during cohabitation was for se (sic) obscene. Similarly the description given by the author at pages 76 to 82 to overpower woman was also obscene. The book was therefore held to be obscene.

(4) Ex. IV. — Panch Sahayak. — Printing of the pictures of nude women which had no relevance to the subject matter and the prescription given at pages 59-80 which are unnatural and unscientific, meant for widening and narrowing the mouth of vagina for purposes of obtaining greater satisfaction during sexual intercourse and increasing the size of the male organ are certainly not matters which deal with healthy sexual education. These things have a tendency to deprave and corrupt the minds of young men in whose hands the book may fall. The book was therefore held to be obscene.

(5) Ex. V. Kamkala — Except for the nude pictures which have no bearing on the subject matter, there was nothing else in the book which could be described as obscene. Because of the pictures this book was held to be obscene.

(6) Ex. VI. Suhagraat — There is nothing in this book which could be described as obscene.

The learned Magistrate accordingly held the books Exs. I to V to be obscene and held

the respondent guilty of an offence under Section 292, I. P. C. and sentenced him to pay a fine of Rs. 500. He also directed that copies of the book 'Suhagraat' be returned to the respondent and rest of the books destroyed after the period of filing an appeal against his order was over.

5. The respondent went up in appeal and contended that so far as nude pictures in these books were concerned they were 'in-offensive and were such as were commonly found in magazines. They could not be said to be obscene. These books were translation from Sanskrit diction of the works of well-known authors on the subject. The prescriptions mentioned therein, even if unscientific from the point of view of western methods, were well known Ayurved prescriptions and this description could not render the book obscene as they could not have a tendency to deprave and corrupt the morals of young men. It was also contended that the books had been submitted to the Government for the sole purpose of scrutiny and if no objection was taken to it it meant that the declaration had been given that the books were not obscene. In respect of the books that had been marked, "for the use of married people only", the finding that some one may hand them over to young men was purely conjectural and did not affect the bona fides of the publication.

6. After discussing the case law on the subject the learned Sessions Judge came to the conclusion that pictures of the nude women which appear to be reprints from various health magazines commonly sold in the market did not fulfil the test of obscenity as laid down in various authorities. He held that there was no suggestive element in the pictures which may be provocative of the lustful ideas so as to deprave or debauch the reader in all events and even though each of these pictures were out of context, they could not be said to be obscene for the reason mentioned above.

7. According to the learned Sessions Judge, these books dealt with sex matters, but there was nothing in the language used in those books so as to excite sexual feelings or to give rise to lustful ideas. So far as the book Kamsutra was concerned mere description of unnatural method for obtaining sexual gratification could not render the book obscene. He referred to the works of authorities like Vatsayan Kam Sutra published by D. B. Tarpurwala, Bombay, Kamsutra by Upadhyaya and others, and pointed out that similar methods have been advocated in those books. He therefore held that the books Kamsutra could not be held to be obscene.

8. The book Rati Rahasya was marked for private circulation only. In this book certain Mantras were mentioned from pages 127-130 for subjugating woman. They were derived from old Sanskrit Text and were translated into Hindi. According to the

learned Judge these Mantras may be foolish and may not have any efficacy; but as there was nothing in the language to render them lewd or libidinous so as to suggest impure ideas in the minds of the individual who may read them. Recitation of these Mantras therefore could not be said to be obscene. Similarly at pages 141 to 146 certain recipes were mentioned for increasing the retention power. Again there was nothing in the language used by describing the recipes to render them obscene. According to the learned Judge the language used was full of restraint and there was nothing therein to suggest lustful ideas. He was also of opinion that the treatment of the subject of importance at pages 161 to 162 was also not such as to render this passage as obscene.

9. In the book entitled 'Anangrang' at pages 51 to 60 certain prescriptions were given for increasing retention power in men during cohabitation. The learned Judge felt that merely because these prescriptions may be considered to be unscientific that by itself could not be a ground for holding the book to be obscene. Similarly the methods mentioned at pages 76 to 86 for overpowering the woman could also not be said to be obscene as there was nothing lustful in the language used therein.

10. The book 'Panch Sahayak' was marked for married people only but certain prescriptions were mentioned at pages 69 to 80 which may be unscientific. But there was nothing in the language used therein to suggest libidinous or lustful thoughts. He therefore held that none of the six books could be said to be obscene and acquitted the accused of an offence under Sec. 292, I. P. C.

11. State of Uttar Pradesh has now come up in appeal before us. In this appeal it was contended that the books Ex. 1 to Ex. V were in fact obscene and the finding of the learned Sessions Judge to the contrary is erroneous.

12. When the appeal came up for hearing before a Bench of this Court, it was discovered that the books that were the subject matter of the charge were missing from the record. In the absence of these books it was not possible to proceed with the hearing of the appeal. Efforts were therefore made to get the record reconstructed and the respondent filed before the court one copy each of the four books Ex. 1 to Ex. 4. He did not have in his possession any copy of the book entitled Kamkala Ex. V. The book 'Suhagraat' Ex. VI had not been held to be obscene by the Magistrate and the State did not question the correctness of the finding in any appropriate proceeding. We have therefore heard the arguments only in respect of books Exs. 1 to 4. In the absence of the book 'Kamkala' it is not possible for us to test the conclusion of the learned Sessions Judge that the book was not obscene.

13. The word "obscene" used in Section 292, I. P. C. has not been defined any-

where in the Code. A long string of authorities of various High Courts in India seems to adopt the meaning given to this word by Cockburn, C. J., in Hicklin's case reported in (1868) 3 QB 360 at p. 371. Test laid down by Cockburn, C. J. is in the following words:

"The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall."

14. In the case of State v. Thakur Prasad, reported in AIR 1959 All 49, a Division Bench of this Court observed as follows:—

"The word 'obscene' is not defined in the Penal Code, but it must be taken as meaning offensive to chastity, modesty, expressing or personating to the mind or view something that delicacy, purity or decency forbids to be expressed. The test of obscenity is this, whether the tendency as obscene is to deprave and corrupt those whose minds are open to such immoral influence and in whose hands a publication of this sort may fall."

15. Meaning and scope of the word obscene as used in Section 292 of the Penal Code came up for consideration before the Supreme Court of India in the case of Ranjeet D. Udeshi v. State of Maharashtra reported in AIR 1965 SC 881, in connection with the question whether the provisions of Section 292, I. P. C. contravene the fundamental right guaranteed under Art. 19 (1) (a) of the Constitution or not. While commenting on the test of obscenity as laid down in Hicklin's case, (1868) 3 QB 360 their Lordships of the Supreme Court observed at page 888 of the report as follows:—

"But even if we agree thus far, the question remains still whether the Hicklin test is to be discarded?" We do not think that it should be discarded. It makes the Court the judge of obscenity in relation to impugned book etc., and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influence. It will remain a question to be decided in each case and it does not compel an adverse decision in all cases."

Their Lordships however, made it clear that it is the obscenity in speech and expression which is offensive to modesty and decency, which is not protected by Art. 19(1) of the Constitution. The freedom of speech and expression is subject to reasonable restrictions, which may be thought necessary in the interest of the general public and such interest is the interest of general public (public decency — Ed.) and morality. It is the interest of general public which is of paramount importance and in this view of the matter, reasonable restrictions in the exercise of this right can be imposed. In this connection their Lordships observed as follows:—

"Speaking in terms of Constitution it can hardly be claimed that obscenity which is

offensive to modesty or decency is within the constitutional protection given to free speech or expression because the Article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinion to change political or social conditions or for advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of general public and one such interest is the interest of public decency and morality. Section 292, Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word obscenity is not really vague because it is a word which is well understood even if persons differ in their attitude to what is obscene and what is not. Lawrence thought James Joyce's *Ulysses* to be an obscene book deserving suppression, but it was legalised and he considered James Joyce to be pornographic but very few people will agree with them.

The former he thought so because it dealt with excretory functions and the latter because it dealt with sex repression (see *sex Literature and Censorship* pp. 26, 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say of where the line is to be drawn. It is, however, clear that obscenity itself has extremely poor value in the propagation of idea, opinion and information of public interest or profit. When there is propagation of ideas opinions and informations of public interest or profit the approach to the problem may become different because then the interest of society may tilt the scale in favour of free speech and expression. It is thus that

"books on medical science with intimate illustrations and photographs, though in a sense immoral, are not considered to be obscene, but the same illustration and photograph collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code dealt with obscenity in this sense and cannot thus be said to be invalid in view of second clause of Article 19."

While dealing with the test laid down in *Hicklin's* case their Lordships observed as follows:—

"The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under the Constitution, or it needs to be modified and, if so, in what respect. The first of these questions invited the Court to reach a decision on a constitutional issue of most far-reaching character and we must beware that we may not lean too far away from the guaranteed freedom. The laying down of the true test is not rendered any the easier because

art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angles and saints of Michael Angelo should be made to wear breeches before they can be viewed. If the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shop would close and the other half would deal in nothing but moral and religious books, which Lord Campbell boasted was the effect of his Act."

16. Aforesaid discussion by the Supreme Court indicates that their Lordships of the Supreme Court were of opinion that if propagation of idea, opinion, or information be for public interest or profit 'it would not be considered to be obscene though such a propagation in different context may be considered to be so. It is in this view of the matter that intimate illustrations in photographs though in a sense immodest are not considered obscene if included in books of medical science. The same illustrations or photographs collected in a book bereft of its medical text may be considered to be obscene. Similarly something which on the face of it may be immodest if contained in a work or art or literature may not be considered to be obscene. The Court has to apply and consider each work at a time, but this examination is not to be done in a spirit of finding fault with the work. If such an attitude towards art and literature is adopted it would make the Court a Board of Censor. An overall view of the matter alleged to be obscene in the setting of the whole work is necessary. But the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. In this connection the interest of our con-

temporary society and particularly the influence of the book on it must not be overlooked. Where obscenity and art are mixed art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial or insignificant that it can have no effect and may be overlooked. In other words treating the sex in a manner offensive to public decency and morality judged by our national standard and considered likely to pander to lascivious prurient or sexually precocious minds, must determine the result. A balance has to be struck between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

17. Further while considering what would constitute obscenity in dealing with the subject-matter of sex their Lordships of the Supreme Court in the case of AIR 1965 SC 851 at p 889 observed as follows:—

"In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our fundamental law), judged by our National standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech an expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality, but when the latter is substantially transgressed the former must give way."

18. It should also be borne in mind that there is some difference between obscenity as such and pornography. Pornography denotes writings, pictures etc. intended to arouse sexual desire while the former may include writing etc., not intended to do so, but to arouse such desire which have a tendency. Both of course offend against public decency and morals but pornography is obscene in a more aggravated form. Regarding pornographic pictures and writings there can never be a doubt that they would be obscene within the meaning of Section 292 of the Indian Penal Code. Practical difficulty arises in applying the test laid down in *Hicklin's case* as explained by the Supreme Court only in cases where it is doubtful if the writing or photograph was intended for arousing erotic feelings, but they may have a tendency towards it. It is in such cases alone that the Courts are required to go into the question of finding whether the subject-matter charged as obscene has a tendency to deprave and corrupt whose minds are open to such immoral influence and in whose hands the publication is likely to fall. If evidence on the record indicates that a writing or a picture was intended to arouse sexual desire the further enquiry, about its likely effect on the persons who are open to immoral influences and in whose hands the publication is likely to fall, becomes unnecessary. In the

present day society in India a book or a publication which deals with such matters cannot per se be said to be obscene. Great emphasis is being laid on family planning and in that connection it has become absolutely necessary to impart education about sex to the masses. Even so the books dealing with sex matters are to be so composed that they do not cross the bounds of decency and do not tend to become pornographic. Even a slight variation in the treatment of the subject in a book dealing with sex matters, from the correct path may have the effect of converting it into an obscene book.

19. It is in the light of above discussion that we have to see whether the four books, object of which is to place before its readers various methods for obtaining sexual gratification are obscene or not. The respondent claims to have translated the well known works of Vatsyana Kamasutra, Koka's Rati Rahasya, Kalyanmal's Anang Rang and Ravishankar's Jyotishacharya Panch Sahayak in Hindi for the benefit of married people. All these books have been divided into various chapters and have classified men and women according to their sexual potentiality. They describe how the man and woman should approach and some prescriptions have also given for obtaining greater sexual prowess. Needless to say that treatment of such a subject has got to be very cautious and circumspect as even slightest deviation from the path of rectitude in treating this subject will certainly have a tendency to deprave and corrupt those whose minds are open to immoral influences.

20. Although these books purport to be translation of the works of old writers, we find inherent evidence in them to show that the author did not intend to keep upto the path of a absolute rectitude in dealing with such a delicate subject. His intention did not appear to be to impart healthy sexual education to the masses but was to obtain greater circulation of these books by pandering to lascivious prurient or sexually precocious minds. The respondent admitted that the pictures which had been included in the books had no connection or reference to the subject-matters which have been discussed in the books. He also admitted that the original books which he translated into Hindi did not contain any nude pictures. He tried to explain this by saying that when the original books were written there was no photography at that time. The pictures in all these books show nude women in various poses. Some of them also show men and women embracing each other in a particular manner. One of the pictures depicts a man peeping towards a scantily clad, practically nude woman.

It is difficult to agree with the learned Sessions Judge that the expression of women and their poses in the pictures are not suggestive at all. The accused in his cross-examination admitted that he would not display such nude

pictures in his house. When such pictures are included in a book which deals with intimate side of sex life, without any reference to the subject-matter, the only inference that can be drawn is that they have been included therein with an idea to arouse sexual desire in the readers. The author used these pictures as a cheap medium for obtaining greater circulation of the books. In the setting of the whole book the pictures included in all of them are certainly pornographic and as such obscene.

21. After considering the way in which the subject-matter of sex has been dealt with in all these books we very much doubt that these books serve any public good. The matter has not been dealt with on any scientific lines and it cannot be considered to be a piece of literature or art. We are also doubtful whether these books are calculated to serve any useful purpose. Since however we have come to the conclusion that the intention of the publisher in publishing these books was to arouse erotic feeling in the minds of the readers, as is evidenced by inclusion of the photographs, it is not necessary to go into the question whether the books would be obscene even if the objectionable pictures had not been there.

22. The inclusion of these pictures certainly render all the four books obscene.

23. The book entitled Kamsutra was marked "for the benefit of married men and women only". Rati Rahasya by Koka was marked by private circulation, absolutely confidential and for the benefit of married men and women. Similarly the book Panchsahayak was meant for married people only and absolutely confidential. No such remark was contained on the book Anang Rang. It was argued that because of these markings the books were meant for use of married people only and the pictures and the subject-matter of these books was not such which would produce any improper thought in their minds and as such these books could not be said to be obscene.

We are unable to agree with this argument. The markings made on these books are meaningless. Some of these books were being openly sold in market and no steps whatsoever had been taken to see that these books should reach the hands of married people only for whose benefit they purport to have been written. They were priced at Rs. 3/- to Rs. 5/- only and were most certainly likely to fall in the hands of young adolescent boys and girls. The markings made on these books also indicate that the author was conscious of the pernicious effect that these books may have on the minds of unmarried adolescents. We also do not agree that the photographs of the nature contained in these books were not intended to generate sexually impure and filthy ideas in the minds of the readers whether they be married or unmarried. In our opinion even if reasonable

steps had been taken by the publisher to see that the books circulated to married people only, these books still would have been pornographic in nature.

24. We therefore, disagree with the learned Sessions Judge and hold that in the circumstances and setting in which the pictures in the four books have been published certainly render them obscene. These books were meant to pander to the prurient taste of the public and to appeal to their baser instinct. These books again are not books of scientific nature and they cannot be described as works of literature either. They are merely collections of certain verses in Sanskrit by writers like Koka, Vatsayan, Jyotishcharya, Kalyan Mal into Hindi. The argument that the books are translations of the works of well known writers does not in our opinion afford a defence to the respondent in publishing an obscene book. In the first instance the petitioner himself admitted that the Sanskrit rendering of the books of the well known authors did not contain any nude or objectionable photographs. In the second place, it may be that the treatment of the subject by the well known writers at the time when they wrote their books may not be considered to be obscene in the setting of the society as it existed then but the circulation of their ideas in the context of the contemporary society may be considered to be obscene. It is also possible that a book which may be considered to be obscene in the contemporary social condition may not be so considered at some future date.

We therefore feel that the argument that the books are translation of the various works of authors of the past would by itself be not a defence to the charge of obscenity if the translated matter has a tendency to pander to the prurient taste in the context of the contemporaneous society. Since we have come to the conclusion that the very object with which these books have been published was to pander to the prurient taste of the public and to appeal to their baser instinct an offence under Section 292 I.P.C. has been committed by the respondent, and it is not necessary to express any final opinion on the question whether or not the treatment of subject matter of the book by itself is obscene or not.

25. Accordingly, we allow the appeal, set aside the order of the learned Sessions Judge acquitting the respondent. We convict him for an offence under Section 292 I. P. C. Since he is being punished on account of four books instead of five books as was done by the learned Magistrate, we sentence him to pay a fine of Rs. 400/-. In default of payment of fine the respondent shall undergo rigorous imprisonment for a period of one month. We restore the order made by the learned Magistrate regarding disposal of books Ext. I to Ext IV and their copies.

Appeal allowed.

AIR 1970 ALLAHABAD 620 (V 57 C 69)

FULL BENCH

SATISH CHANDRA, T. P. MUKERJEE
AND R. L. GULATI, JJ.M/s. Raghunandan Prasad Mohan Lal,
Bareilly, Petitioner v. The Income Tax Appellate Tribunal and others, Opposite Parties.Civil Misc. Writ No. 789 of 1968, D/-
3-11-1969.

(A) Constitution of India, Article 226 — Extraordinary jurisdiction — Exercise of — Writ petition challenging penalty proceedings — Validity of assessment order cannot be challenged — Statutory remedy cannot be allowed to be by-passed — Income-tax Act (1922), Section 66.

When Parliament has enacted that a question of law ought to be raised before the Tribunal before the High Court can give an opinion on it, it will not be right for the High Court to circumvent the legislative mandate, by exercising the discretionary jurisdiction in favour of an assessee who did not raise the question before the Tribunal, either in the assessment or the penalty proceedings, and who has not given any explanation for the omission. A litigant is not entitled to raise a question of jurisdiction for the first time in a writ petition unless he satisfactorily explains why he did not raise the plea before the appropriate authority.

(Para 52)

Where a writ petition is filed for challenging the penalty proceedings, the petitioner cannot be allowed to raise the validity of the assessment order which formed the basis of the penalty proceedings. When remedy by way of appeal to Tribunal and reference to High Court is available, the petitioner cannot by-pass that procedure.

(Paras 6, 52)

(B) Constitution of India, Article 20 — Penalty proceedings under Section 297 (2) (g) of Income-tax Act (1961) — Article 20 is not applicable.

Article 20 contemplates proceedings of the nature of criminal proceedings and the prosecution in this context means an initiation of proceedings of a criminal nature. The first part of Article 20 (1) prohibits a conviction while the second part deals with penalty that may be inflicted on conviction by way of punishment. Article 20 affords protection against conviction and punishment for an offence by a court of law. Penalties imposed by the Income-tax authorities cannot be regarded as punishment awarded for an offence. In fact, prosecution for an offence under the Income-tax Act is provided separately under the two Acts. Section 52 of the 1922 Act provides for a prosecution and conviction before a Magistrate with regard to offences enumerated therein. Similar provisions are to be found in the new Act

of 1961 in Chapter 22. AIR 1953 SC 825, Foll. (Paras 9, 10, 55)

It is well known that the Legislature can impose both a criminal as well as civil sanction for the same act or omission. Invocation of one does not exclude resort to the other. Penalty proceedings are revenue in nature, to which Article 20 does not apply. (1967) 64 ITR 669 (Ker), Rel. on; (1938) 303 US 391 and (1943) 317 US 492, Ref. to.

(Paras 56, 57)

(C) Constitution of India, Article 14 — Income-tax Act (1961), Section 297 (2) (a), (b) — Classification between Clauses (a) and (b) — Being based on date of filing return, it is well defined — No violation of Art. 14. (Per Full Bench):—

Looking at Clauses (a) and (b) of Section 297 (2) it becomes immediately apparent that a classification was made amongst the assesseees whose cases for the assessment years prior to the year 1962-63 were pending when the new Act came into force repealing the old Act. The classification is based on the date of filing of the returns. Those assesseees who had filed their returns prior to 1st April, 1962 were to be dealt with for the purposes of assessment under the old Act, while those who had filed their returns after that date were to be dealt with under the new Act. This classification for purposes of assessment appears to be well defined and reasonable even though the better basis for the classification would have been the commencement of the assessment proceedings. The assessment proceedings under the Income-tax Act commence against an assessee when he files voluntary return or when a notice is issued to him calling for a return. Had that basis been adopted all pending assessments would have been dealt with under the old Act. However, it was for the Parliament to have chosen the basis of the classification and as, in its wisdom, it chose the date of the filing of the return to be the dividing line, no fault can be found with such a classification. (Para 12)

(D) Constitution of India, Article 14 — Income-tax Act (1961), Section 297 (2) (f) and (g) — Classification between Cls. (f) and (g) — It is based on date of completion of assessment — No nexus with object to be achieved — Clause (g) is ultra vires — (1968) 70 ITR 293 (All), Overruled; (1967) 64 ITR 285 (Madh Pra) and AIR 1969 Madh Pra 72 and C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi), Dissented from.

Per Majority (Satish Chandra, J. contra):—

The classification brought about by Cls. (f) and (g), is based on the date of the completion of the assessment, which has no rational nexus with the object sought to be achieved. Clause (g) of Section 297 (2), therefore, is discriminatory and ultra vires Article 14. (1968) 70 ITR 293 (All), Overruled; (1967) 64 ITR 285 (Madh Pra) and AIR 1969 Madh Pra 72 and C. M. W. No. 1247 of 1967.

D/- 24-2-1969 (Delhi), Dissented from. (Case law discussed). (Paras 14, 21, 33)

It is open to the legislature to form a classification on the basis of time just as much as it can have a basis on geographical or territorial considerations. But if the legislature brings about a classification on the basis of time, the point of time selected must be for some rational and intelligible consideration. A purely arbitrary or capricious selection of time cannot possibly form the basis of a rational classification. (Para 15)

The object of penalty provisions in a taxing statute like the Income-tax Act is to punish and prevent evasion of tax. The measure of penalty depends upon the nature and gravity of the default committed by an assessee. Under both the acts the quantum of penalty varies according to the tax which is quantified by an assessment order. The imposition of penalty has thus some relation to the assessment of tax, but the time of making the assessment has no bearing whatsoever upon the penalty itself. The default for which the assessee is to be penalised is neither aggravated nor mitigated by the time when the assessment comes to be made. The time for making the assessment is neither an attribute or a quality of the assessee nor does it have any relation to the nature or gravity of the default for which penalty is to be imposed. In fact the making of an assessment order is a fortuitous circumstance over which the assessee has no control. (Para 16)

Section 297 (2) (g) is ultra vires also on the ground that Section 271 of the 1961 Act, which contains penal provisions and which is made applicable to cases falling under Clause (g) of Section 297 (2) is more harsh and stringent than its corresponding section i. e., Section 28 of the 1922 Act. (Para 27)

(E) Income-tax Act (1961), Sections 271, 297 (2) (g) — Institution of penalty proceedings on basis of assessment under Income-tax Act (1922) — Case falling under Cl. (g) of Section 297 (2) — Section 271 is, however, inapplicable — Section 297 (2) (g) is not charging section — Expression “any proceeding under this Act” in Section 271 — Interpretation — (1968) 70 ITR 293 (All), Overruled; (1967) 64 ITR 285 (Madh Pra) and AIR 1969 Madh Pra 72 and C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi), Dissented from.

Per Majority (Satish Chandra, J. contra):— Where the assessment is made under the 1922 Act and the appeal is also instituted and disposed of under the 1922 Act, even assuming that Clause (g) of Section 297 (2) is intra vires, Section 271 is inapplicable in terms and no penalty can be imposed under that section, when the assessment is made under the old Act. The condition precedent for an action under Section 271 is the satisfaction of the officer concerned in the course of proceedings under the new Act. Section 297 (2) (g) is not a charging section and hence penalty cannot be imposed by its own force. Notwithstanding, the use in this provision of the expression “any such penalty may be imposed under this Act”, it is merely an enabling provision. It provides for neither the measure of penalty nor does it contain the defaults in respect of which penalty may be levied nor indeed does it specify the authorities empowered to levy the penalty. All these provisions are to be found in Chapter 21 which becomes applicable by virtue of this provision. (1968) 70 ITR 293 (All), Overruled; (1967) 64 ITR 285 (Madh Pra) and AIR 1969 Madh Pra 72 and C. M. W. No. 1247 of 1967, D/- 24-2-1969 (Delhi), Dissented from. (Case law discussed.) (Paras 34, 35, 38)

(F) Constitution of India, Article 226 — Natural justice — Institution of penalty proceedings under inapplicable or unconstitutional law — Proceedings must be quashed — Plea that penalty imposed is less than minimum prescribed under law is not tenable — Income-tax Act (1961), S. 297 (2) (g).

Justice has to be done in accordance with law. If the penalty has been imposed with the aid of a provision which is unconstitutional and under a law which is inapplicable, the penalty is clearly unauthorised and without jurisdiction and cannot be upheld even if the amount of penalty happens to be less than the minimum prescribed under the law. Where the penalty is imposed under Cl. (g) of Section 297 (2) of Income-tax Act (1961), and Clause (g) is ultra vires, the question as to whether the penalty could be levied under the old Act does not arise and need not be decided. Moreover, it is not possible to speculate as to what would have been the amount of penalty if the assessee had been proceeded against under the old Act. (Para 41)

Cases Referred :	Chronological	Paras
(1969) AIR 1969 SC 701 (V 56) = Criminal Appeals Nos. 130 to 133 of 1968, D/- 12-12-1968, T. S. Baliah v. T. S. Rangachari		32, 65
(1969) Matter No. 213 of 1966, D/- 5-3-1969 = 75 ITR 781 (Cal), Narendra Sharma v. Income Tax Officer		89
(1969) Civil Misc. Writ No. 1247 of 1967, D/- 24-2-1969 (Delhi), M/s. Jain Brothers v. Union of India		40, 76,
(1969) 72 ITR 17 = (1969) 1 ITJ 801 (Guj), D. M. Mansavi v. Commr. of Income Tax		39, 80
(1969) AIR 1969 Madh Pra 72 (V 56) = (1969) 72 ITR 417, Commr. of Income Tax, M. P. v. Champalal Sukhram		80
(1969) AIR 1969 Madh Pra 220 (V 56) = (1969) 73 ITR 263, Gopichand Sarjuprasad v. Union of India		76, 80, 81

- (1968) Civil Appeal No. 1832 of 1968, D/- 12-12-1968 (SC), State of U. P. v. Kishan Chand Dhaun 19, 73
- (1968) 70 ITR 293 (All), Income Tax Officer v. Firm Madan Mohan Damma Mal 3, 40, 54, 75, 76, 80
- (1968) 69 ITR 312 = 9 Guj LR 659, Commr. of Income Tax v. Hiralal Mohanlal Shah 39, 60
- (1967) AIR 1967 SC 657 (V 54) = (1967) 63 ITR 458, Ramanathan Chettiar v. Commr. of Income Tax 52
- (1967) AIR 1967 SC 691 (V 54) = (1967) 1 SCR 15, Jalan Trading Co. v. Mill Mazdoor Sabha 3, 18, 73, 77
- (1967) 63 ITR 67 (SC), T. D. Kumar Brothers (P) Ltd. v. Commr. of Income Tax 52
- (1967) 64 ITR 637 = ILR (1968) Bom 33, Shakti Offset Works v. Inspecting Asst. Commr. of Income Tax 3, 21, 27, 39, 54, 58, 63, 76
- (1967) 64 ITR 669 = (1966) 1 ITJ 171 (Ker), P. Ummali Umma v. Inspecting Asst. Commr. of Income Tax 54, 56
- (1967) 64 ITR 285 = 1966 MPLJ 1118, Kishanlal v. Commr. of Income Tax 40, 80, 84
- (1966) AIR 1966 SC 1039 (V 53) = 1966-60 ITR 112, K. S. Venkataraman and Co. (P) Ltd. v. State of Madras 2, 48
- (1963) AIR 1963 SC 591 (V 50) = (1963) 3 SCR 809, Khandiga Sham Bhat v. Agricultural Income Tax Officer 72
- (1963) AIR 1963 SC 1561 (V 50) = (1964) 2 SCR 87, Municipal Council Palai v. Joseph 82
- (1963) AIR 1963 All 451 (V 50) = (1963) 49 ITR 680, Ram Kumar Bhargava v. Commr. of Income Tax 22, 78
- (1962) AIR 1962 SC 970 (V 49) = (1962) 44 ITR 739, Commr. of Income tax, Madras v. S. V. Angidi Chettiar 87
- (1962) 46 ITR 452 (All), Mohd. Atiq v. Income Tax Officer, Kanpur 27
- (1961) AIR 1961 SC 1633 (V 48) = (1961) 42 ITR 589, Commr. of Income tax, Bombay v. Scindia Steam Navigation Co., Ltd. 52
- (1960) AIR 1960 SC 266 (V 47) = (1960) 2 SCR 89 = 1960 Cri LJ 410, Satwant Singh v. State of Punjab 54
- (1960) AIR 1960 All 294 (V 47) = 1960 All LJ 20, K. N. Halwai v. Registrar Co-operative Society U. P. 52
- (1958) AIR 1958 SC 538 (V 45) = 1959 SCR 279, R. K. Dalmia v. Justice S. R. Tendolkar 73
- (1958) AIR 1958 Mys 70 (V 45) = ILR (1958) Mys 10, M. Parmanand v. Addl Income Tax Officer 79
- (1957) AIR 1957 SC 397 (V 44) = 1957 SCR 233, Pannalal Binraj v. Union of India 52
- (1957) AIR 1957 Bom 233 (V 44) = 60 Bom LR 18 (FB), Balabhai Manaji v. Bapuji Satwaji 20
- (1956) AIR 1956 SC 269 (V 43) = (1956) 29 ITR 390, M. Ct. Muttiah v. Commr. of Income Tax 18
- (1955) AIR 1955 SC 13 (V 42) = (1954) 26 ITR 713, Shree Meenakshee Mills Ltd., Madurai v. A. V. Viswanatha Sastri 17, 27
- (1955) AIR 1955 SC 191 (V 42) = 1955 Cri LJ 374, Budhan Choudhry v. State of Bihar 11, 73
- (1954) AIR 1954 SC 752 (V 41) = 1954 Cri LJ 1822, Zaverbhai Amaida v. State of Bombay 82
- (1953) AIR 1953 SC 325 (V 40) = 1953 Cri LJ 1432, Maqbool Hussain v. State of Bombay 9, 55
- (1953) AIR 1953 All 624 (V 40), J. K. Iron and Steel Co., Ltd. v. Labour Appellate Tribunal 52
- (1952) AIR 1952 SC 75 (V 39) = 1952 Cri LJ 510, State of West Bengal v. Anwar Ali 27, 60, 73
- (1952) AIR 1952 SC 235 (V 39) = 1952 SCR 710 = 1952 Cri LJ 1167, Lachmandas v. State of Bombay 27
- (1951) AIR 1951 SC 41 (V 38) = 1950 SCR 869, Charanjit Lal Chowdhury v. Union of India 69, 73
- (1951) AIR 1951 SC 97 (V 38) = 1951 SCR 127, Ramji Lal v. Income-Tax Officer 22, 78
- (1951) AIR 1951 SC 318 (V 38) = 1951 SCR 682 = 52 Cri LJ 1361, State of Bombay v. F. N. Balsara 73
- (1943) 317 U. S. 492 = 87 Law Ed 418, Spies v. United States 56
- (1938) 303 U. S. 391 = 82 Law Ed 917, Helvering v. Mitchell 56
- (1927) AIR 1927 Mad 163 (V 14) = ILR 50 Mad 300, Rangiah v. Appaji Rao 63
- R. R. Agarwal and Bharatji Agarwal, for Petitioner; Gopal Behari and Standing Counsel, for Opposite Parties.
- R. L. GULATI, J.: This is a petition under Article 226 of the Constitution and the facts giving rise to it are briefly these.
2. The petitioner is a partnership firm which runs a flour, oil and rice mill at Bareilly, in the name and style of M/s. Raghunandan Prasad Mohan Lal. On December, 29, 1959, it filed its return for the assessment year 1959-60 showing a net profit of Rs. 22,674. Later, a revised return was filed by it on February 1, 1962, showing a loss of Rs. 3,940, on the ground that in the ear-

lier return the liability for sales tax had not been deducted. The Income-tax Officer did not accept the petitioner's return and by his order dated March 30, 1964 assessed it at a net income of Rs. 82,662. The petitioner appealed. At the time of the hearing of the appeal the Appellate Assistant Commissioner of Income-tax found that there were certain deposits in the petitioner's bank account which had not been properly explained and the partners had not withdrawn any amount from the partnership accounts for their personal expenses. The Appellate Assistant Commissioner of Income-tax after calling for a remand report from the Income-tax Officer came to the conclusion that the petitioner had earned an income of Rs. 1,03,500 from undisclosed sources and finally computed the petitioner's total income at Rs. 1,69,350 by his order dated April 5, 1965. On the same day he issued a notice under Section 274 of the Income-tax Act, 1961, calling upon the petitioner to show cause why penalty under Section 271 (c) should not be imposed upon it for having concealed its income or having furnished inaccurate particulars thereof. By his order dated December 31, 1966 the Appellate Assistant Commissioner of Income-tax imposed a penalty of Rs. 52,500 which was reduced on appeal to Rs. 10,000 by the Income Tax Appellate Tribunal by its order dated December 17, 1967. One of the contentions raised by the petitioner before the Income Tax Appellate Tribunal was that Section 297 (2) (g) of the Act was ultra vires.

The Income-tax Appellate Tribunal relying upon the decision of the Supreme Court in *K. S. Venkataraman and Co. (P) Ltd. v. State of Madras*, (1966) 60 ITR 112 = (AIR 1966 SC 1089) declined to adjudicate upon that contention of the petitioner, because the Supreme Court in that case had held that an authority constituted under a Statute was not competent to pronounce upon the validity of a provision of that Statute. The petitioner then filed the present writ petition and amongst others, raised a ground about the constitutional validity of Section 297 (2) (g) of the Act.

3. This petition came up for hearing before a Division Bench of this Court of which one of us was a Member. In support of his contention that Section 297 (2) (g) was ultra vires, the learned counsel for the petitioner relied upon a decision of the Bombay High Court in *Shakti Offset Works v. Inspecting Asst. Commr. of Income Tax*, (1967) 64 ITR 637 (Bom) and also on certain observations of the Supreme Court in *Jalan Trading Co. v. Mill Mazdoor Sabha*, AIR 1967 SC 691 and contended that an earlier decision of this Court in *Income-tax Officer v. Firm Madan Mohan Damma Mal*, (1968) 70 ITR 293 (All) required reconsideration. As the Bench considered the question to be of considerable importance and not free from difficulty, it referred this petition to a larger Bench and

that is how it has now come up before the Full Bench.

4. In this petition the petitioner has not only challenged the penalty proceedings, but has also challenged the orders of the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal passed in appeal against the assessment order. We cannot allow the petitioner to agitate any question relating to the assessment, because the petitioner has already availed of the statutory remedies and at its instance a reference under Section 66 (1) of the Income-tax Act, 1922 is pending in this Court. Any question arising out of the order of the Income-tax Appellate Tribunal can be decided in that reference and cannot be entertained by this Court under Article 226 of the Constitution. We shall, therefore, confine ourselves to the grounds relating to the imposition of penalty.

5. Mr. Raja Ram Agarwal, appearing for the petitioner has attacked the imposition of penalty upon the following grounds:

(1) The finding that there was concealment of income in the assessment proceedings was without jurisdiction and could not form the basis of penalty proceedings.

(2) Section 297 (2) (g) of the Income-tax Act, 1961, violates Article 20 (1) of the Constitution.

(3) Section 297 (2) (g) offends against Article 14 of the Constitution, and

(4) Section 271 of the Act was inapplicable in terms and the penalty order based upon that provision was, therefore, without jurisdiction.

6. As regards the first contention, in our opinion, the petitioner is not entitled to raise the same before us. The petitioner had taken the matter in appeal before the Income-tax Appellate Tribunal and it was open to it to have raised this question before it, and in case the Tribunal decided that question against the petitioner, to have asked the Tribunal to make a reference to this Court on any question of law arising out of the order of the Tribunal. The petitioner cannot be permitted to by-pass that procedure. If the petitioner has not sought a reference against the order of the Tribunal on such a question, we cannot permit such a question to be raised before us in a petition under Article 226 of the Constitution.

7. Before we proceed to examine the remaining contentions of the learned counsel for the petitioner, we think it appropriate to enumerate briefly the legislative history. Prior to April 1, 1962, the Income-tax Act, 1922 (hereinafter referred to as the old Act) was in force. On April 1, 1962 the Income-tax Act of 1961 (hereinafter referred to as the new Act) came into force and repealed the old Act. The new Act being prospective in operation would govern all assessments from the assessment years 1962-63 onwards. For the assessments for the earlier years some provision had to be made. Sub-section (2) of Section 297 enumerates such provisions.

The material portion of Section 297 for our purpose is its sub-section (1) and Clauses (a), (b), (f) and (g) of sub-section (2) which are reproduced below:

"297. Repeals and savings — (1) The Indian Income-tax Act, 1922, (XI of 1922), is hereby repealed.

(2) Notwithstanding the repeal of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act),—

(a) where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed;

(b) where a return of income is filed after the commencement of this Act otherwise than in pursuance of a notice under Section 34 of the repealed Act by any person for the assessment year ending on the 31st day of March, 1962, or any earlier year, the assessment of that person for that year shall be made in accordance with the procedure specified in this Act;

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962 may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act."

8. A perusal of this section discloses the scheme with regard to the assessment of tax and imposition of penalty relating to assessment years prior to the year 1962-63. The scheme in short is that the pending proceedings were to be dealt with under the old Act or the new Act according as the returns were filed by the assessee before or after April 1, 1962. Where the return had been filed before that date the assessment proceedings as also the subsequent proceedings by way of appeals etc. were to be taken under the old Act and in cases where the returns were filed after that date such proceedings were to be taken under the new Act. Clauses (f) and (g) relate to penalty proceedings. According to Clause (f) the penalty was to be imposed in accordance with the old Act if the assessment giving rise to the penalty came to be made before April 1, 1962, while according to Clause (g) the penalty proceedings were to be taken under the new Act if the relevant assessment came to be made after that date.

9. The petitioner has challenged the constitutional validity of Clause (g) on the ground that it violates Article 20 of the Constitution because by virtue of this clause the penalty provisions of the new Act have been made applicable which are more onerous

than the corresponding provisions of the old Act. It is urged that according to the guarantee contained in Article 20 of the Constitution, the petitioner could not be subjected to greater penalty than that which might have been inflicted under the law in force at the time the offence was committed. It is not necessary to examine at this stage as to whether the penalty provisions under the new Act are more harsh and onerous than the corresponding provisions under the old Act, because in our opinion, Article 20 has no application to the facts of the case. Article 20 reads as under:—

"20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

This Article affords protection against conviction and punishment for an offence by a court of law. Penalties are imposed by the Income-tax authorities and cannot be regarded as punishment awarded for an offence. In fact, prosecution for an offence under the Income-tax Act is provided separately under the two Acts. Section 52 of the old Act provides for a prosecution and conviction before a Magistrate with regard to offences enumerated therein. Similar provisions are to be found in the new Act in Chapter XXII of the new Act. The Supreme Court in *Magbool Hussain v. State of Bombay*, AIR 1953 SC 325 held that the Article 20 contemplates proceedings of the nature of criminal proceedings and the prosecution in this context means an initiation of proceedings of a criminal nature. The first part of Article 20 (1) prohibits a conviction while the second part deals with penalty that may be inflicted on conviction by way of punishment.

10. The first contention based on the alleged violation of Article 20 is accordingly rejected.

11. The next question is as to whether Section 297 (2) (g) offends against Art. 14 of the Constitution. It has been urged that penalty provisions contained in the new Act are more onerous and harsh to the assessee in comparison to the penalty provisions contained in the old Act and Section 297 (2) (g) makes applicable the provisions of the new Act to a certain class of assessee leaving other assessee similarly situated to be dealt with under the old Act. It is pointed out that this discrimination is not based upon any reasonable classification. Article 14 of the Constitution guarantees equal protection of the laws. The Article itself does not

speak of any classification, but it is now well settled that while Article 14 prohibits class legislation, it does not prohibit reasonable classification. The classification permissible under Article 14 must, however, satisfy the following two conditions:

(i) It must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the ground, and

(ii) the differentia must have a rational relation to the objects sought to be achieved by the Statute in question. (See *Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191 at p. 193).

12. Now looking at Clauses (a) and (b) of Section 297 (2), it becomes immediately apparent that a classification was made amongst the assesseees whose cases for the assessment year prior to the year 1962-63 were pending when the new Act came into force repealing the old Act. The classification is based on the date of filing of the returns. Those assesseees who had filed their returns prior to 1st April, 1962 were to be dealt with for the purposes of assessment under the old Act, while those who had filed their returns after that date were to be dealt with under the new Act. This classification for purposes of assessment appears to be well defined and reasonable even though the better basis for the classification would have been the commencement of the assessment proceedings. The assessment proceedings under the Income Tax Act commence against an assessee when he files a voluntary return or when a notice is issued to him calling for a return. Had that basis been adopted, all pending assessments would have been dealt with under the old Act. However, it was for the Parliament to have chosen the basis of the classification and as, in its wisdom, it chose the date of the filing of the return to be the dividing line, no fault can be found with such a classification.

13. In that class of assesseees whose assessments were pending for the years prior to the year 1962-63, there existed a section of assesseees who had rendered themselves liable to penalty and a separate provision was made with regard to them. Under clause (f) penalty was to be imposed in accordance with the provisions of the old Act, if the assessment giving rise to the penalty was made prior to April 1, 1962, while clause (g) provided that penalty was to be imposed in accordance with the provisions of the new Act if the relevant assessment came to be made after that date. As a result of these two provisions the class of assesseees who were liable to penalties was split in two. The question that falls for consideration, therefore, is as to whether this sub-classification is valid.

14. In order that a classification should be permissible for purposes of Article 14, it must satisfy the dual test already indicated

above, viz. that it must be founded on an intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the Statute. In our opinion, the classification brought about by clauses (f) and (g) does not satisfy the second test based as it is on the date of the completion of the assessment, which has no rational nexus with the object sought to be achieved.

15. It is open to the legislature to form a classification on the basis of time just as much as it can have a basis on geographical or territorial considerations. But if the legislature brings about a classification on the basis of time, the point of time selected must be for some rational and intelligible consideration. A purely arbitrary or capricious selection of time cannot possibly form the basis of a rational classification.

16. Now, the object of penalty provisions in a taxing statute like the Income Tax Act is to punish and prevent evasion of tax. The measure of penalty depends upon the nature and gravity of the default committed by an assessee. Under both the Acts the quantum of penalty varies according to the tax which is quantified by an assessment order. The imposition of penalty has thus some relation to the assessment of tax, but the time of making the assessment has no bearing whatsoever upon the penalty itself. The default for which the assessee is to be penalised is neither aggravated nor mitigated by the time when the assessment comes to be made. The time for making the assessment is neither an attribute or a quality of the assesseees, nor does it have any relation to the nature or gravity of the default for which penalty is to be imposed. In fact the making of an assessment order is a fortuitous circumstance over which the assessee has no control. It is difficult to understand how the class of assesseees otherwise similarly situated can be sub-divided into two classes depending upon the time of the making of the assessment order.

17. In *Shree Meenakshi Mills Ltd. Madurai v. A. V. Vishvanatha Sastri*, (1954) 26 ITR 713 = (AIR 1955 SC 13) the Supreme Court had to deal with a similar classification based on time. Out of the class of tax evaders those whose cases had been referred by the Central Government to the Investigation Commission by September 1, 1948 under Section 5 (1) of Act XXX of 1947, were to be dealt with under the provisions of that Act while others were to be dealt with under Section 34 of the Income Tax Act. The procedure for assessment of escaped income under the two Acts was materially different. That classification was held by the Supreme Court to be violative of Article 14 of the Constitution. Mahajan, C. J., who delivered the judgment of the Court, at page 719 (of ITR) = (at pp. 17-18 of AIR); observed:

"As regards the first contention canvassed by the learned Attorney General, it seems to us that it cannot stand scrutiny. The class of persons alleged to have been dealt with by Section 5 (1) of the impugned Act was comprised of those unsocial elements in society who during recent years prior to the passing of the Act had made substantial profits and had evaded payment of tax on those profits and whose cases were referred to the Investigation Commission before 1st September, 1948. Assuming that evasion of tax to a substantial amount could form a basis of classification at all for imposing a drastic procedure on that class, the inclusion of only such of them whose cases had been referred before 1st September, 1948, into a class for being dealt with by the drastic procedure, leaving other tax evaders to be dealt with under the ordinary law, will be a clear discrimination for the reference of the case within a particular time has no special or rational nexus with the necessity for drastic procedure" (underlining ours)

18. Dealing with another case of similar nature, in *M. Ct. Muthiah v. Commissioner of Income Tax*, (1956) 29 ITR 390 = (AIR 1956 SC 269) the Supreme Court reiterated its earlier view in the following observations at page 402 (of ITR) = (at p. 276 of AIR).

"It is, therefore, clear that the period originally fixed for the reference of the cases of substantial evaders of income-tax for investigation by the Commission, viz., 30th June, 1948 or the extended period viz. 1st September, 1948, provided in Section 5 (1) of Act XXX of 1947 or the period fixed by the new Section 34 (1-A) of the Indian Income-tax Act viz. 31st day of March, 1950, was not a necessary attribute of the class of substantial evaders of income-tax but was merely in accident and a measure of administrative convenience and was not an element in the formation of the particular class of substantial evaders of income-tax, (underlining ours)

In *M/s. Jalan Trading Co. (P) Ltd.*, AIR 1967 SC 691 (supra) the Supreme Court struck down a provision of the Payment of Bonus Act, 1965, as violative of Article 14 of the Constitution because as a result of the classification brought about by it similarly situated industrial concerns were subjected to differential treatment depending on the pendency of an industrial dispute between the industrial undertaking and its employees before a particular date. It held at page 708:

"Assuming that the classification is founded on some intelligible differentia, which distinguishes an establishment, from other establishments, the differentia has no rational relation to the object sought to be achieved by the statutory provision viz. of ensuring

peaceful relations between capital and labour by making an equitable distribution of the surplus profits of the year."

19. The latest case of the Supreme Court on this point is the State of U. P. v. *Kishan Chand Dhaun*, Civil Appeal No. 1832 of 1968, D/- 12-12-1968 (SC). In that case as a result of the operation of Rule 30 (a) of the Higher Judicial Service Rules, 1953, officers recruited prior to July 4, 1931 and confirmed after December 31, 1950, got higher salary than those officers who, even though appointed prior to July 4, 1931, were confirmed before December 31, 1950. The rule was struck down as violative of Article 14 of the Constitution with the following observations:

"The object of Rule 30, admittedly was to preserve to the officers who entered service prior to July 4, 1931, their previous pay scale. We have to examine the validity of the classification made under the said rule having in mind the object intended to be achieved. One can appreciate any difference made in service conditions between those officers who entered service prior to July 4, 1931, and those entered service thereafter. But what is not understandable is why there should be any difference between those who were confirmed as Civil and Sessions Judge before December 31, 1950 and those confirmed thereafter."

20. A Full Bench of the Nagpur High Court in *Balabhau Manaji v. Bapuji Satwaji*, (1958) 60 Bom LR 18 = (AIR 1957 Bom 233) struck down Section 242 (3) of the Madhya Pradesh Land Revenue Act, 1954 as offending Article 14 of the Constitution because as a result of that provision a classification was made in respect of pending suits for pre-emption. Those suits which were filed before March 25, 1954 were to remain alive, but those filed after that date were to be dismissed. Chief Justice Chagla, speaking for the Full Bench, held that the classification was arbitrary not permissible by Article 14 of the Constitution.

21. The case which directly deals with the point involved in the present case is that of the Bombay High Court in *Shakti Offset Works*, (1967) 64 ITR 637 (Bom) (supra). While striking down, as ultra vires, Section 297 (2) (g) of the Income Tax Act, 1961, the Bombay High Court observed at p. 657:

"The date of completion of the assessment makes no difference, so far as this aspect is concerned. In fact, it has no impact either on incurring of the liability or for imposition of penalty. We are, therefore, unable to see how the classification made by Clause (g) of sub-section (2) of Section 297 of the Income-tax Act of 1961 can be justified either as relevant or having any relation to the subject with which it is concerned. So far as making a provision for imposing a penalty is concerned, there is no difference between the assessee who have filed returns but in whose cases the assessment was completed

prior to April 1, 1962, and assesseees who have filed returns but in whose cases assessment was not completed or could not be completed till April 1, 1962."

We are in respectful agreement with the observations of the Bombay High Court as extracted above.

22. On behalf of the opposite side reliance was placed on *Ramji Lal v. Income Tax Officer*, AIR 1951 SC 97 to support the contention that pending proceedings and fresh proceedings could be the basis of a valid classification. There, however, the basis for the classification was that the pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and proceedings commenced. Such a classification would indeed be a reasonable classification. In fact, the classification brought about by Cl. (a) of sub-section (2) of Section 297 is founded on that basis and we have already observed that such a classification is permissible and valid. But Clause (g) makes a departure from that principle inasmuch as unlike Cl. (f) it seeks to apply the law other than that which was in force at the time the liability to penalty was incurred. That case is, therefore, clearly distinguishable and on the same ground is distinguishable the case of this Court in *Ram Ram Kumar Bhargava v. Commr. of Income Tax*, AIR 1963 All 451 which followed the case of *Ramji Lal*, AIR 1951 SC 97 (supra).

23. After having held that the classification brought about by Clause (g) is arbitrary having no rational nexus with the objects of the Act, the next question that falls for consideration is as to whether the penalty provisions in the new Act are more onerous than the corresponding provisions contained in the old Act. The penalty provisions in the new Act are contained in Chapter XXI comprising Sections 270 to 275. Besides penalty is also provided in Section 221 (1) for non-payment of tax. The corresponding provisions under the old Act are contained respectively in Sections 44-E (6), 44-F (5), 28, 25 (2), 18-A (9) and 46 (1). Sub-section (2) of Section 274 and Section 275 of the new Act are new having no corresponding provisions under the old Act. Section 274 (2) provides that in cases falling under Clause (c) of Section 271, the penalty shall be imposed by the Inspecting Assistant Commissioner of Income Tax, if the minimum penalty imposed exceeds Rs. 1,000, while Section 275 prescribes a limitation for the imposition of penalty, the limitation being two years from the date of the completion of the proceedings giving rise to the penalty.

24. The main penalty provisions under the new Act are contained in Section 271 which corresponds to Section 28 of the old Act. Since we are concerned mainly with these two provisions, it would be better to reproduce them in full.

25. Section 271 of the new Act as amended upto April 1, 1968 reads as under:

"271. Failure to furnish returns, comply with notices, concealment of Income etc.

(1) If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person:

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of Section 139 or by notice given under sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 139 or by such notice, as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub-section (1) of Section 142 or sub-section (2) of Sec. 143, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,—

(i) in the cases referred to in clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent, of the tax;

(ii) in the cases referred to in Clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent, but which shall not exceed fifty per cent, of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income;

(iii) in the cases referred to in Clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

Explanation — Where the total income returned by any person is less than eighty per cent, of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under Section 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction) such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of Clause (c) of this sub-section.

(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under Clause (b)

of Section 183 then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under sub-section (1) shall be the same amount as would be impossible on that firm if that firm were an unregistered firm.

(3) Notwithstanding anything contained in this section—

(a) no penalty for failure to furnish the return of his total income under sub-sec. (1) of section 139 shall be imposed under sub-section (1) on an assessee whose total income does not exceed the minimum amount not chargeable to tax in his case by one thousand five hundred rupees,

(b) where a person has failed to comply with a notice under sub-section (2) of Section 139 or Section 148 and proves that he has no income liable to tax, the penalty imposable under sub-section (1) shall not exceed twenty five rupees,

(c) no penalty shall be imposed under sub-section (1) upon any person assessable under Clause (i) of sub-section (1) of Section 160 read with S. 161, as the agent of a non-resident for failure to furnish the return under sub-section (1) of Section 139.

(4) If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership on the basis of which the firm has been registered under this Act, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall in addition to the tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of tax which has been avoided or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(4-A) Notwithstanding anything contained in Clause (i) or Clause (iii) of sub-section (1) the Commissioner may, in his discretion—

(i) reduce or waive the amount of minimum penalty imposable on a person under Clause (i) for failure, without reasonable cause, to furnish the return of total income which such person was required to furnish under sub-section (1) of Section 139, or

(ii) reduce or waive the amount of minimum penalty imposable on a person under Clause (ii) of sub-section (1), if he is satisfied that such person—

(a) in the case referred to in clause (i) of this sub-section has, prior to the issue of notice to him under sub-section (2) of Section 139 voluntarily and in good faith, made full disclosure of his income, and in the case referred to in Clause (ii) of this sub-section has, prior to the detection by the Income Tax Officer, of the concealment of parti-

culars of income in respect of which the penalty is impossible, or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, made full and true disclosure of such particulars;

(b) has co-operated in any enquiry relating to the assessment of such income; and

(c) has either paid or made satisfactory arrangements for payment of any tax or interest payable in consequence of an order passed under this Act in respect of the relevant assessment year;

Provided that if in a case the minimum penalty imposable under Clause (i) or, as the case may be, Clause (iii) of sub-sec. (1) in respect of the relevant assessment year, or where such disclosure relates to more than one assessment year, the aggregate of the minimum penalty imposable in respect of those years, exceeds a sum of rupees fifty thousand, no order reducing or waiving the penalty shall be made by the Commissioner unless the previous approval of the Board has been obtained.

(4-B) An order under sub-section (4-A) shall be final and shall not be called in question before any court of law or any other authority."

26. Section 28, as it stood immediately prior to the commencement of the new Act, was as under:

"28. Penalty for concealment of income or improper distribution of profits—(1) if the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act, is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of Section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) has without reasonable cause failed to comply with a notice under sub-section (4) of Section 22 or sub-section (2) of Section 23, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income;

Provided that—

(a) no penalty for failure to furnish the return of his total income shall be imposed

on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-section (2) of Section 22;

(b) where a person has failed to comply with a notice under sub-section (2) of Section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be penalty not exceeding twenty-five rupees;

(c) no penalty shall be imposed under this sub-section upon any person assessable under Section 42 as the agent of a person not resident in the taxable territories for failure to furnish the return required under section 22 unless a notice under sub-section (2) of that section or under Section 34 has been served on him;

(d) when the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of sub-section (5) of Section 23, then, notwithstanding anything contained in the other provisions of this Act, the amount of income tax and super-tax payable by the firm, itself shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in Clauses (b) and (c), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm.

(2) If the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution, and that any partner has thereby returned his income below its real amount he or it may direct that such partner shall in addition to the income-tax and super-tax, if any, payable by him pay by way of penalty a sum not exceeding one and a half times the amount of income-tax and super-tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard.

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

(5) An Appellate Assistant Commissioner or the Appellate Tribunal on making an order under sub-section (1) or sub-section (2) shall forthwith send a copy of the same to the Income Tax Officer.

(6) The Income Tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner."

On a comparison of the two sets of provisions under the new and old Act, it cannot be doubted that they differ materially from each other.

27. Mr. N. A. Palkhivala in the 6th Edition of his book on Income Tax has correctly summarised the changes brought about by the new Act in the law relating to penalty and the same may be reproduced with advantage.

"(a) Unlike Section 28 of the 1922 Act this section does not confer any power on the Appellate Tribunal to impose a penalty. (b) In cases of concealment of income where the minimum penalty imposable exceeds Rs. 1,000 the Inspecting Assistant Commissioner alone is empowered to impose a penalty (S. 274 (2)), whereas under the 1922 Act the Income Tax Officer had the power to impose a penalty even in such cases.

(c) Under the 1922 Act the Income Tax Officer could not impose any penalty without the previous approval of the Inspecting Assistant Commissioner. Under this Act the Income Tax Officer does not have to take the sanction of the Inspecting Assistant Commissioner in any case.

(d) This section provides that if any penalty is imposed, it should not be less than the minimum prescribed (subject to the Commissioner's power of reduction or waiver); there was no such minimum prescribed under the 1922 Act.

(e) The maximum penalty imposable has been reduced in cases falling within Cls. (a) and (b) of Section 271 (1); and it has to be computed by reference to the amount of income concealed, and not the tax avoided, in cases falling within Clause (c).

(f) The burden of proof is thrown on the tax payer where the income returned is less than 80 per cent of the income assessed.

(g) There was no time limit for commencement of penalty proceedings under the 1922 Act. This Act requires penalty proceedings to be commenced before the completion of those proceedings in which the Income Tax Officer or the Appellate Assistant Commissioner is satisfied that the default attracting a penalty has been committed (S. 275).

(h) There was no time limit in the 1922 Act for the passing of penalty order, but a time limit is now imposed by Section 275.

(i) No prosecution could be instituted under the 1922 Act in respect of the same

facts on which a penalty was imposed. Under this Act a penalty can be imposed and a prosecution launched on the same facts."

There can be no doubt that some changes are advantageous to the assessee but on the whole the penalty provisions in the new Act appear to us to be definitely more harsh and stringent for the following reasons:

(i) Under the old Act, no penalty could be imposed by the Income Tax Officer without the prior approval of the Inspecting Assistant Commissioner of Income Tax. Under the new Act no such previous permission is required, except that in cases of concealment of income, the penalty is imposed by the Inspecting Assistant Commissioner of Income Tax himself, where the minimum imposable penalty exceeds Rupees 1,000/-. It is true that in big cases of concealment, the penalty is to be imposed by a higher officer. But this little advantage is offset by the fact that the assessee loses the right of appeal to the Appellate Assistant Commissioner of Income-tax because against the order of the Inspecting Assistant Commissioner of Income-tax only one appeal is provided to the Income Tax Appellate Tribunal: (vide Section 253 (1) (b) of the new Act).

(ii) In cases involving concealment of income, the minimum penalty provided by clause (ii) of Section 271 (1) is equal to the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished, the maximum being twice that amount. This measure of penalty is undoubtedly drastic. It can work great hardship in petty cases. For example, in a case where the income shown in the return is Rs. 2,000/- which is below the taxable limits and the assessment comes to be made at Rs. 10,000/-, the minimum penalty imposable would be Rs. 8,000/-, maximum being Rs. 16,000/, even though the tax which the assessee may have tried to evade would be about Rs. 500/-. Under the old Act the maximum penalty of Rs. 750 could have been imposed in such a case even though the assessee could have been let off with a nominal penalty of Rs. 50 or so, there being no minimum limit.

(iii) By the Finance Act of 1964, two significant changes have been made in Section 271:

The word 'deliberately' has been omitted from Clause (c) and an explanation has been added at the end of Clause (ii).

The combined result of these two changes is that an assessee would be liable to penalty for furnishing inaccurate particulars of income even if the inaccurate particulars are furnished accidentally and not deliberately. The newly added Explanation makes a drastic change in the procedure inasmuch as the onus is cast upon the assessee where the income returned by him turns out to be less than 80% of the income assessed. The pro-

ceedings for the imposition of penalty are of quasi criminal nature and under the old Act, it was a settled law that in penalty proceedings the onus lay upon the Revenue to prove that income had been concealed or inaccurate particulars thereof had been furnished deliberately. This position no longer holds good. It is now settled law that the guarantee of equal protection applies against substantive laws as well as procedural laws, (See: Lachmandas v. State of Bombay, 1952 SCR 710 at p. 726 = (AIR 1952 SC 235 at p. 242), State of West Bengal v. Anwar Ali, AIR 1952 SC 75 and AIR 1955 SC 13).

(iv) The time limit fixed for the imposition of penalty by Section 275 may seemingly appear to be beneficial to the assessee but in practice it would work to their disadvantage. Under the old Act the imposition of penalty, could be deferred until the assessment order giving rise to the penalty became final after the decision of the assessee's appeals etc. Under the new Act, however, the Income Tax Officer shall be compelled to pass the penalty order, if the proceedings by way of appeals etc. are not concluded within two years. This would result in multiplicity of proceedings and the assessee would be exposed to coercive processes of recovery in case he is unable to pay the penalty within the prescribed time. Moreover, under the old Act even though no limitation was fixed for passing the penalty order, the appellate authorities as also the courts could always intervene to give relief to the assessee, where the penalty was sought to be imposed after inordinate delay not attributable to the assessee. This court in Mohd. Atiq v. Income Tax Officer, Kanpur, (1962) 46 ITR 452 (All) quashed the penalty order which was passed after the lapse of fourteen years.

(v) The fixing of the minimum amount of penalty is another feature which makes the provisions of the new Act more onerous. The Bombay High Court in the case of Shakti Offset Works, (1967) 64 ITR 637 (Bom) (supra), has, at page 651 given an illustration to demonstrate the drastic consequences of this provision showing that in a given case a penalty of not less than Rs. 1,40,000 will have to be imposed as the minimum penalty even though under the corresponding provisions of the old Act the penalty may have been a sum of Rs. 5,000 or even less.

28. It is, of course, true that under sub-section (4A) of Section 271 added by the Income Tax Amendment Act of 1965 the Commissioner has been vested with the power to reduce or waive the amount of minimum penalty imposable in cases falling under Clauses (i) and (ii) of sub-section (1) of Section 271 on conditions enumerated therein. The conditions themselves are of onerous nature inasmuch as the assessee has to make a confession of concealment before the concealment is detected by the Income

Tax Officer and he has to pay or make arrangement for the payment of the tax for the relevant assessment year. This provision may seem to soften the rigour of the provision requiring the imposition of a minimum penalty, but the small advantage that it seems to confer upon assessee is more than offset by sub-section (4B) which provides that an order under sub-section (4A) would be final and shall not be called in question before any court of law or any other authority. It is doubtful if an assessee would avail himself of the remedy provided in sub-section (4A) firstly because the conditions imposed are onerous and secondly because once he moves in that direction, he places himself entirely at the mercy of the Commissioner against whose order he will have no remedy whatsoever.

29. At this stage it may be mentioned that clause (iii) of sub-section (1) prescribing the minimum amount of penalty in cases of concealment equal to the amount of income concealed came into force with effect from April 1, 1968 after its amendment by Finance Act of 1968 and would not ordinarily be applicable to the pending assessments for the assessment years prior to 1962-63 covered by Clause (g) of sub-section (2) of Sec. 297 because the assessments for those years would normally be completed before March 31, 1966 and the penalty proceedings would also be completed before March 31, 1968 by reason of the period of limitation prescribed for assessment and imposition of penalty (four years for assessment under the old Act and two years for penalty under the new Act). But this amended provision would catch in its net the assessments which are set aside on appeal or revision and are to be made afresh and also the cases where the penalty is imposed by the Appellate Assistant Commissioner of Income Tax where the reassessment is made or the appellate proceedings are concluded after April 1, 1968. This would bring about yet another sub-classification amongst the assesseees otherwise similarly situated. So long as Clause (g) is on the Statute book, such a situation cannot be prevented and there appears to be no good reason why persons falling in the above sub-classification should be subjected to the drastic treatment envisaged by the amendment of 1968. It is true that the petitioner does not fall in that category and in its case the penalty was imposed under the law as it stood prior to the amendment of 1968. That, however, makes no difference because in testing the constitutionality of a provision on the touchstone of Article 14 we are entitled to take into consideration all the consequences that may flow from the operation of the offending provision.

30. Assuming that the amendment of 1968 is to be left out of consideration, the position would be no better. Clause (iii) before its amendment stood as under:

"(iii) in the cases referred to in clause (c), in addition to any tax payable by him a sum which shall not be less than twenty percent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

The maximum limit is the same as under the old Act, but the condition with regard to the minimum penalty makes this provision more onerous, as we have already shown above.

31. The last major difference between the two sets of provisions is that while under the old Act immunity was given to an assessee from prosecution for a default in respect of which a penalty was imposed upon him (section 28 (4)) there is no such immunity under the new Act, so that for the same default an assessee may be penalised under Chapter XXI and may also be prosecuted and punished under Chapter XXII.

32. It is true that Clause (g) makes only the penal provisions of the new Act applicable and the provisions for prosecution contained in Chapter XXII, would not be attracted in pending cases. But in cases governed by Clause (g) the provision for prosecution contained in Section 52 of the old Act would be attracted by virtue of Section 6 of the General Clauses Act as has been held by the Supreme Court in *T. S. Baliah v. T. S. Rangachari*, Criminal Appeals Nos. 130 to 133 of 1968, D/- 12-12-1968 = (reported in AIR 1969 SC 701). The immunity granted by Section 28 (4) of the old Act would not be available in such case because the immunity under that provision is extended only to cases where penalty is imposed under the old Act. In cases falling under Clause (g) the penalty is impossible under the new Act.

33. Mr. Gopal Behari, learned counsel for the Department drew our attention to the fact that with regard to the penalty for non-payment of tax, the new Act is more liberal inasmuch as an appeal against such a penalty can be filed without depositing the arrears of tax while under the old Act such an appeal was available only after the tax had been paid. This, no doubt, is a minor advantage to the assesseees but it has no impact on the quantum of penalty. It merely makes the remedy of appeal more efficacious. We, therefore, hold that Clause (g) of Section 297 (2) is ultra vires.

34. The fourth and the last contention on behalf of the petitioner is that even if Clause (g) of sub-section (2) of Section 297 of the new Act is intra vires, Section 271 is inapplicable in terms and no penalty could have been imposed under that section. This contention of the learned counsel also appears to be well founded.

35. According to its opening words Section 271 applies only "if the Income-tax Officer or the Appellate Assistant Commis-

sioner, in the course of any proceeding under this Act", is satisfied that any person has committed the defaults enumerated in Cls. (a) to (c) of sub-section (1) of that section. The reference to "this Act" is to the new Act. The condition precedent for an action under this section, therefore, is the satisfaction of the officer concerned in the course of proceedings under the new Act. It has been noticed above that by virtue of Clause (a) of sub-section (2) of Section 297, the pending cases where the return was filed prior to April 1, 1962, were to be disposed of in accordance with the provisions of the old Act. In such cases there would be no proceedings under the new Act. In the instant case also the assessment was made under the old Act and the appeal was also instituted and disposed of under the old Act. The Appellate Assistant Commissioner of Income-tax who initiated the penalty proceedings and levied the penalty came to be satisfied about the concealment of income by the petitioner only in the course of the appeal which admittedly was under the old Act. In fact, no proceedings can be said to have been pending before him under the new Act. In the circumstances the initiation of the proceedings under Section 274 and the levy of penalty under Section 271 of the new Act was without jurisdiction.

36. It was suggested by the learned counsel for the opposite parties that the satisfaction referred to in Section 271 (1) may be reached by the authority concerned during the course of the proceedings for the imposition of penalty itself and that such proceedings can be initiated by a notice under S. 274 of the new Act. This contention is plainly wrong. A bare reading of Section 271 shows very clearly that the proceedings referred to in Section 271 during the course of which the authority concerned is to be satisfied about an assessee having rendered himself liable to penalty are proceedings other than the penalty proceedings. In fact, the penalty proceedings are taken in consequence of those proceedings. This is borne out by Section 275 which says that no order imposing a penalty shall be passed after the expiration of two years from the date of the completion of the proceedings in the course of which the proceedings for the imposition of penalty have been commenced. A similar phraseology is to be found in Section 28 of the old Act. Under that provision also the penalty could be imposed if the officer concerned was satisfied during the course of any proceeding that an assessee had rendered himself liable to penalty. There is ample authority for the proposition that when penalty is to be levied by the Income-tax Officer, the proceedings in the course of which he is to be so satisfied mean the assessment proceedings and similarly the Appellate Assistant Commissioner of Income Tax and the Income Tax Appellate Tribunal have to be satisfied

in the course of appellate proceedings pending before them. There was some doubt as to the time when penalty proceedings could be initiated. It was held by some High Courts that the officer imposing the penalty had to initiate the penalty proceedings before the proceedings giving rise to the penalty were completed.

37. The Supreme Court in *Commissioner of Income-tax, Madras v. S. V. Angidi Chethiar*, (1962) 44 ITR 739 = (AIR 1962 SC 970) has set at rest that controversy by holding that the satisfaction has to be acquired during the assessment proceedings where the penalty is to be imposed by the Income Tax Officer. Reference may be made to the following observations at page 745 (of ITR) = (at p. 974 of AIR):

"The power to impose penalty under Section 28 depends upon the satisfaction of the Income Tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in Clause (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income Tax Officer before the completion of the assessment proceedings by the Income Tax Officer. Satisfaction before conclusion of the proceedings under the Act, and not the issue of notice of initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income Tax Officer was not satisfied in the course of the assessment proceeding that the firm had concealed its income. The assessment order is dated the 10th of November, 1961, and there is an endorsement at the foot of the assessment order by the Income Tax Officer that action under section 28 had been taken for concealment of income indicating clearly that the Income Tax Officer was satisfied in the course of the assessment proceeding that the firm had concealed its income."

Moreover, in the instant case the contention that the Appellate Assistant Commissioner was satisfied about the default of the assessee in proceedings other than the appellate proceedings pending before him is factually incorrect inasmuch as in paragraph 24 of his appellate order dated April 5, 1965 he recorded his satisfaction thus:

"Since the assessee has concealed the particulars of his income and has deliberately furnished inaccurate particulars thereof, a notice under Section 274 of the Income Tax Act, 1961 has also been issued to show cause why penalty may not be imposed under Section 271 (1) (c) of the Act." This shows very clearly that his satisfaction was reached during the hearing of the appeal and he recorded the same in the appellate order itself.

38. We are also unable to agree with the argument that Section 297 (2) (g) is a charging section in the sense that penalty

can be imposed by its own force. Notwithstanding, the use in this provision of the expression "any such penalty may be imposed under this Act", it is merely an enabling provision. It provides for neither the measure of penalty nor does it contain the defaults in respect of which penalty may be levied nor indeed does it specify the authorities empowered to levy the penalty. All these provisions are to be found in Chapter XXI which becomes applicable by virtue of this provision.

39. The view that we are taking is supported by the Bombay High Court in (1967) 64 ITR 637 (Bom); by the Gujarat High Court in *Commr. of Income Tax v. Hira Lal Mohan Lal Shah*, (1968) 69 ITR 312 (Guj) and *D. M. Mansavi v. Commr. of Income Tax*, (1969) 72 ITR 17 (Guj) and by the Calcutta High Court in its unreported decision in *Narendra Sharma v. Income Tax Officer*, Matter No. 213 of 1966, D/- 5-3-1969 (Cal).

40. With respect we cannot subscribe to the contrary view taken by this Court in *Madan Mohan Damma Mal*, (1968) 70 ITR 293 (All) (supra); by the Madhya Pradesh High Court in *Kishan Lal v. Commr. of Income Tax, M. P.*, (1967) 64 ITR 285 (Madh Pra) and in *Commr. of Income Tax v. Champalal Sukhram*, (1969) 72 ITR 417 = (AIR 1969 Madh Pra 72) and the Delhi High Court in its unreported decision in *M/s. Jain Brothers v. Union of India*, Civil Misc. Writ No. 1247 of 1967, D/- 24-2-1969 (Delhi).

41. Lastly it was contended that no injustice had been caused to the petitioner inasmuch as the penalty of Rs. 10,000 ultimately levied by the Tribunal was less than the minimum of 20% prescribed by Sec. 271 and, therefore, this Court should not interfere. We are not impressed by this argument. Justice has to be done in accordance with law. If the penalty has been imposed with the aid of a provision which is unconstitutional and under a law which is inapplicable, the penalty is clearly unauthorised and without jurisdiction and cannot be upheld even if the amount of penalty happens to be less than the minimum prescribed under the law. Whether the penalty could be levied under the old Act is a question which does not arise in this case and need not be decided. Moreover, it is not possible to speculate as to what would have been the amount of penalty if the petitioner had been proceeded against under the old Act. In the circumstances, we are not prepared to accept the suggestion that the petitioner has not been prejudiced or that no injustice has been caused to him.

42. For the reasons stated above, we allow this petition and quash the order of the Appellate Assistant Commissioner dated December 31, 1966 (Annexure 6) and the order of the Income-tax Appellate Tribunal dated December 17, 1967 (Annexure 7) and

direct that the amount of penalty, if realised be refunded to the petitioner. The other reliefs claimed by the petitioner are refused.

43. In the circumstances of the case, we make no order as to costs.

SATISH CHANDRA, J.: 44. A Bench of this Court referred this writ petition to a Full Bench principally because it involved the constitutional vires of Section 297 (2) (g) of the Income-tax Act, 1961.

45. The petitioner is a partnership firm. It runs a flour, oil and rice mill at Bareilly. For the assessment year 1959-60 the firm filed a return on 29th December, 1959, showing a net profit of Rs. 22,674. On 1st February, 1962, the firm filed a revised return showing an overall loss of Rs. 3,940. The Income-tax Officer on 30th March, 1964, assessed the petitioner on a total income of Rs. 82,662. The petitioner preferred an appeal. At the hearing of the appeal the Income-tax Officer brought to the notice of the Appellate Assistant Commissioner that there were several discrepancies between the assessee's bank pass-books and the bank account in the Khata Bahi. The Commissioner asked the Income-tax Officer *inter alia* to check the bank accounts in the assessee's ledger for the financial year 1958-59 with their pass-books and submit a detailed report in regard to the discrepancies if any. The Income-tax Officer submitted a report on 30th December, 1964. The Appellate Assistant Commissioner felt that there were large amounts of undisclosed income. He consequently issued a notice of enhancement to the assessee on 14th January, 1965. The petitioner firm in its reply to the notice admitted concealment to the extent of Rs. 56,000. The Commissioner examined the matter in detail and came to the conclusion that the unexplained amounts of deposits, remittances and expenses came to Rs. 1,03,500. This represented the petitioner's concealed income from undisclosed sources. Ultimately he assessed the petitioner's total income at Rs. 1,69,350. At the end of his order dated 5th April, 1965, the Commissioner held that since the assessee had concealed the particulars of its income and deliberately furnished inaccurate particulars thereof, a notice under Section 274 of the Income-tax Act, 1961, was also being issued requiring the assessee to show cause why penalty may not be imposed under Section 271 (1) (c) of the Act. The same day the requisite notice was issued to the assessee.

46. The petitioner went up in appeal to the Tribunal. The Tribunal by its order dated 18th June, 1966, reduced the amount of income from undisclosed sources, which was fixed by the Commissioner at Rs. 1,03,500 to Rs. 80,000. It also made certain alterations in other items and the total assessable income of the petitioner was fixed at Rs. 1,07,902.

47. On 29th December, 1966, the petitioner filed a reply to the penalty notice. He took the plea that in view of the assessable income as finally determined by the Tribunal and in view of the fact that certain items were still disputed by way of reference, if the disputed amounts are excluded, then the income as finally determined by the Tribunal remains the same as assessed by the Income-tax Officer. As the firm had already been heavily assessed, it requested that a lenient view of the case be taken and it may be exempted from the imposition of penalty.

48. In his order dated 31st December, 1966, the Appellate Assistant Commissioner held that this is a case where concealment of income of at least Rs. 80,000 had not only been established but also admitted by the assessee. It was a case of deliberate concealment of income to which clause (c) of Section 271 (1) of the Act was attracted. He imposed a penalty in the sum of Rs. 52,500. The Commissioner observed that this sum was equal to nearly half of the maximum amount of penalty leviable in this case. The petitioner felt aggrieved and went up in appeal to the Tribunal. Before the Tribunal it was argued for the assessee that Section 297 (2) (g) of the Income-tax Act, 1961, violated Article 14 of the Constitution. This plea was repelled by the Tribunal on the strength of the Supreme Court decision in (1960) 60 ITR 112 = (AIR 1966 SC 1089) in which it was held that the authorities created under a statute could not consider questions relating to the constitutional vices of that Act. The Tribunal, therefore, declined to go into this question. On the basis of several decided cases of various High Courts, the Tribunal held that the findings reached in assessment proceedings as to the undisclosed income, were prima facie sufficient to support a finding on that question in penalty proceedings, though such findings are not conclusive. It then observed that "the assessee has not brought on record any material to show that the finding arrived at in the assessment proceedings was erroneous". It held that those findings were rightly acted upon in these proceedings. The Tribunal observed that after giving anxious thought to the question of the amount of penalty the ends of justice would be met by imposing a penalty of Rs. 10,000 only. This order of the Tribunal dated 17th December, 1967, is sought to be quashed in the present writ petition.

49. It appears that the petitioner applied for reference to the High Court of several questions of law arising out of the Tribunal's order passed in the assessment proceedings. The Tribunal on 15th September, 1967, referred one question of law relating to the credit balance in the petitioner's sales tax account, which had been treated as an income. The petitioner filed an application in this Court under Section 66 (2) of the Income-tax Act, 1922, for reference of two

other questions of law relating to items of income which had been added to the trading account and on account of the personal expenses of the partners. No other finding appears to have been challenged in this application. This application was rejected by this Court on 13th February, 1968.

50. In the writ petition the petitioner has prayed that the order of the Appellate Assistant Commissioner as well as of the Tribunal passed in assessment proceedings be quashed in so far as they relate to the addition of income on the finding that it was concealed income from undisclosed sources. The order of the Commissioner merged in that of the Tribunal. The order of the Tribunal dated 18th June, 1966, was specifically questioned by the petitioner by way of an application under Section 66 (2). This Court dismissed that application on 13th February, 1968. Thus, the orders on the regular assessment side have become final so far as this Court is concerned. They cannot be questioned in this Court even under Article 226 of the Constitution.

51. Mr. Raja Ram Agarwal, appearing for the petitioner attacked the orders passed in penalty proceedings on the following grounds:—

1. The finding that there was concealment of income in the assessment proceedings was without jurisdiction and could not form the basis of penalty proceedings.

2. Section 297 (2) (g) of the Income-tax Act, 1961, violates Article 20 (1) of the Constitution.

3. Section 297 (2) (g) infringes the guarantee of equality enshrined in Art. 14 of the Constitution.

4. Section 271 of the Act was inapplicable.

52. In my opinion the petitioner is not entitled to raise the first ground. The Income-tax Act provides for a reference for the opinion of the High Court of a question of law arising out of the order of the Tribunal. The Supreme Court in *Commr. of Income Tax v. Scindia Steam Navigation Co. Ltd.*, (1961) 42 ITR 589 = (AIR 1961 SC 1633) held that a question of law not raised before the Tribunal and not dealt with by it in its order cannot be said to arise out of its order, even if on the facts of the case stated in the order, the question fairly arises. The same view was taken by the Supreme Court in *Ramanathan Chettiar v. Commr. of Income Tax*, (1967) 63 ITR 458 = (AIR 1967 SC 657 and *T. D. Kumar and Brothers (P.) Ltd. v. Commr. of Income Tax*, (1967) 63 ITR 67 (SC). When Parliament has enacted that a question of law ought to be raised before the Tribunal before the High Court can give an opinion on it, it will not be right for this Court to circumvent the legislative mandate, by exercising the discretionary jurisdiction in favour of an assessee who did not raise the question before the Tribunal, either in the assess-

ment or the penalty proceedings, and who has not in the present petition given any explanation for the omission. This Court has held that a litigant is not entitled to raise a question of jurisdiction for the first time in a writ petition unless he satisfactorily explains why he did not raise the plea before the appropriate authority. (See *J. K. Iron & Steel Co. Ltd. v. Labour Appellate Tribunal*, AIR 1953 All 624, Supdt. of Police v. R. M. Singh, AIR 1959 All 710 and *K. N. Halwai v. Registrar Co-operative Society U. P.* (Relying on *Pannalal Binraj v. Union of India*, AIR 1957 SC 397 at p. 412)).

53. Clause (g), Section 297 (2) of the Income-tax Act, 1961, makes the new Act applicable to penalty proceedings in respect of an assessment for the year ending on 31st March, 1962, or any earlier year, provided the assessment is completed on or after 1st April, 1962. It was urged that this provision violates Article 20 (1) of the Constitution because the new Act provides for a greater penalty than that which might have been inflicted under the law in force at the time of a commission of the offence. Section 28 of the 1922 Act did not prescribe any minimum, whereas clause (iii) of Section 271 (1) (c) of the 1961 Act prescribes that a minimum of 20 per cent of the penalty must be imposed. The maximum penalty is the same under the old as well as the new Act for some classes of defaults, while it is lower now for other classes. Even this minimum can be waived or reduced by the Commissioner under Section 271 (4-A). Previously it was left to the Income-tax Officer to determine the reasonable amount of penalty to be awarded in each case, but under the new Act, Parliament by fixing a minimum seems to say that anything below it will not be reasonable. This is only guiding the discretion of the officer, and not imposing a greater penalty.

54. The Supreme Court in *K. Satvant v. State of Punjab*, (1960) 2 SCR 89 at pp. 111, 113 = (AIR 1960 SC 266 at pp. 276, 277) held that a law which provides for a minimum sentence of fine on conviction cannot be read as one which imposes a greater penalty than that which might have been inflicted under the law under which there was no limit as to the extent of the fine. This Court in (1968) 70 ITR 293 (All) and the High Courts of Kerala in *P. Ummali Umma v. Inspecting Assistant Commr. of Income-tax*, (1967) 64 ITR 669 (Ker) and Bombay in (1967) 64 ITR 637 (Bom) and Rajasthan in *Indra & Co. v. Union of India*, (1967) 64 ITR 664, have held that the Act of 1961 does not provide for a greater penalty. So, Article 20 of the Constitution is not violated.

55. But assuming that the new Act tends to impose a greater penalty, yet Article 20 would not be attracted to penalty proceedings. Article 20 (1) states:—

“20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.....”

The Supreme Court in AIR 1953 SC 325 observed that:—

“Article 20 (2) incorporates within its scope the plea of ‘autrefois convict’ as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribes it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.”

It held that the article contemplates proceedings of the nature of criminal proceedings and the prosecution in this context means an initiation of proceedings of a criminal nature. The first part of Article 20 (1) prohibits a conviction while the second part deals with penalty that may be inflicted on conviction. The word “penalty” has been used to denote the sentence of punishment. Like sub-article (2), sub-article (1) also contemplates proceedings of a criminal nature.

56. It is well known that the Legislature can impose both a criminal as well as civil sanction for the same act or omission. In *Halvering v. Mitchell*, (1938) 303 US 391, it was held that civil sanctions are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-payer's fraud. Similarly Jackson J. said in *Spies v. United States*, (1943) 317 US 492 that the civil sanction consists of additions to the tax upon determinations of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt, whereas criminal sanction consists of penal offences enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other. Relying upon these decisions the Kerala High Court in *P. Ummali Umma's case*, (1967) 64 ITR 669 (Ker) held that the object of the penalty proceedings was to render evasion unprofitable and to secure to the State compensation for damages caused by attempted evasion.

57. Chapter XXI of the 1961 Act deals with penalty. A separate chapter No. XXII provides for offences and prosecutions. Penalty is imposed by the revenue authorities. Prosecution for the offences has to be launched, in view of Section 292, in the regular criminal court, which alone can convict and sentence. The authorities impose

penalty if they are satisfied that a default has been committed. The revenue does not have to prove its case beyond all reasonable doubt. In prosecution under Chapter XXII the Revenue will have to prove its case beyond all reasonable doubt, because that is a fundamental principle prevailing in the criminal courts. All these features indicate that prosecutions under Chapter XXII are criminal proceedings, but penalty proceedings constitute a civil sanction. They are Revenue in nature, to which Art. 20 of the Constitution does not apply.

58. The next submission of Mr. Agarwal, learned counsel for the petitioner, was that section 297 (2) (g) of the Act violated Article 14 of the Constitution. It was urged that the penalty provisions of the 1961 Act are more onerous and adverse to the assessee in comparison to the penalty provisions of the 1922 Act. Section 297 (2) (g) classifies assessee for application of the 1961 Act without any reasonable basis. The vice of discrimination is hence imported into this provision. The learned counsel relied upon the decision of the Bombay High Court in (1967) 64 ITR 637 (Bom) where this submission was accepted.

59. Section 297 of the Income-tax Act of 1961 provides for repeals and savings. Sub-section (1) repeals the Income-tax Act of 1922. Sub-section (2) mentions the saving clauses. Clauses (a), (f) and (g) are relevant. They state—

"2. Notwithstanding the repeal of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act):—

(a) where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed;

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act;

These provisions classify the application of the new Act on the basis of the date of filing the return for purposes of assessment proceedings, and the date of the completion of the assessment, for purposes of initiating and imposing penalty.

60. In AIR 1952 SC 75 S. R. Das, J. (page 93) observed that Article 14 forbids class legislation in the sense of making im-

proper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed. The question hence would be whether the new Act confers greater privileges on the Revenue or imposes more onerous liabilities on the assessee than the 1922 Act? If no, Article 14 will not be attracted.

61. In the present case we are concerned with the provisions of the 1961 Act as it stood prior to the 1968 amendments. The acts and omissions for which penalty can be levied are the same under both the 1922 and the 1961 enactments. In matters of procedure and consequence the two Acts differ.

62. Kanga and Palkhivala's Commentary on the 1961 Act (5th Edition, p. 938) states:—

"The main changes effected by this section namely Section 271 and Sections 274 and 275 are as follows:—

(a) Unlike Section 28 of the 1922 Act, this section does not confer any power on the Appellate Tribunal to impose a penalty.

(b) In cases of concealment of income where the minimum penalty imposable exceeds Rs. 1,000 the Inspecting Assistant Commissioner alone is empowered to impose a penalty (S. 274 (2)), whereas under the 1922 Act the Income-tax Officer had the power to impose a penalty even in such cases.

(c) Under the 1922 Act the Income-tax Officer could not impose any penalty without the previous approval of the Inspecting Assistant Commissioner. Under this Act the Income tax Officer does not have to take the sanction of the Inspecting Assistant Commissioner in any case.

(d) This section provides that in certain cases if any penalty is imposed, it should not be less than the minimum prescribed; there was no such minimum prescribed under the 1922 Act.

(e) The maximum penalty imposable has been reduced in cases falling within Cls. (a) and (b) of Section 271 (1).

(f) There was no time limit for commencement of penalty proceedings under the 1922 Act. This Act requires penalty proceedings to be commenced before the completion of those proceedings in which the Income-tax Officer or the Appellate Assistant Commissioner is satisfied that the default attracting a penalty has been committed (S. 275).

(g) There was no time limit in the 1922 Act for the passing of a penalty order, but a time limit is now imposed by Section 275.

(h) No prosecution could be instituted under the 1922 Act in respect of the same facts on which a penalty was imposed. Under this Act a penalty can be imposed and a prosecution launched on the same facts."

Mr. Gopal Behari, appearing for the Department, pointed out that in addition, it

may be stated that the minimum prescribed penalty can be waived or reduced by the Commissioner under the new Act (vide section 271 (4-A)). Another significant departure relates to appeals. Under the proviso to Section 30 of the 1922 Act, no appeal lay against an order imposing a penalty under Section 46 (1), unless the tax had been paid. There is no such fetter to the right of appeal against similar orders under the 1961 Act.

63. The Bombay High Court in Shakti Offset case, (1967) 64 ITR 637 (Bom) held (page 650):—

"In our opinion, the protection that is given to an assessee governed in the matter of penal proceedings under the Act of 1922 in the Income-tax Officer not being able to initiate proceedings or inflict penalties except after concurrence of the Inspecting Assistant Commissioner is a valuable guarantee given to the assessee. Similarly, the immunity from prosecution on the basis of facts which have led to a penalty being imposed under S. 28 of the Act of 1922, which is absent from the provisions of the Income-tax Act of 1961, is a material departure from the scheme of liability for the penalty under the two Acts. These features along with the provisions of punishment cannot therefore be lost sight of in a case where there is any ground for complaint of discrimination between two assessee similarly situated."

Thus, the immunity from prosecution and sentence, and the inter-position of a superior officer like the Inspecting Assistant Commissioner for initiating penalty proceedings, were considered to be the main privileges available to the assessee under the old Act, which have been taken away by the new Act and, therefore, the new Act was held to be more onerous.

64. The Act of 1961 is prospective. Section 297 (2) states the exceptions. Clause (g) makes the penalty provisions of this Act operate retrospectively. Section 297 (2) does not touch Chapter XXII which deals with offences and prosecutions. This chapter also operates prospectively, and will not apply to past acts or omissions. The provisions in Chapter XXII expressly make acts and omissions mentioned in the various stated sections of the 1961 Act as offences. There is no provision anywhere in the 1961 Act which makes punishable, defaults or omissions in relation to the provisions of the 1922 Act. An assessee covered by Section 297 (2) (g) does not become liable to prosecution under the new Act.

65. In the case of T. S. Baliah, C. A. Nos. 130 and 133 of 1968, D/- 12-12-1968 = (reported in AIR 1969 SC 701) the Supreme Court has held that Section 297 (2) was not exhaustive. There was nothing in that provision or in any other provision of the 1961 Act which expressed an intention to exclude the application of Section 6, General Clauses Act. Hence that section will apply

to the repeal of the 1922 Act. The provisions of the 1922 Act, which provided for prosecution (like section 52) would survive the repeal and would be available for dealing with the liability to prosecution incurred prior to the repeal. It may be said that since, in view of Clause (g) of Section 297 (2) penalty would be impossible on him under the 1961 Act, his case would not be governed by Section 28 (4) which provides that an assessee will not be liable to prosecution for the same acts or omissions for which a penalty has been imposed "under this section". In such a case penalty is not imposed under Section 28 and, therefore, he will be liable to prosecution, though if his assessment had been completed before 1st April, 1962, he would have been immune from prosecution in view of Section 28 (4).

66. According to this Supreme Court decision the prosecution provisions of the old Act survive the repeal. Section 28 (4) provides a condition precedent to the launching of prosecutions. That section would necessarily survive the repeal.

67. The liability to penalty is incurred under Section 28 when the default is committed. But, though the liability was incurred under Section 28 of the old Act, Clause (g) of Section 297 (2) enables the proceedings to be taken therefor under Section 271 of the new Act. Thus, the award of penalty is the result of the combined action of Section 28 of the old Act and Section 271 of the new Act. In the eye of law the penalty is imposed under Section 28 read with Section 271. Thus, such a case would also be within the ambit of S. 28 (4) and where penalty has been so imposed, the assessee cannot be prosecuted on the same facts. The assessee remains immune from prosecution as before.

68. As regards the inter-position of the Inspecting Assistant Commissioner under the 1922 Act, the position is, in my opinion, no worse under the new Act. Previously the Income-tax Officer had to refer every case to the Inspecting Assistant Commissioner for sanction to initiate penalty proceedings. After sanction he decided every case himself. In view of Section 274 (2), in cases of concealment of income, which is really the substantial head for imposition of penalty, the Income-tax Officer has to refer to the Inspecting Assistant Commissioner every case entirely if the minimum penalty impossible exceeds Rs. 1,000. So except in petty cases, the Income-tax Officer cannot take action himself. A superior officer like the Inspecting Assistant Commissioner has to initiate and complete the proceedings. So, in a majority of cases, the inter-position is more effective. The safeguard to the assessee is beneficial rather than onerous and he cannot complain of discrimination.

69. In Charanjit Lal Chowdhury v. Union of India, AIR 1951 SC 41, S. R. Das, J. (page 66) observed:

"It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary'."

That being the test, could it be said that leaving to the Income-tax Officer the discretion to initiate proceedings himself in petty cases, is palpably unreasonable and arbitrary? Before answering this query, the impact of the other changes, on the assessee, may also be noted

70. Previously penalty proceedings could not only be initiated, but also completed, without any limit of time. The assessee was perpetually under this threat; but under the new Act they cannot be commenced after the completion of the proceedings, in the course of which the satisfaction was reached. Further, the new Act has imposed a limit of two years from the date of the completion of the assessment, for completing penalty proceedings. In this respect Parliament has provided to the assessee, a safeguard of great magnitude. Then, if an assessee has crossed through the stages of the Income-tax Officer and the Appellate Assistant Commissioner, he is immune, because he is in no danger of facing penalty proceedings at the instance of the Appellate Tribunal under the new Act, though he was liable to an action by the Tribunal also under the 1922 Act. This is another concession to the assessee. Again, under the old Act as assessee could not appeal against an order imposing penalty under Section 46 (1) without paying the tax, while under the new Act he has an unfettered right of appeal against a similar order. Here also the Legislature has relaxed the provisions in favour of an assessee. These substantial safeguards given to an assessee, in my opinion, more than offset the sting of the loss of immunity from an action of penalty being taken by the Income-tax Officer himself in some cases. As seen above, the prescribing of a minimum does not impose a greater burden on the assessee.

71. It may be said that previously the penalty was imposed by the Income-tax Officer; the assessee hence had two rights of appeal. Now the penalty is imposed by the Appellate Assistant Commissioner. He stands to lose a right of appeal. The new Act, therefore, adversely affects the assessee. This is true; but, on the other hand, the assessee gains the advantage that the proceedings for penalty are not taken by the same officer who had already recorded a finding against the assessee on the question of concealment of income which is the basis for the penalty. Under the new Act the penalty proceedings are initiated not only by a superior officer but by an officer who cannot be deemed to have pre-judged the issue and who would apply a fresh mind to the case. This, in my

opinion, balances the loss of one right of appeal

72. Looking broadly, Parliament did not change the substantive provisions. Penalty was even now impossible for the same acts or omissions; but the machinery has been tightened to make the scheme more fair and efficient. I am unable to hold that the new Act confers better privileges upon the revenue or imposed greater liabilities on the assessee on the topic of penalty. The inequality produced by the new Act, if any, is not palpably unreasonable or arbitrary. Section 297 (2) (g) has not been enacted with an evil eye and an unequal hand. It does not import the vice of discrimination.

73. Even if it is assumed for the sake of argument that the new Act is more prejudicial to the assessee, the further question would be whether the classification is invalid. The Supreme Court has formulated several principles to determine the validity of classifications for the purposes of Article 14 of the Constitution. It has been laid down that:

1. In permissible classification mathematical nicety and perfect equality are not required. Similarly, not identity of treatment, is enough. *State of Bombay v. F. N. Balsara*, 1951 SCR 682 at pp. 709-10 = (AIR 1951 SC 318 at pp. 326-327) and 1952 SCR 284 at pp. 349-50 = (AIR 1952 SC 75 at pp. 98-99).

2. The legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. (*R. K. Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538, proposition (d)).

3. It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. (*Dalmia's case*, AIR 1958 SC 538 proposition (c)).

4. In order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived (*Dalmia's case*, AIR 1958 SC 538 proposition (e)).

5. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like (*Dalmia's case*, AIR 1958 SC 538).

6. Permissible classification must satisfy two conditions, namely,

(i) it must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group, and

(ii) the differential must have a rational relation or nexus to the object sought to be achieved by the statute, (AIR 1951 SC 41, AIR 1955 SC 191).

7. If the two tests are satisfied it is not for the courts to see to the wisdom of the basis

for the classification. It may be demonstrated that the scheme is not the best in the circumstances, and the choice of the legislature may be shown to be erroneous, but the classification will not be subject to judicial interference on these grounds (vide *Shah, J.*, speaking for the majority in AIR 1967 SC 691 paragraph 27).

8. A general classification cannot be justified on the basis of exceptional cases: Civil Appeal No. 1832 of 1968, decided by the Supreme Court on 12-12-1968 (SC).

(In other words, general classification cannot fail because of exceptional cases.)

9. Tax Laws are not immune from Article 14, but in the application of the principles of classification the Courts, in view of the inherent complexity of fiscal adjustment to diverse elements, permit a larger discretion to the Legislature in the matter of classification. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. (*Khandige Sham Bhat v. Agricultural Income-tax Officer*, AIR 1963 SC 591).

Thus, it is for the legislature to choose the basis for classification. It is not for the Courts to judge whether the chosen basis was the best or the wisest or a different basis may have served the purpose better.

74. The Courts are confined to seeing that the twin tests of differentia and nexus are satisfied. The classification would, therefore, not be bad simply because the legislature chose the event of completion of the assessment to be the basis of the classification of assessee, for penalty proceedings, though the date of the filing of the return may have been better, and though the latter was fixed for classifying assessment proceedings.

75. In (1968) 70 ITR 293 (All) this Court upheld the classification underlying Cl. (g) of Section 297 (2) of the Act. *Bishambhar, Dayal, J.* observed that:—

“Since penalty has to be calculated and then imposed according to the tax assessed, the penalty being proportionate to the tax, the imposing of penalty must necessarily follow the assessment. The question of imposition of penalty thus arises after the assessment has been completed and, therefore, the provision that in cases where assessment has been completed after the new Act had come into force, the penalty would be imposed according to the new Act, appears to be a reasonable classification.”

So, the event which enabled the impossible penalty to be found out was considered an intelligible differentia. It had, nexus, because it enabled the application of the new Act.

76. It is well known that generally the finding regarding satisfaction that the default attracting penalty has been committed, is recorded in the assessment order. The event of the completion of the assessment hence crystallises or fixes the liability for

drawing up proceedings for penalty. It furnishes a material part of the cause of action for it. The fact that a material part of the cause of action has accrued before or after the commencement of the new Act is a quality or characteristic or differentia which is intelligible, for founding the classification of assessee for initiating penalty proceedings under the old or the new Act. This differentia is rationally related to the object of Clauses (f) and (g), namely to apply the Act which was in force when penalty proceedings are normally to commence. In those cases where the proceedings are to be drawn up after the commencement of the new Act, the provisions of the new Act were made applicable. This classification satisfies the twin tests and is valid. The view of this Court in (1968) 70 ITR 293 (All) that Cls. (f) and (g) does not violate Article 14 of the Constitution has been accepted by the Delhi High Court in Writ Petn. No. 1247 of 1967, D/- 24-2-1969 (Delhi) and the Madhya Pradesh High Court in *Gopichand Sarjuprasad v. Union of India*, (1969) 73 ITR 263 = (AIR 1969 Madh Pra 220). These Courts have dissented from the Bombay view expressed in *Shakti Offset case*, (1967) 64 ITR 637 (Bom). I think the consensus of opinion is better.

77. Mr. Agarwal appearing for the petitioner relied upon the decision of the Supreme Court in AIR 1967 SC 691. There the majority struck down Section 33 of the Payment of Bonus Act, 1965, as infringing Article 14 of the Constitution. Under it the classification was based on the pendency of disputes. It was held that this basis was under the peculiar circumstances neither logical nor reasonable. That case is, in my opinion, not applicable because the classification in the present case is not dependent upon the pendency of a dispute, but upon the occurrence of a material part of the cause of action for penalty proceedings.

78. However, a classification which is not valid for one purpose may nonetheless be valid for another. The classification of assessee on the basis of pending proceedings and fresh proceedings was upheld by the Supreme Court in AIR 1951 SC 97. Similarly a classification based on pending proceedings was held valid by this Court in AIR 1963 All 451. This case related to Sec. 3 of the Income-tax (Amendment) Act of 1950.

79. In *M. Parmanand v. Addl. Income-tax Officer*, AIR 1958 Mys 70, the Income-tax (Amendment) Act (XXV of 1953) was challenged as discriminatory. The basis of classification for applying the amended Act was the event of the completion of the assessment. The classification was upheld by the Mysore High Court.

80. The last submission raised on behalf of the petitioner was that Section 271 while, on its terms, does not apply to the present case. Under S. 271 (1) (c) penalty can be levied if the officer is satisfied (that the asses-

see has concealed income) in the course of proceedings under this Act. Hence, this section will not apply where the satisfaction is reached in the course of the proceedings under the 1922 Act, as in the present case. The second ground emphasised was that under Clauses (a) and (b) of Section 271 (1) penalty can be imposed for omissions or defaults in relation to the mentioned sections of the Act of 1961 alone and not for non-compliance with the provisions of the old Act. This submission was accepted by the Gujarat High Court in (1968) 69 ITR 312 (Guj) and (1969) 72 ITR 17 (Guj), but was rejected by this Court in (1968) 70 ITR 293 (All) and by the Madhya Pradesh High Court in (1967) 64 ITR 285 (Madh Pra) as well as in (1969) 73 ITR 263 = (AIR 1969 Madh Pra 220).

81. In Gopichand's case, (1969) 73 ITR 263 = (AIR 1969 Madh Pra 220) (supra) the Madhya Pradesh High Court held that after the commencement of the Act of 1961 assessment proceedings initiated under the 1922 Act were allowed to continue under it only by force of Section 297 (2) (a) of the Act of 1961, and hence they were proceedings under the 1961 Act itself; consequently, the satisfaction reached by the Income-tax Officer about the concealment of the income on the part of the assessee attracting penalty was in the course of proceedings under the 1961 Act. With respect, this reasoning appeals to me. But the matter may be considered from the alternative view point that such proceedings are not "under this Act."

82. Section 297 (2) (g) not only authorises the initiation of proceedings but also expressly empowers the imposition of the penalty. It is hence in the nature of a charging provision as well. It makes the penalty provisions operate retrospectively, because it empowers the imposition of penalty under the Act of 1961 for defaults committed before its commencement. Section 271 on its terms authorises the levy of penalty if the satisfaction is reached in the course of assessment proceedings held under the Act of 1961. Clause (g) however applies Sec. 271 to cases where the satisfaction is reached in proceedings held under the old Act. These are mutually conflicting provisions on the same subject. They cannot co-exist or stand together. In this situation the doctrine of implied repeal will apply. The doctrine says that when two provisions on the same subject-matter directly collide, that is obedience to one is not possible without disobedience to the other, and the co-existence of the two is destructive of the object sought to be achieved by the later enactment, then the earlier provision is repealed. The basis of this doctrine is that the legislature is presumed to know the existing law, and it is not deemed to intend to create confusion in the law by retaining conflicting provisions in the statute. In applying the doctrine, the

Courts do no more than give effect to the intention of the legislature (see *Municipal Council Palai v. Joseph*, AIR 1963 SC 1561 1565 (Para 10)). When repeal operates by implication, the earlier provision goes, to the extent of repugnance (see *Zaverbhai Amaldas v. State of Bombay*, AIR 1954 SC 752 (Para 11)). Section 297 (2) (g) comes later in the Act. It will repeal the offending part of section 271. The troublesome words in Section 271 are "under this Act" occurring in the phrase "in the course of proceedings under this Act." They will be deemed non-existent in the application of Section 271 to cases governed by Section 297 (2) (g).

83. It is often said that Courts do not favour implied repeal. The doctrine is not applied unless the two provisions cannot be reconciled. One rule of construction relating to conciliation was laid down by the Madras High Court in *Rangiah v. Appaji Rao*, AIR 1927 Mad 163. At page 164 the Bench held:—

"It is a well known canon of construction that the Courts should construe the provisions of legislative enactments in such a way as not to impute inconsistency to the Legislature. Where the provisions are reconcilable the Courts should try to reconcile. They should not attach importance to a single phrase or clause in one section and overlook the clear provision in other sections which are of a general character." This principle may well apply here. For cases covered by Cl. (g), the words "under this Act" in section 271 will have to be disregarded.

84. The same kind of thing was said by the Madhya Pradesh High Court in *Kishanlal's case*, (1967) 64 ITR 285 (Madh Pra) while dealing with the argument that Cls. (a) and (b) of Section 271 (1) entitle the imposition of penalty only if there has been a default in relation to sections like 139, 142, 143 and 148 of the 1961 Act, which are expressly mentioned in them. The Court observed that the defaults for which penalty can be imposed under the various clauses of Section 28 of the 1922 Act are precisely the same for which penalty can be levied under Section 271 (1) of the 1961 Act. It was held that:—

"The substance of the matter is the nature of the acts and omissions of the assessee for which he is liable to penalty and not the particular provisions, whether of the 1922 Act or the 1961 Act, under which the assessee is required to do those acts or is restrained from doing them."

It was then observed that Section 271 (1) has to be construed in harmony with Section 297 (2) (g), and not in a manner so as to render Clause (g) meaningless or redundant.

85. Be that as it may, this argument cannot be used by the petitioner. Here Cl. (c) of Section 271 (1) is applicable. This clause states:—

"(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income."

This clause does not refer to any section of any Act. Its application cannot be ousted on this ground.

86. Even if it is held that technically Section 271 was not attracted and only Section 28 of the old Act could be used, yet the petition cannot succeed. The Appellate Assistant Commissioner said that a penalty of Rs. 52500 was nearly half of the maximum leviable. The Tribunal reduced it to Rs. 10,000 which was much below the minimum of 20% prescribed by Section 271. If the petitioner had raised the technical objection that Section 271 was not applicable in reply to the show cause notice, the Revenue may have satisfied this objection by taking proceedings under Section 28 of the old Act. As seen above, there is no limitation for penalty proceedings under the old Act. Penalty can even now be levied under the old Act. The petitioner cannot escape altogether. He cannot be heard to say that Rs. 10,000 (merely 10% of the maximum) was not reasonable for deliberate concealment. Article 226 of the Constitution confers a discretionary jurisdiction. It is to be exercised primarily to advance the interests of justice, and not merely to feed a technicality. The findings as to concealment are clear. No material whatsoever was adduced by the petitioner to prove his innocence. The petitioner has already paid the amount of penalty. Even if it be held that Section 28 of the old Act and not Section 271 of the new Act was applicable, this will, in my opinion, not be a fit case for interference.

87. In the result, the petition fails and is dismissed with costs.

BY THE COURT

In view of the majority opinion the petition is allowed. The order of the Appellate Assistant Commissioner dated 31st December, 1966, and of the Income Tax Appellate Tribunal dated 17th December, 1967, are quashed. The amount of penalty, if realised, will be refunded to the petitioner. The other reliefs claimed by the petitioner are refused. There will be no order as to costs.

Petition allowed.

AIR 1970 ALLAHABAD 641 (V 57 C 90)

FULL BENCH

S. K. VERMA, R. S. PATHAK AND
T. P. MUKHERJEE, JJ.

Commissioner Sales Tax, U. P., Applicant
v. Sukan Chand Shyam Lal, Agra, Opposite
Party.

Sales Tax Ref. No. 551 of 1967, D/- 21-5-1970.

Sales Tax — U. P. Sales Tax Act (15 of 1948), Sections 7 (3) and 21 — Failure to

HN/HN/D603/70/CWM/P

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furnish return — Proceeding under Sec. 7 (3) not without jurisdiction — Assessment under Section 7 (3) cannot be considered as one under Section 21.

On failure of assessee to furnish his return, the turnover "escapes" assessment and it is open to the Sales Tax Officer to proceed either under Section 7 (3) or under Sec. 21. When he proceeds under Section 7 (3) and makes an assessment he acts within his jurisdiction and the assessment made under Section 7 (3) cannot be considered as made under Section 21. Sales Tax Ref. No. 397 of 1961, D/- 30-7-1963 (All) Observation of Desai, J., held overruled by AIR 1968 SC 565.

(Para 9)

It cannot be said that Section 7 (3) can be invoked only when a return has been filed though not in time while a case where a return has not been filed at all falls under Section 21. There is no provision entitling an assessee to furnish a return beyond the time allowed by the statute. Unless the date for submission of the return is extended under Section 7 (1), there is no obligation upon the Sales Tax Officer to consider the return filed out of time.

(Para 11)

Cases Referred: Chronological Paras

(1970) 25 STC 74 = 1970 MPLJ 573,

Addl. Asst. Commr. Sales Tax v.

Firm Jagmohandas Vijay Kumar

8

(1968) AIR 1968 SC 565 (V 55) =

(1968) 21 STC 326, Anandji Haridas

and Co. (P.) Ltd. v. S. P. Kasture

6, 7,

9, 10

(1964) AIR 1964 SC 766 (V 51) =

(1963) 14 STC 976, Ghanshyam

Das v. Regional Asst. Commr. of

Sales Tax

3, 7, 9

(1963) Sales Tax Ref. No. 397 of

1961, D/- 30-7-1963 (All), Kishan

Lal Gopi Krishna v. Commr. of Sales

Tax

3, 10

Standing Counsel, for Applicant; K. N. Seth, for Opposite Party.

PATHAK, J.:— This is a reference under Section 11 (1) of the U. P. Sales Tax Act on the following question:

"Whether under the facts and circumstances of the case the proceedings for assessment in this case should not have been taken to be the proceedings for "escaped assessment" under Section 21 of the U. P. Sales Tax Act and should have been held to be only the first assessment under rule 41(5) of the U. P. Sales Tax Rules as mentioned in the notice for assessment issue to the assessee?"

2. The assessee is a partnership firm which appears to have enjoyed a brief period of existence only. Business was commenced on February 13, 1957 and was closed on July 8, 1957. The dissolution of the firm followed on October 5, 1957. Admittedly, notice of the dissolution was not conveyed to the sales tax authorities.

3. The assessee did not file any return of its turnover under the U. P. Sales Tax Act

for the period during which it had carried on business during the assessment year 1957-58. On March 11, 1959, and again on May 20, 1959 two notices were issued by the Sales Tax Officer purporting to be under Rule 41 (5) of the U. P. Sales Tax Rules. They were followed by a third notice dated November 2, 1960. The firm having been dissolved all the notices were served, it is said, by affixation to the last known place of the business. On December 1, 1960, the Sales Tax Officer made an ex parte assessment order, purporting to be under Rule 41 (5). The assessment order was set aside in appeal and the case was remanded for fresh assessment. The assessee applied in revision and contended that the entire assessment proceedings should have been annulled and the remand order was contrary to law. The revision application was allowed by the Additional Judge (Revisions) Sales Tax. The Additional Judge (Revisions) held, relying upon *Ghanshyam Das v. Regional Asstt. Commr. of Sales Tax*, (1963) 14 STC 976 = (AIR 1964 SC 766) that as no return had been filed by the assessee it was a case where the turnover had escaped assessment and, therefore, the proceeding lay under Section 21 of the Act. In adopting this view, the additional Judge (Revisions) declined to follow the decision of this Court in *Kishan Lal Gopi Krishna v. Commr. of Sales Tax*, Sales Tax Ref. No. 397 of 1961, D/- 30-7-1963 (AIL). Accordingly, he allowed the revision application and quashed the entire proceeding for the assessment year 1957-58. At the instance of the Commissioner of Sales Tax the present reference has been made. It came on for hearing before a Division Bench of this Court, which being of opinion that the decision of this Court in *Gopikrishna Kishan Lal* (supra) required reconsideration in view of the decision of the Supreme Court in *Ghanshyamdas*, (1963) 14 STC 976 = (AIR 1964 SC 766) (supra) referred the case to a larger Bench.

4. Section 7 (1) of the U. P. Sales Tax Act requires every dealer, who is liable to pay tax under the Act, to submit a return or returns of his turnover at such intervals and within such period as is prescribed. Section 7 (2) provides that if the assessing authority is satisfied that the returns submitted are correct and complete he shall assess the tax on the basis thereof. Section 7 (3) reads:—

"If no return is submitted by the dealer under sub-section (1) within the period prescribed in that behalf or, if the return submitted by him appears to the assessing authority to be incorrect or incomplete the assessing authority shall, after making such enquiry as he considers necessary, determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof:

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity for proving the cor-

rectness or completeness of the return submitted by him."

Section 21 provides:—

"21. Assessment of tax on the turnover not assessed during the year. (1) If the assessing authority has reason to believe that the whole or any part of the turnover of the dealer has, for any reason, escaped assessment to tax for any year, the assessing authority may, after issuing notice to the dealer, and making such enquiry as may be necessary, assess or re-assess him to tax:

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment or full assessment, as the case may be.

Explanation. — Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

(2) No order of assessment under sub-section (1) or under any other provision of this Act shall be made for any assessment year after the expiry of four years from the end of such year:—

Provided that where the notice under sub-section (1) has been served within such four years the assessment or re-assessment to be made in pursuance of such notice may be made within one year of date of the service of the notice even if the period of four years is thereby exceeded;

Provided further that nothing contained in this section limiting the time within which any assessment or re-assessment may be made shall apply to an assessment or re-assessment made in consequence of, or to give effect to, any finding or direction contained in an order under Section 8, 10 or 11

Explanation.— Where the assessment proceedings relating to any dealer remained stayed under the orders of any Civil or other competent Court, the period during which the proceedings remained so stayed shall be excluded in computing the period of limitation for assessment provided under this sub-section."

5. The contention on behalf of the Commissioner of Sales Tax is that as the assessee had failed to submit its return of turnover for the assessment year 1957-58, the turnover had escaped assessment and could be taxed under section 7 (3). The case for the assessee is that Section 7 (3) can be invoked only where a return has been filed but not within time, and where a return has not been filed at all as in the present case, recourse can be had to Section 21 only.

6. Learned Counsel for the Commissioner has relied on two decisions of the Supreme Court. One is *Ghanshyamdas* (supra) and other *Anandji Haridas and Co. (P.) Ltd. v. S. P. Kasture*, (1963) 21 STC 326 = (AIR 1963 SC 565). In both cases the Supreme Court was concerned with Section 11 (4) (a)

and Section 11-A of the C. P. and Berar Sales Tax Act, 1947. The material portion of those provisions is set out hereunder:—

"11. If a registered dealer (a) does not furnish returns in respect of any period by the prescribed date, the Commissioner shall in the prescribed manner assess the dealer to the best of his judgment:

Provided that he shall not so assess him in respect of the default specified in clause (a) unless the dealer has been first given a reasonable opportunity of being heard."

"11-A (1) If in consequence of any information which has come into his possession, the Commissioner is satisfied that any turnover of a dealer during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom, the Commissioner may, at any time within three calendar years from the expiry of such period, after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess or assess, as the case may be, the tax payable on any such turnover; and the Commissioner may direct that the dealer shall pay, by way of penalty in addition to the amount of tax so assessed, a sum not exceeding that amount.

(2) The assessment or reassessment made under sub-section (1) shall be at the rate at which it would have been made, had there been no under-assessment or escapement.

(3) (a). Nothing in sub-sections (1) and (2) (i) shall apply to any proceeding (including any notice issued) under Section 11."

7. In *Ghanshyamdas*, (1963) 14 STC 976 = (AIR 1964 SC 766) (supra) the Supreme Court examined the scope of the expression 'escaped assessment' under the aforesaid Act and held that the turnover cannot be said to escape assessment if assessment proceedings are already pending but where the dealer has failed to file his return and no proceeding for assessment has been initiated by the assessing authority, it may be said that turnover has escaped assessment. In that event, the Supreme Court observed, recourse to Section 11-A was permissible provided the proceeding was taken within limitation. This case was followed by *Anandji Haridas and Co. (P) Ltd.*, (1968) 21 STC 326 = (AIR 1968 SC 565) (supra). The question there was whether Section 11 (4) (a) of the C. P. and Berar Sales Tax Act, 1947, contravened Article 14 of the Constitution. The Supreme Court pointed out that as the dealer had not filed his return, turnover had escaped assessment and it was open to the assessing authority to treat the case either under Section 11 (4) (a), which prescribes no period of limitation for completing the assessment, or under Section 11-A which provides a period of limitation in that behalf. A case of escaped turnover, the Court observed, fell

under both Section 11 (4) (a) and Sec. 11-A and, therefore, could be considered under either provision, but as a proceeding taken under Section 11 (4) (a) was not circumscribed by any bar of limitation while a proceeding taken under Section 11-A (1) was limited by such a provision to the benefit of the dealer, Section 11 (4) (a) was a discriminatory provision liable to be struck down as violating Article 14.

8. We have also been referred to *Addl. Asst. Commr. of Sales Tax v. Firm Jagmohandas Vijay Kumar*, (1970) 25 STC 74 (SC). The Supreme Court, in that case, considered the provisions of Section 8 (1) (b) and Section 10 of the *Madhya Bharat Sales Tax Act, 1950*, which substantially correspond to Section 11 (4) (a) and Section 11-A of the C. P. and Berar Sales Tax Act, 1947. The Sales Tax Officer had commenced proceedings for the assessment year 1955-56 under Section 8 (1) (b). The proceedings were set aside in revision by the commissioner who remanded the case for fresh assessment. The Sales Tax Officer then served a fresh notice and resumed the assessment proceeding. The dealer raised an objection that the Sales Tax Officer had no jurisdiction to proceed to tax the sales made in the year 1955-56 because the period of three years contemplated by Section 10 of the Act for making the assessment had expired. The objection found favour with the High Court in a writ petition. On appeal, the Supreme Court held that once the proceedings for assessment had been initiated under Section 8 (1) (b) it could not be said that the turnover had escaped assessment so as to attract the provisions of Section 10 unless those proceedings had come to a close.

9. The question before us is whether the proceedings already taken under Rule 41 (5) of the U. P. Sales Tax Rules must be attributed to the jurisdiction of the Sales Tax Officer under Section 21 of the U. P. Sales Tax Act. When taking the assessment proceeding, what the Sales Tax Officer did in effect was to exercise the jurisdiction under Section 7 (3) of the Act. Section 7 (3) provides that if no return is submitted by the dealer within the period prescribed in that behalf the Sales Tax Officer shall determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof. Now, it does appear that for the purposes of the controversy before us, Section 7 (3) and Section 21 of the U. P. Sales Tax Act may be considered as in *pari materia* with Section 11 (4) (a) and Section 11-A of the C. P. and Berar Sales Tax Act, 1947. If that be so, then upon the reasoning adopted by the Supreme Court in *Ghanshyamdas*, (1963) 14 STC 976 = (AIR 1964 SC 766) (supra) and *Anandji Haridas and Co. (P) Ltd.*, (1968) 21 STC 326 = (AIR 1968 SC 565) (supra) we must hold that on the failure of the assessee to furnish his return, the turnover "escaped" assessment and it was open to

the Sales Tax Officer to proceed either under Section 7 (3) or under Section 21, and that when he proceeded under Section 7 (3) and made an assessment he acted within his jurisdiction. The assessment made under Section 7 (3) cannot be considered as made under Section 21. Upon this, it would seem that the question referred in this case stands disposed of.

10. In Sales Tax Ref. No. 397 of 1961, D/- 30-7-1963 (All) (supra) this Court proceeded on the assumption that 'escaped' turnover can be assessed only under Section 21 and that Section 7 (3) does not contemplate an assessment proceeding in respect of 'escaped' turnover. It was said, therefore, by Desai, C. J., that the two provisions were quite distinct from each other and were enacted to apply in mutually exclusive circumstances. That decision was rendered before either Ghanshyamdas (supra) or Anandji Haridas and Co (P) Ltd., (1968) 21 STC 326 = (AIR 1968 SC 565) (supra) was decided by the Supreme Court and some of the reasons of Desai, C. J., in that case are opposed to the observations of the Supreme Court. In an appropriate case, the view taken in *Kishan Lal Gopi Krishna, Sales Tax Ref No 397 of 1961, D/- 30-7-1963 (All)* (supra) may be considered further. In the present case, having found that the assessment has been made in the exercise of the jurisdiction under Section 7 (3) and was rightly so made, the need for examining the scope of Section 21 does not arise.

11. The contention of learned Counsel for the assessee that Section 7 (3) can be invoked when a return has been filed though not in time, while a case where a return has not been filed at all falls under Section 21 only cannot be accepted. The distinction attempted by learned Counsel is not founded in good reason. According to Section 7 (3) if a return is not filed within time it is open to the Sales Tax Officer to proceed to make an assessment to the best of his judgment. The rights which the Act confers upon a dealer who files a return cannot be claimed by him if the return is not filed within time. It is only when the return is filed within time that the Sales Tax Officer is obliged to take it up for consideration and if it appears to be an incorrect or incomplete return then by reason of the proviso to Section 7 (3) he must afford an opportunity to the dealer to establish that it is a correct and complete return. If after the enquiry held by him he still finds that the return is incorrect or incomplete he is empowered by Section 7 (3) to make a best judgment assessment. There is no provision such as Section 139(4) of the Income Tax Act, 1961 entitling an assessee to furnish a return even beyond the time allowed by the statute. Section 7(1) empowers the Sales Tax Officer to extend the date for submission of the return but unless the date is extended there is no obligation

upon the Sales Tax Officer to consider the return filed out of time.

12. In the result, the assessment order under consideration must be considered as an order under Section 7 (3) of the Act read with Rule 41 (5) of the Rules and not as an order under Section 21 of the Act. The question referred is answered accordingly.

13. The Commissioner of Sales Tax is entitled to his costs which are assessed at Rs. 150/-. Counsel's fee is assessed in the same figure.

Reference answered accordingly.

AIR 1970 ALLAHABAD 644 (V 57 C 91)

SPECIAL BENCH

T. RAMABHADRAN, R. S. PATHAK AND
T. P. MUKHERJEE, JJ.

Padam Chand Jain, Applicant v. The Chief Controlling Revenue Authority, Opposite Party.

Misc. Reference No. 76 of 1969, D/- 9-7-1970.

(A) Interpretation of Statutes — Statute creating special liability — Special definition will supersede ordinary connotation.

When a statute creates a special liability, the special definition of any term given in such statute must supersede and prevail over the ordinary connotation of that term in which it is understood at common law.

(Para 4)

(B) Stamp Duty — Stamp Act (1899), Section 2 (17) — Definition of mortgage-deed in — Is wider than in Section 58 (a), T. P. Act.

The connotation of mortgage involved in the definition given in Section 2 (17) is much wider; it is not restricted to immovable property and, therefore, it includes pawn or pledge of movables, and secondly, it is not restricted to transfer of an interest or right to property; it also includes a charge which creates a right to property.

(Para 3)

(C) Stamp Duty — Stamp Act (1899), Sch. 1B, Articles 6 (1) and 40 (b) (as amended by U. P. Stamp (Amendment) Act, 1962) — Mortgage deed or agreement relating to deposit of title deeds — Deed held evidenced agreement pledging goods and also agreement purporting to create mortgage by deposit of title deeds.

Where a person executed in favour of a bank, document by which the bank agreed to grant cash credit facilities upto a maximum limit of Rs. 1,75,000/- at any one time against the pledge of goods in the account of such person's firm with the bank upon having the repayment secured by a first mortgage by deposit of title deeds of certain land as collateral security.

Held that the deed evidenced an agreement pledging goods and also an agreement

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purporting to create a first mortgage by deposit of title deeds. It was not, therefore, chargeable under Article 40 in view of the clear terms of that Article which excluded an agreement relating to deposit of title deeds and a pledge; but was chargeable under Article 6. (Para 10)

(D) T. P. Act (1882), Sections 58, 100 — Mortgage by deposit of title deeds — Effect — Effectuates transfer of right to properties — Hence creation of charge separately on properties becomes unnecessary — AIR 1965 SC 430, Rel. on. (Para 9)

Cases Referred : Chronological Paras
(1965) AIR 1965 SC 430 (V 52) =

(1964) 6 SCR 727, K. J. Nathan v.

S. V. Maruthi Rao 9

K. C. Agarwal, for Applicant; Standing Counsel, for Opposite Party.

MUKHERJEE, J.: This is a reference by the Board of Revenue, U. P., as the Chief Controlling Revenue Authority, under Section 57 of the Indian Stamp Act as amended by the U. P. Stamp (Amendment) Act, 1962 (hereafter referred to as the Act). The question for decision relates to the chargeability of stamp duty on a document dated November 18, 1964 executed by one Sri Padam Chand Jain of Agra, and it has arisen in the following circumstances.

2. Sri Padam Chand Jain, who is the sole proprietor of Prem Electric Press, Agra, executed the document in question on November 18, 1964 in favour of the State Bank of India, Agra (hereafter referred to as the Bank), with a view to obtain overdraft facility up to a maximum limit of Rs. 1,75,000 at any one time. The executant treated the document as a memorandum of agreement relating to deposit of title deeds and he, therefore, stamped the same with a duty of Rs. 504 under Article 6 (1) of Schedule I-B to the Act. When the document was presented for registration, the Sub-Registrar, Agra, held that it was a deed of simple mortgage on which a stamp duty of Rs. 3,937.50 P. was payable under Article 40 (b) of the same Schedule to the Act. He, therefore, impounded the document and forwarded it to the Collector for necessary action under Section 38 (2) of the Act. The Collector who was doubtful as to the true nature of the document referred the case to the Board of Revenue under Section 56 (2) of the Act. The Board, in its turn, referred the case to this Court, as already noted for decision under Section 57 of the Act. The question referred to this Court is as follows:

“Whether the document under reference is a memorandum of agreement relating to deposit of title deeds within the meaning of Article 6 (1), Schedule I-B of the U. P. Stamp (Amendment) Act, 1962 or a mortgage deed within the definition of that term in Section 2 (17) of the Stamp Act and chargeable accordingly with a duty of Rs. 3,937.50 under Article 40. (b), Sch. I-B *ibid.*”

Section 2 (17) of the Act defines “mortgage-deed” as follows:

“Mortgage-deed” includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates to, or in favour of, another, a right over or in respect of specified property;

The essentials of a “mortgage deed” as defined in Section 2 (17) of the Act are: (1) that the instrument must be executed for the purpose of securing a loan or debt or to ensure the performance of an engagement, (2) the mortgagor must transfer or create a right to specified property in favour of the mortgagee, and (3) the transfer or creation of such right must be in accordance with law. The definition of mortgage in S. 58 (a) of the Transfer of Property Act is as follows:

“A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan and existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.”

According to this definition, a mortgage is the transfer of an interest in immovable property by way of security for a loan or a debt or the performance of an engagement which may give rise to a pecuniary liability.

3. It would be noticed that the connotation of mortgage involved in the definition given in Section 2 (17) of the Act is much wider; in the first place, it is not restricted to immovable property and, therefore, it includes pawn or pledge of movables, and secondly, it is not restricted to transfer of an interest or right to property; it also includes a charge which creates a right to property, that is, a *jus ad rem*, as distinguished for a *jus in rem* created by a mortgage under the Transfer of Property Act.

4. The levy of stamp duty on any instrument which answers the definition of a “mortgage-deed” will be governed by the provisions of the Indian Stamp Act and not by the Transfer of Property Act. When a statute creates a special liability, the special definition of any term given in such a statute must supersede and prevail over the ordinary connotation of that term in which it is understood at common law.

5. A “mortgage-deed” within the definition given in Section 2 (17) of the Act is dutiable under Article 40 of Schedule I-B to the Act. The class of instruments dutiable as “mortgage-deed” under Article 40 have been divided into two categories depending upon whether or not possession of the property comprised in such deed has been given to the mortgagee or agreed to be given. The material part of Article 40 of the Act is reproduced below:

"40. Mortgage-Deed, not being an agreement relating to deposit of title deeds, Pawn or Pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a Crop (No. 41), Respondentia Bond (No. 56) or Security Bond (No. 57)—

(a) When possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given;

(b) when possession is not given or agreed to be given as aforesaid.

6. The contention put forward on behalf of the Revenue is that the instrument in question is a mortgage deed, as defined in Section 2 (17) of the Act, and dutiable under Article 40 (b) of Schedule I-B. On the other hand, the contention of Sri K. C. Agarwal appearing for applicant Padam Chand Jain is that the instrument is an agreement relating to deposit of title deeds and the stamp duty specified in Article 6 (i) is payable thereon. Article 6 of Schedule I-B covers following instruments:

"6. Agreement relating to deposit of title deeds, pawn or pledge, that is to say, any instrument evidencing an agreement relating to—

(1) the deposit of title deeds of instruments constituting or being evidence of the title to any property whatever (other than a marketable security); or

(2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt—"

7. As regards the construction of the deed dated November 18, 1964, it was, as already stated, executed by the applicant with a view to obtain overdraft facility up to a maximum limit of Rs. 1,75,000, at any one time, on the basis of a cash credit agreement. The preamble to the deed reads as follows:

"Whereas (1)

(2) The Bank, at the request of the Borrower agreed to grant cash credit facilities up to a maximum limit of Rs. 1,75,000 (Rupees one Lac and seventy five thousand only) at any one time against the pledge of goods in the account of his said firm "the Prem Electric Press (hereinafter referred to as said firm accounts) with the Bank upon having the repayment thereof as aforesaid and such other sums as are hereinafter mentioned and with interest payable thereon secured by a first mortgage by deposit of title-deeds of the said land and premises described in the said First Schedule hereto as collateral security.

(3) Pursuant to the hereinbefore recited agreement and as a collateral security for the said sum of Rs. 1,75,000 and such other sums with interest thereon as hereinafter

The same duty as conveyance (No. 23) for a consideration equal to the amount secured by such deed.

The same duty as a Bond (No. 15) for the amount secured by such deed."

mentioned the Borrower on the 18th November, 1964 deposited with the Branch of the State Bank of India at Chipitola, Agra the title deeds mentioned in the Second Schedule hereunder written relating to the said land and premises with intent to create a security thereon as hereinafter mentioned." Then follow the covenants by the borrower the material portion of which is reproduced below:

Now this indenture witnesseth as follows:

1. In pursuance of the said agreement and in consideration of the premises aforesaid the Borrowers hereby covenant with the Bank as follows:

(i) To repay to the Bank on demand the amount or amounts as may be due by the Borrower to the Bank under the said firm account up to a maximum of Rs. 1,75,000 at any one time and shall in the meantime pay interest on the amount or amounts for the time being due to the Bank at the rate of State Bank of India advance rate minimum 6 per cent p. a. on the cash credit account with monthly rates, which interest is to be debited to the said firm account.

(ii) To pay to the Bank on demand all law costs (including as between attorney and clients), charges and expenses which may be paid or incurred by the Bank in connection with these presents or in enforcing or fulfilment of the covenants and conditions of these presents with interest thereon at the rate of 6% p. a. from the time the said charges and expenses are paid by the Bank and until repayment the same shall be a charge upon the properties herein comprised.

"And this indenture also witnesseth as follows:

That the Borrowers doth hereby admit and acknowledge that in further pursuance of the said agreement and in consideration of the premises and Borrowers did on the 18-11-1964 deliver to and deposit with the Branch of State Bank of India, Chipitola, Agra the title deeds mentioned in the Second Schedule hereunder written relating to All That the land and premises more particularly described in the First Schedule hereto (hereinafter referred to as "the said premises") with intent to create a First Mortgage by Deposit of Title Deeds on the said premises to secure the repayment by the Borrower to

the Bank of the amount or amounts for the time being due on the said firm account upto a maximum of Rs. 1,75,000 at any one time as aforesaid with all interests and costs in manner hereinbefore mentioned and all other moneys if any which at any time hereafter shall on any account be due and payable by the Borrower to the Bank and such law costs, charges and expenses as are hereinbefore mentioned in accordance with the covenants herein contained."

8. The deed provides that if the borrower defaults in payment of the principal amount with interest thereon, owing to the Bank within seven days after demand, the moneys due to the Bank shall, at the option of the Bank immediately become payable by the borrower and in such event the Bank shall be at liberty to take steps for the realisation of the security.

9. On reading these terms it is obvious that the document in question evidences an agreement between the applicant and the Bank relating to over-draft facility in respect of a maximum sum of Rs. 1,75,000/- against the pledge of goods in the account of the firm "Prem Electric Press" which is referred to in the deed as "the said firm account". The pledge of goods in the said firm account was, apparently, intended to be the primary security for the over-drawal, if any. The deed also records an agreement relating to "a first mortgage by deposit of title deeds in respect of the land and premises specified in the first schedule as collateral security for the said amount. As stated in the deed, the title deeds had already been deposited with the Branch of the State Bank of India at Chipitola, Agra. The deed, however, does not purport to create any charge on the specified properties to secure the sum of Rs. 1,75,000/-. The reason is obvious: a mortgage by deposit of title deeds effectuates transfer of a right to the properties and creation, separately, of a charge thereon becomes unnecessary. (See K. J. Nathan v. S. V. Maruthi Rao, AIR 1965 SC 430). The averment in the statement of the case submitted by the Board of Revenue to the effect that "the document does not restrict itself merely to the deposit of title deeds as security but burdens the immovable property with a charge to secure cash credit facility to the extent of Rs. 1,75,000/-"

is misconceived. It is true, no doubt, that under the terms of the deed, if any legal expenses are paid or incurred by the Bank in enforcing the terms of the agreement, then, until repayment, the same shall be a charge upon the properties specified in the schedule to the deed, but this charge would arise in future, if at all, when any such legal expenses are incurred by the Bank. As laid down in Section 17 of the Act, all instruments chargeable with duty must be stamped either before or at the time of execution. In the present case, when the

deed was executed, no charge was created on the properties in respect of an ascertained or an ascertainable sum of money and, hence, the stipulation in point may be regarded as a surplusage in determining the chargeability of the deed to stamp duty.

10. To sum up, the deed evidences an agreement pledging goods and also an agreement purporting to create a first mortgage, by deposit of title deeds. It is not therefore, chargeable under Article 40 in view of the clear terms of that Article which excludes an agreement relating to deposit of title deeds and a pledge. The instrument is, clearly, chargeable under Article 6 of the Act.

11. In the view I have taken of the chargeability of the document under reference it is not necessary to decide the contentions of Sri K. C. Agarwal, as regards the invalidity of the document for want of attestation and otherwise.

12. In my opinion, therefore the answer to the question under reference should be that the deed dated November 18, 1964 is chargeable under Article 6 (1) and not under Article 40 (b) of Schedule I-B of the Act.

13. Applicant Padam Chand Jain shall get Rs. 200 as costs of this reference from the Chief Controlling Revenue Authority. Counsel's fee is assessed at the same amount.

PATHAK, J. 14. I agree with my brother Mukherjee that the deed executed by Padmchand Jain on November 18, 1964, in favour of the State Bank of India is chargeable to duty under Article 6 (1) of Schedule I-B of the Indian Stamp Act as amended by the U. P. Stamp (Amendment) Act, 1962 and not under Article 40 (b) of the Schedule.

15. Upon a perusal of the terms of the deed it appears that it is not a mortgage deed falling under Article 40. The deed specifically recites that as a collateral security for the sum of Rs. 1,75,000 the borrower, on November 18, 1964, deposited with the State Bank of India the title deeds relating to the immovable property "with intent to create a security thereon". There is no provision thereafter in the deed expressly charging or mortgaging the property for payment of the sum of Rs. 1,75,000. Cl. (I) (1) (i) following paragraph 3, recites that the borrowers covenant with the Bank to repay to the Bank on demand the amount falling due by the borrower to the Bank up to the maximum of Rs. 1,75,000 but there is no provision here which can be said "in proprio vigore" to burden the property for payment of that amount. Clause (I) (1) (ii) refers to law costs, charges and expenses which may be paid or incurred by the Bank in connection with the transaction, and it is in respect of these that a charge is contemplated thereunder upon the property. Upon a fair reading of the entire deed, it seems to me impossible to hold that any such

charge has been created under the deed in respect of the amount of Rs. 1,75,000. As the case before the Board, and also before us, proceeded on the basis that the question referred is confirmed to the amount of Rs. 1,75,000, it does not appear necessary to me to consider the effect of Cl. (I) (1) (ii).

16. I agree that the applicant is entitled to his costs which should be assessed at Rs. 200 and that counsel's fee should be assessed in the same figure.

RAMABHADHAN, J. 17. I have had the advantage of perusing the opinions prepared by my learned brothers Pathak and Mukherjee, JJ. I agree with them that the deed executed by the applicant Padam Chand Jain in favour of the State Bank of India, Agra on 18-11-64 is chargeable to duty under Article 6 (1) of Schedule I-B of the Indian Stamp Act as amended by the U. P. (Amendment) Act, 1962 and not under Art. 40 (b) of the said Schedule. I further agree to the proposed order as to costs.

BY THE COURT

18. Our answer to the question under reference is that the deed executed by the applicant Padam Chand Jain on 18-11-64 in favour of the State Bank of India, Agra is chargeable to duty under Article 6 (1) of Schedule I-B of the Indian Stamp Act as amended by the U. P. Stamp (Amendment) Act, 1962 and not under Article 40 (b) of that Schedule.

19. The applicant Padam Chand Jain will get his costs of this reference, assessed at Rs. 200, from the Chief Controlling Revenue Authority. U. P. Counsel's fee is also assessed at the same amount.

Answer accordingly.

AIR 1970 ALLAHABAD 648 (V 57 C 92)

D. S. MATHUR, J.

Mohd. Ismail, Appellant v. Ashiq Husain, Respondent.

Ex. Second Appeal No. 784 of 1963, D/- 4-8-1969, from Judgment and decree of Civil J. Roorkee at Saharanpur, D/- 30-11-1962.

(A) Transfer of Property Act (1882), Section 52 — "Otherwise dealt with" — Includes raising of constructions wrongfully — Suit for possession of vacant land — Defendant putting up superstructure after filing of suit — Cannot claim advantage out of the buildings wrongfully put up. (Para 5)

(B) C. P. Code (1908), Order 21, Rule 35 — Suit for possession of vacant land — Buildings put up pendente lite — Removal in execution — Building put up prior to institution of suit — Remedy suggested.

In execution of a decree for possession, the executing Court can order the removal or demolition of the constructions made dur-

ing the pendency of the suit. AIR 1934 Lah 978, Followed.

Where the constructions were made before the institution of the suit, the rule laid down in AIR 1927, Rang 82 where the judgment-debtor was allowed time to vacate the land and if he so desired, carry away the materials of the building, can be adopted.

Where it appears to the executing Court that the cost of removal or demolition would exceed the costs of the material to be fetched after demolition and the decree-holder is willing to let the construction stand on the land, the rule laid down in (1872) 18 WR 527 (Cal) can be adopted, namely, it can be left open to the decree-holder to decide what he shall do with the constructions after he is given actual possession of the land along with the constructions standing thereon. But if the cost of demolition shall not exceed the costs of the materials and the judgment-debtor is willing to release the materials in favour of the decree-holder free of charges and the decree-holder is willing to accept the constructions, the executing Court need not direct demolition of the constructions, the ownership of which would automatically pass to the decree-holder. (Para 7)

Cases Referred: Chronological Paras
(1934) AIR 1934 Lah 978 (V 21) =
154 Ind Cas 724, Narain Singh v. Imam Din 6
(1927) AIR 1927 Rang 82 (V 14) =
5 Bur LJ 201, Kauk Sike v. Ong Hock Sein 2, 6
(1872) 18 WR 527 (Cal), Radha Gobind Shaha v. Brijendro Coomar Roy Chowdhri 6, 7.

Sri Nath Agarwal, for Appellant.

MATHUR, J.: This is an Execution Second Appeal by Mohammad Ismail, decree-holder, against the order of the Civil Judge of Roorkee at Saharanpur, allowing the appeal of Ashiq Husain (since dead), judgment-debtor, and holding that in the execution of a decree for possession, possession could not be delivered after removal of the constructions.

2. The learned Civil Judge placed reliance upon the case of Kauk Sike v. Ong Hock Sein, AIR 1927 Rang 82 but failed to realise the importance of this decision and also what order was eventually passed, otherwise he would have known that this decision was more damaging to the judgment-debtor as thereby the building would go under the control and possession of the decree-holder if not removed before the delivery of possession and thereby the judgment-debtor would be put to a great loss. If the materials of the constructions are removed by the judgment-debtor, he would be in a position to use them in constructing another house or he would be in a position to make some money by their sale. But if it is for the decree-holder to consider after he has obtained possession whether the constructions be removed or not, the judgment-debtor

cannot take advantage of the materials of the constructions.

3. The facts of the instant case, in brief, are that at the time of the institution of the suit no constructions stood on the land in dispute. The judgment-debtor had merely dug the foundations. This is why only reliefs for possession and permanent injunction were sought for and there was no prayer for the removal or demolition of the constructions. The judgment-debtor had however, completed the ground floor before the matter of temporary injunction could be finally decided.

4. After the constructions were made by the judgment-debtor, the plaintiff did not apply for amendment of the plaint and hence he was simply granted a decree for possession and injunction. When this decree was put into execution, the judgment-debtor raised an objection that the removal or demolition of the constructions could not be ordered by the executing court. The objection was repelled by the executing court but in appeal the learned Civil Judge allowed the objection holding that in execution of the decree for possession, there could be no removal of the constructions.

5. On the application of the rule of equity no party can be permitted to take advantage of the wrongful acts committed during the pendency of a suit. The same principle can be inferred from the provisions of Sec. 52 of the Transfer of Property Act which clearly provides that during the pendency in any Court having authority of a suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. The words "otherwise dealt with" are general and can also include the raising of constructions wrongfully. When the defendant could not, in any manner deal with the immovable property in dispute in the suit, he cannot to the disadvantage of the plaintiff decree-holder, claim any advantage out of the constructions wrongfully made.

6. If it were necessary for the plaintiff to always institute a new suit with regard to any wrongful act done during the pendency of the suit, the litigation would never come to an end and it shall be open to the defendant to cause an irreparable injury to the plaintiff. In the circumstances, I see no difficulty in the executing court ordering the removal or demolition of the constructions made during the pendency of the suit, during the execution of a decree for possession. A similar view was expressed in *Narain Singh v. Imam Din*, AIR 1934 Lah 978. The decision in *Radha Gobind Shaha v. Brijendra Coomar Roy Chowdhri*, (1872) 18 WR 527

(Cal) was followed by Duckworth, J., in AIR 1927 Rang 82 (supra) and the order passed in the Second Appeal was as below:—

"I modify the order of the lower court by directing that the appellant do vacate the building on the land as soon as this order is communicated to him and that he be granted two months from this date within which, if he so pleases, he may dismantle the building and remove its material."

In (1872) 18 WR 527 (Cal) (supra) demolition of the constructions made before the institution of the suit, was not ordered but it was said that was a matter for the decree-holder to consider after he had obtained possession. At the same time the judgment-debtor was allowed two months' time within which he could, if he so desired, vacate the land and carry away the materials of the building.

7. Where the constructions were made before the institution of the suit, the rule laid down in the Rangoon case could be adopted; but where the constructions were made during the pendency of the suit, constructions made are against the law and hence shall be deemed to have been made by the judgment-debtor at his own risk and responsibility namely, that he shall not be able to claim any benefit of such constructions during the execution proceeding. When the judgment-debtor had no right to the constructions, he can raise no objection to the removal of the constructions during the execution. Where it appears to the executing court that the costs of removal or demolition of the constructions would exceed the costs of material to be fetched after the demolition and the decree-holder is willing to let the construction stand on the land, the rule laid down in (1872) 18 WR 527 (Cal) (supra) can be adopted namely, that it can be left open to the decree-holder to decide what he shall do with the constructions after he is given actual possession of the land along with the constructions standing thereon. Thereby the judgment-debtor would not be put to any additional expenses. But if costs of demolition shall not exceed the costs of the materials and the judgment-debtor is willing to release the materials in favour of the decree-holder free of charges, and the decree-holder is willing to accept the constructions, the executing court need not direct the demolition of the constructions, the ownership which would automatically pass to the decree-holder.

8. The Second Appeal is hereby allowed with costs of all the courts and the decree and order of the learned Civil Judge in appeal are set aside. It is further ordered that the objection of the judgment-debtor to demolition of the constructions shall stand dismissed. The judgment-debtor is given three months from today to vacate the land after removal of the materials of the constructions.

No further time shall be granted to him for the purpose. In case of default, possession of the land shall be delivered to the decree-holder after dispossession of the judgment-debtor from both the land and the constructions standing thereon and thereafter it shall be for the decree-holder to decide how to deal with the constructions.

Appeal allowed.

AIR 1970 ALLAHABAD 650 (V 57 C 93)

FULL BENCH

SATISH CHANDRA, J. S. TRIVEDI AND R. L. GULATI, JJ.

M/s. Ram Kumar & Co., Appellant v. The Commissioner of S. T., U. P., Opposite Party.

S. T. R. No. 259 of 1966, D/- 2-3-1970.

Sales Tax — U. P. Sales Tax Act (5 of 1948), Section 2 (c) — Dealer — Assessee carrying on business in Calcutta dispatching goods on orders from U. P. on railway receipts in name of self which were endorsed by assessee's bankers at Calcutta — Price realised from purchasers on endorsement and delivery of receipts from Banker's branches in U. P. — Assessee not a 'dealer' — AIR 1968 SC 739, Foll.; (1963) 14 STC 606 (All) and (1970) 25 STC 12 (SC), Distinguished.

(Para 11)
Cases Referred: Chronological Paras
(1970) 25 STC 12 (SC), Commr. of

Sales Tax, U. P. v. D. C. Dhimani & Brothers Ltd. 10

(1968) AIR 1968 SC 739 (V 55) =
(1970) 25 STC 82 = (1968) Lab IC 814, State of Punjab v. Bajaj Electricals Ltd. 1, 6, 16

(1963) 14 STC 606 (All), Nestles' Products (India) Ltd. v. Commr. of Sales Tax 1, 5, 16

S. N. Agarwal, for Appellant; Standing Counsel, for Opposite Party.

SATISH CHANDRA, J.: A Bench of this Court being of the opinion that in view of the observations of the Supreme Court in State of Punjab v. Bajaj Electricals Ltd., (1970) 25 STC 82 = (AIR 1968 SC 739) the decision of this Court in Nestles' Products (India) Ltd. v. Commr. of Sales Tax, (1963) 14 STC 606 (All) requires reconsideration, referred this Reference to a larger Bench. That is how the matter has come before us.

2. The Judge (Revisions) Sales Tax, U. P. Lucknow, referred the following three questions of law for the opinion of this Court under Section 11 (1), U. P. Sales Tax Act:—

"1. Whether under the circumstances of this case the applicant can be treated to be carrying on business activity within U. P. so as to be classified as the dealer for the purposes of assessment?

"2. Whether under the circumstances of this case the applicant can be treated to be

an importer against whom an assessment can be passed?

3. Whether under the circumstances of this case the Sales Tax Officer at Barabanki who had been so directed as having jurisdiction was vested with the jurisdiction to pass the assessment?"

3. For deciding the first question, the relevant facts are: the assessee carries on the business of buying and selling cotton yarn at Calcutta. It received orders from certain U. P. dealers, and, in execution thereof it despatched cotton yarn to them. The railway receipts were prepared in the name of self. They were endorsed to the assessee's Bankers at Calcutta. The Bankers at Calcutta then realised the sale price from the purchasers within U. P. on endorsement and delivery of the receipt, through its branches in U. P. This modus operandi was accepted by the assessing authorities. But, they, including the Judge (Revisions), held that the assessee was carrying on the business of selling goods within U. P. and was a 'dealer' as defined by the U. P. Sales Tax Act, and as such liable to tax.

4. Section 2 (c), U. P. Sales Tax Act, defines the word 'dealer' to mean any person who carries on the business of buying or selling goods within Uttar Pradesh.

5. The learned Standing Counsel supported the view taken by the Judge (Revisions) by the decision of this Court in (1963) 14 STC 606 (All) (supra). In my opinion, that case is, on facts, distinguishable. In that case, the assessee had its office at Calcutta. It had no office in Uttar Pradesh. It entered into contracts of sale of condensed milk and powdered milk with customers residing in Uttar Pradesh. It sent goods by train. The railway receipts were prepared in the name of the assessee as consignor and consignee both. At the destinations, the goods were taken delivery of either by the assessee's representatives in Uttar Pradesh, who then sold them by going from door to door, or by the customers through a Bank against payment. The assessee sent the railway receipts to its Bankers in U. P., after endorsing them in their favour and they delivered them to the customers, after receiving payments from them and endorsing them in their favour. On these facts, it was found that in so far as the goods were delivered to the assessee's representatives in Uttar Pradesh, the sale by the representatives of the assessee by going from door to door, would be sale of goods by the assessee itself. In relation to the delivery made to customers through a Bank against payment, it was held that the bankers acted as an agent of the assessee. Hence, this activity of the bankers was a part of the business activity of the assessee. This would mean that he was carrying on the business of selling in Uttar Pradesh so as to be a 'dealer'. In the present case, the distinguishing feature is that the assessee or his

representative did not take delivery of the goods from the railway. The customers directly took delivery from the railway. The assessee or its representatives did not sell the goods within Uttar Pradesh, after they had arrived in Uttar Pradesh.

6. The observation that the Bank in so far as it collected the price of the goods for the assessee would be its agent and as such the assessee would be carrying on the business of selling in U. P. seems contrary to the decision of the Supreme Court in (1970) 25 STC 82 = (AIR 1968 SC 739). In that case, the assessee carried on business at Bombay and had a branch office at New Delhi. It received certain orders from the Government of Punjab and other semi-Government bodies in the State of Punjab. It despatched goods from Delhi by rail or by public motor transport. The railway or other receipts were prepared in the name of the assessee and presented to the purchasers duly endorsed in their favour, to secure realization of the price of the goods. On these facts, the Supreme Court held that the assessee did not carry on a trade in Punjab. It held that the assessee had no shop or office within the State of Punjab. The facts that the assessee supplied goods within the State of Punjab and received price of the goods within the State of Punjab, were ancillary activities of the assessee, which did not amount to carrying on trade within the State of Punjab. This principle is applicable to the facts of our case. Here also, the assessee had supplied goods to customers, and, collected the price in U. P. The orders were received directly at Calcutta. They were executed at Calcutta. The assessee had no shop or office or representative in Uttar Pradesh. In the circumstances, the facts that the goods were supplied and price collected in U. P. would be an ancillary activity of the assessee and would not amount to carrying on the business of selling within Uttar Pradesh.

7. The fact that the assessee entrusted the documents to the Bank for encashment would not necessarily make the Bank an agent of the assessee. The bank would be the assessee's agent only if the assessee paid the bank its charges or commission. But if the U. P. customers paid the bank charges (which is not unusual), the bank would in law be the customers' agent. There is no finding here that the assessee paid the bank's charges.

8. Further even if the Bank is held to be the assessee's agent, it would not automatically make the bank an agent for carrying on the business of the assessee. It has been found that the assessee firm was granted an overdraft by the bank at Calcutta on the assessee's risk and on the condition that if the money was not collected from the U. P. dealers the bank will debit the money in their account. This would suggest that if the customer did not honour the railway

receipt by retiring it on payment, the bank would debit the assessee's account. The bank does not undertake to take delivery of the goods from the railway, if the customers do not retire the documents, and sell them on behalf of the assessee, in order to realise and pay the assessee the price.

9. The bank could not be treated as a business agent of the assessee. The Bank, if at all, would be an agent for the ancillary activity of transmitting the documents to the customers and crediting the assessee with the proceeds, if the customers willingly paid. The assessee could not be held to be carrying on business in U. P. on the basis of this activity of the bank.

10. Learned counsel for the assessee relied on the decision of the Supreme Court in *Commr. of Sales Tax, U. P. v. D. C. Dhimani and Brothers Ltd.*, (1970) 25 STC 12 (SC). That case, in our opinion, is not helpful. There, the assessee carried on the work of fabricating wagons and coaches at Izatnagar in Uttar Pradesh. They were then supplied to the railway administration within the State of Uttar Pradesh. The Supreme Court held that the assessee was carrying on the work of manufacturing wagons and coaches in Uttar Pradesh and this manufacturing would not make him a 'dealer' because he did not carry on the business of selling goods in Uttar Pradesh. It was also held that a single or stray instance of selling will not be carrying on the business of selling. Here, it is not disputed that the assessee carries on the business of buying and selling cotton yarn. He is not a manufacturer. This case is, therefore, not applicable.

11. I would answer the first question in the negative, in favour of the assessee and against the Department. In view of the answer to the first question, the other questions are merely of academic importance, and would leave them unanswered. The assessee would be entitled to his costs, which are assessed at Rs. 200. The fee of the learned counsel for the Department is assessed at the same figure.

TRIVEDI, J.: 12. I agree that the first question should be answered in favour of the assessee and against the Department. I also agree that the remaining two questions need not be answered.

13. I would like to add that carrying on business of selling goods in the State of Uttar Pradesh implies active promotion of trade by the dealer or his agent. The bank will not be the agent of the dealer for the purpose of business even though it may be an agent for the purpose of realising the purchase money. Mere transport of goods through the railway or some other transport agency will not amount to carrying on business in the State a dealer who attracts business by advertisement in a newspaper of the State also cannot be said to be carrying on the business of selling in the State. There

should be an element of personal activity by the dealer or his agent for the sales in the State before the dealer can be said to be carrying on the business of selling in the State.

R. L. GULATI, J.: 14. I agree with brother Satish Chandra, J. that question No. 1 should be answered in favour of the assessee and the remaining two questions need not be answered but I wish to add a few words by way of elucidation.

15. The statement of the case as originally submitted by the Revising Authority, opens thus:

"The applicant is a concern having its head office at Calcutta dealing in yarn. The applicant used to import yarn in his own name and received delivery thereof at Barabanki whereafter this yarn so received was effected sale...."

Similar observations were found at two places in the revisional order. When the matter came up for hearing before a Bench consisting of myself and Hon. Pathak, J. we called for a supplementary statement of the case as, in our opinion, the Judge (Revisions) had merely expressed its conclusion without settling out the primary facts. The supplementary statement of the case has since been received and it discloses the *modus operandi* of the assessee's business. According to that *modus operandi* the assessee whose principal place of business is Calcutta merely despatches goods to dealers in Uttar Pradesh in execution of the orders received from them. The railway receipts are made out in the assessee's name. The railway receipts are endorsed in favour of the assessee's bankers at Calcutta which deliver them through their branches to the assessee's constituents in U. P. on payment of the price of the goods. It has not been found that the delivery of the goods at any of the destinations in U. P. is taken either by the assessee directly or through its agents or by the banks. On these facts the question arises as to whether the assessee can be said to be carrying on business of selling goods in U. P. so as to be a dealer within the meaning of Section 2 (c) of the U. P. Sales Tax Act. I agree that on these facts the assessee cannot be held to be a dealer in U. P.

16. The case of (1963) 14 STC 606 (All) can be distinguished only on the ground that sometimes the representatives of the assessee in that case took delivery of the goods in Uttar Pradesh and they sold the goods by going from door to door. That *modus operandi* would certainly make the assessee a dealer in Uttar Pradesh but the fact that in the present case the assessee delivered the railway receipts to its bankers at Calcutta while in the case of Nestles' Products, the documents were sent to banks in U. P., would afford no ground of distinction because in either case the banks agency would be limited to the collection of the price of the goods from the customers. There is nothing

to show that on the failure of the customers to retire the documents, the banks would take the delivery of the goods on behalf of the assessee and would proceed to sell them. Such a course of conduct is against the established practice of the banking system as it prevails in our country. If the documents are not retired by the customers, the banks merely return them to the owner. Indeed, in the instant case it has been found that the assessee's banks had allowed to the assessee an overdraft facility against the railway receipts negotiated through it on the condition that if the documents were not honoured by the assessee's constituents in U. P. the amount advanced to the assessee shall be debited to its accounts. That is the only function which the assessee's banks performed in the conduct of the assessee's business. I am further of the opinion that the payment of the bank commission by the assessee or its customers is of no consequence. That is a matter of contract between the parties. Even if the bank commission is paid by the assessee, the bank cannot be said to be the agent of the assessee through whom it carries on the business of selling goods in U. P. As has been pointed out by the Supreme Court in (1970) 25 STC 82 = (AIR 1968 SC 739), the negotiation of documents through a bank is an ancillary activity to secure the realisation of the price of the goods from the purchasers. I am, therefore, of the opinion that the decision in the case of Nestles' Products is erroneous in so far as it seeks to hold the assessee in that case to be dealer in U. P. on the ground that the railway receipts in respect of the goods despatched to U. P. dealers were negotiated through bankers in U. P.

BY THE COURT

17. The first question is answered in the negative, in favour of the assessee and against the Department. In view of the answer to the first question, the other questions are merely of academic importance, and they are returned unanswered. The assessee would be entitled to his costs, which are assessed at Rs. 200. The fee of the learned Counsel for the Department is also assessed at the same figure.

Answer accordingly.

AIR 1970 ALLAHABAD 652 (V 57 C 94)

FULL BENCH

S. K. VERMA, S. N. DWIVEDI AND
HARI SWARUP, JJ.

Bhagwan Swarup, Applicant v. Municipal Board, Ujhani and others, Opposite Parties.

Civil Revn. No. 448 of 1969, D/- 22-5-1970 against Order of Civil J., Budaun, D/- 28-1-1969.

(A) Limitation Act (1963), Secs. 12, 14, 4 — Mode of computing period — Sections 12 and 14 provide for extension of limita-

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tion — Periods provided under Sections 12 and 14 are to be added to the period prescribed — If such periods taken together expire during vacation appeal may be filed on day on which Court reopens — Section 4 does not extend time — Period for filing appeal expiring during vacation — Copy of judgment not obtained before closing of court — Application for copy on date of re-opening of Court — Appellant is not entitled to exclusion of time taken in obtaining copy. 1962 All LJ 1149 and S. A. No. 420 of 1967, D/- 19-4-1968 (All) and 1956 All WR (HC) 737, Overruled; (1901) ILR 25 Bom 584 and (1901) ILR 25 Bom 586 and (1897) ILR 19 All 342 and AIR 1914 All 303 and AIR 1929 Rang 96 (1) and AIR 1931 Pat 60, held no longer good law in view of AIR 1935 P. C. 85. AIR 1954 Cal 569 and (1904) ILR 27 Mad 21 and AIR 1922 Oudh 39 and AIR 1937 Oudh 26, Dis-sented from; AIR 1968 SC 960, Distinguished. Case law discussed.

(Paras 2, 5, 9, 11)

(B) Limitation Act (1963), Section 5 — Condonation of delay — Delay due to conflicting decisions misleading the party in filing appeal is good ground for condoning delay. (Para 11)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 960 (V 55) = 1968 Cri LJ 1132, State of U. P. v. Maharaja Narain 8
(1968) Second Appeal No. 420 of 1967, D/- 19-4-1968 (All), Dudhnath Dubey v. Prakhru Dube 9
(1966) AIR 1966 Madh Pra 340 (V 53) = 1966 Jab LJ 466, Kanhaiyalal v. Ram Kishan 6
(1965) AIR 1965 Mad 459 (V 52) = ILR (1964) 2 Mad 907, S. N. Jayarama Aiyar v. Rajagopalan 6
(1962) 1962 All LJ 1149 = 1962 All WR (HC) 902, Ganga Prasad v. Raghubir Prasad 7
(1961) AIR 1961 Orissa 133 (V 48) = ILR (1961) Cut 169, Municipal Councillors of Puri Municipality v. Madhusudan Das Mohapatra 6
(1960) AIR 1960 Mys 216 (V 47), C. Raghavendra Rao v. Vasavamba 6
(1959) AIR 1959 All 699 (V 46) = 1959 All LJ 456, Mukat Beharilal Agarwal v. Addl. Dist. Magistrate 1, 5, 7, 8
(1956) 1956 All WR (HC) 737, Udairaj Singh v. Jugal Kishore Mehra 3, 7
(1954) AIR 1954 Cal 569 (V 41) = ILR (1953) 2 Cal 144, Smt. Kamala Sundari Dasi v. Sridham Chandra (1954) AIR 1954 Madh Bha 18 (V 41) = Madh BLJ 1954 HCR 404, Sadashiv Rao Gangadhar v. Ramchandra Bhawan Bhagwat 6
(1953) AIR 1953 Bom 353 (V 40) = ILR (1953) Bom 565, Karim Ismail v. Abdul Rahiman 6

(1948) AIR 1948 Nag 15 (V 35) = ILR (1947) Nag 375, Chudamansao Nishramsao v. Ram Kuwar Birajlal 6
(1947) AIR 1947 Oudh 3 (V 34) = ILR 21 Luck 447, Ram Manorath v. Ram Bhulawan 6
(1947) AIR 1947 Lah 168 (V 34) = ILR (1946) Lah 107, Bhawani Cloth Mills Ltd. v. Parmeshwari Doss 6
(1942) AIR 1942 All 429 (V 29) = ILR (1943) All 84 (FB), Raja Pande v. Sheopuran Pande 6
(1942) AIR 1942 Mad 604 (V 29) = ILR (1942) Mad 868, Avasarala Kamaraju Pantulu v. Balla Saramma 6
(1941) AIR 1941 Nag 100 (V 28) = ILR (1941) Nag 144, Shivajiram Dhannalal Marwadi v. Gulabchand Marwadi 6
(1939) AIR 1939 All 252 (V 26) = 1939 All WR 153, Mst. Shayam Peare v. Ram Autar Singh 6
(1938) AIR 1938 All 606 (V 25) = ILR (1938) All 861, Puranchand v. Abdullah 6
(1938) AIR 1938 Lah 317 (V 25) = 40 Pun LR 74, Asa Singh v. Hira Singh 7
(1938) AIR 1938 Lah 234 (V 25) = ILR (1938) Lah 193 (FB), Shanti Prakash v. Harnam Das 6
(1937) AIR 1937 Oudh 26 (V 24) = ILR 12 Luck 531, Sukhnandan Prasad Shukla v. Raja Ahmad Ali Khan 7
(1935) AIR 1935 PC 85 (V 22) = 62 Ind App 80, Maqbool Ahmad v. Onkar Pratap Narain Singh 5, 7
(1934) AIR 1934 Pat 367 (V 21) = ILR 13 Pat 632, Dhanna Mistry v. Bengal Nagpur Rly. Co. Ltd. 6
(1931) AIR 1931 Pat 60 (V 18) = 14 Pat LT 91, Ramchandra Shukul v. Sri Thakurjee Mandil Darkadhis 7
(1929) AIR 1929 Pat 615 (V 16) = 10 Pat LT 545, Munshi Mohton v. Lachmanlal 8
(1929) AIR 1929 Rang 96 (1) (V 16) = ILR 6 Rang 743, Ma Dan v. Tan Chong San 7
(1922) AIR 1922 Oudh 39 (V 9) = 25 Oudh Cas 71, Abdul Ghaffor v. Mt. Rasulunnis 7
(1916) AIR 1916 Pat 317 (V 3) = 1 Pat LJ 485, Debi Charan Lal v. Mehdi Husain 8
(1914) AIR 1914 All 303 (V 1) = 23 Ind Cas 874, Budhu v. Sultan 7
(1904) ILR 27 Mad 21 = 13 Mad LJ 300, Saminath Ayyar v. Venkatasubba Ayyar 7
(1901) ILR 25 Bom 554 = 3 Bom LR 143, Tukaram Gopal v. Pandurang Sadaram 5, 7
(1901) ILR 25 Bom 556 = 3 Bom LR 244, Pandharinath Sakharam v. Shankar Narayan 5, 7

(1897) ILR 19 All 342 = 1897 All WN 76, Siyadat-Un-Nissa v. Muhammad Mahmud 1, 5, 7
Sirish Prasad, for Applicant; N. Lal, for Opposite Party.

VERMA, J.— This application in revision came up for hearing before Oak, C. J. and S. N. Singh, J. They have referred it to a Full Bench because of a conflict between two Division Benches of this Court— Siyadat-un-nissa v. Muhammad Mahmud, (1897) ILR 19 All 342 and Mukat Behanlal Agarwal v. Addl. District Magistrate Bareilly, AIR 1959 All 699.

2. The question involved in the case is one of limitation and it arises in this way. The applicant Bhagwan Swarup filed a suit against the opposite parties for the recovery of Rs 600 by way of damages on the allegation that he had been maliciously retrenched from his position as Commanding Officer of No. 229, U. P. N. C. C. R. Company of Municipal Intermediate College, Ujhani. The learned Munsif decreed the suit of the applicant against defendants nos. 1 and 2 on May 25, 1967. The Civil Courts closed for the summer vacation on June 2, 1967 and reopened after the vacation on July 3, 1967. The application for copies of the judgment and decree was made on the same date, that is to say on, July 3, 1967. Copies were ready and delivered on July 5, 1967 and the appeal was filed on July 6, 1967.

3. A preliminary point was raised before the learned Civil Judge of Budaun to the effect that the appeal was barred by time. The learned Civil Judge, relying upon the cases of Udairaj Singh v. Jugal Kishore Mehra, 1956 All WR 737, Munshi Mohtan v. Lachmanlal, AIR 1929 Pat 615 and Debi Charan Lal v. Mehdi Husain AIR 1916 Pat 317, held that the appeal was within limitation. Hence this application in revision.

4. The relevant sections of the Indian Limitation Act, 1963 (hereinafter referred to as the 'Act') are Sections 4 and 12. They are reproduced below:—

4. "Where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the Court re-opens.

Explanation— A Court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day."

12. "(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree,

sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Explanation — In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded."

5. In (1897) ILR 19 All 342, a Division Bench of this Court, on facts similar to the facts of the present case, came to the conclusion that the appeal was within time. In AIR 1959 All 699 another Division Bench came to the conclusion that the cases decided prior to the decision of their Lordships of the Privy Council in Maqbul Ahmad v. Onkar Pratap Narain Singh, AIR 1935 PC 85 were no longer good law. Some of these cases were cited before the Division Bench and they are— (1897) ILR 19 All 342; Tukaram Gopal v. Pandurang Sadaram, (1901) ILR 25 Bom 534, and Pandharinath Sakharam v. Shankar Narain, (1901) ILR 25 Bom 536. Before advertent to the decision of their Lordships of the Privy Council mentioned above, we should like to point out the difference between Section 4 and Sections 12 and 14 of the Act. The language of Section 4 pre-supposes that the period of limitation has already expired but it has expired on a day when the court was closed, and it provides that, despite the fact that limitation has expired, the suit, appeal or application may be instituted, preferred or made on the day on which the court reopens. There is nothing in Section 4 of the Act on the basis of which it could be said that it has the effect of extending or enlarging the period of limitation. The language of Sections 12 and 14, however, clearly provides for the extension of the period of limitation and, therefore, the period contemplated by Sections 12 and 14 must be added to the period of limitation prescribed by the Act and if, after this addition, limitation expires on a day when the court is closed, the suit, appeal or application may be filed on the reopening day. In Maqbul Ahmad's case, AIR 1935 PC 85 their Lordships of the Privy Council said this:—

"The second period is the period of the long vacation. In regard to that matter, the appellants seem to their Lordships to be in a position which is in the nature of a dilemma. It is to be noted that there is a marked distinction in form between Sec-

tion 4 and Section 14. The language, employed in Section 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court reopens; so that there is nothing in the section which alters the length of the prescribed period; whereas in Section 14 and other sections of a similar nature in the Act, the direction being with the words: "In computing the period of limitation prescribed for any application," certain periods shall be excluded. It, therefore seems to their Lordships that, where there is ground for excluding certain periods under Section 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period; that is to say, if the prescribed period is three years, and twenty days ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained."

6. The decision of the Judicial Committee mentioned above has been followed by large number of High Courts in this country. See *Puran Chand v. Abdullah*, AIR 1938 All 606; *Mst. Shayam Peare v. Ram Autar Singh*, AIR 1939 All 252; *Raja Pande v. Sheopuran Pande*, AIR 1942 All 429 (FB); *Shanti Prakash v. Harnam Das*, AIR 1938 Lah 234 (FB); *Bhawani Cloth Mills Ltd. v. Parmeshwari Doss*, AIR 1947 Lah 168; *Avasarala Kamaraju Pantulu v. Balla Saramma*, AIR 1942 Mad 604; *S. N. Jayarama Aiyar v. S. Rajagopalan*, AIR 1965 Mad 459; *Shivjiram Dhannalal Marwadi v. Gulabchand Kalooram Marwadi*, AIR 1941 Nag 100; *Chudaman v. Nishramsao v. Ram Kuwar Birajlal*, AIR 1948 Nag 15; *Sadashivrao Gangadhar v. Ramchandra Bhawan Bhagwat*, AIR 1954 Madh Bha 18; *Kanhaiyalal v. Ram Kishan*, AIR 1966 Madh Pra 340; *Ram Manorath v. Ram Bhulawan*, AIR 1947 Oudh 3; *Karim Ismail v. Abdul Rahiman*, AIR 1953 Bom 353; *Municipal Councillors of Puri Municipality v. Madhusudan Das Mohapatra*, AIR 1961 Orissa 133; *C. Raghavendra Rao v. Vasavamba*, AIR 1960 Mys 216. In *Dhanna Mistry v. Bengal Nagpur Rly. Co. Ltd.*, AIR 1934 Pat 367, it was laid down and, in our view, correctly, that the period of limitation should be computed first and, if Section 12 or other similar sections permit the exclusion of any period, that period should be added to the prescribed period of limitation and if the total period thus arrived at, expires on a day when the court is closed, Section 4 of the Act would come into play. To us, it appears that the law has been correctly laid down in the impressive array of authorities enumerated above.

A plain reading of Section 4 on the one hand and Sections 12, 14 and other similar sections on the other, makes the conclusion at which the above mentioned authorities have arrived, inevitable.

7. Mr. N. Lal, learned counsel for the opposite parties, has relied upon the following cases: (1901) ILR 25 Bom 584; (1901) ILR 25 Bom 586; and of course. (1897) ILR 19 All 342; *Smt. Kamala Sundari Dassi v. Sridam Chandra*, AIR 1954 Cal 569; 1956 All WR 737; *Saminatha Ayyar v. Venkatasubba Ayyar*, (1904) ILR 27 Mad 21; *Ganga Prasad v. Raghubir Prasad*, 1962 All LJ 1149; *Abdul Ghaffor v. Mt. Rasulunnis*, AIR 1922 Oudh 39; *Sukhanandan Prasad Shukla v. Raja Ahmad Ali Khan*, AIR 1937 Oudh 26; *Budhu v. Sultan*, AIR 1914 All 303; *Asa Singh v. Hira Singh*, AIR 1938 Lah 317; *Ma Dan v. Tan Chong San*, AIR 1929 Rang 96 (1) and *Ramcharan Shukul v. Sri Thakurjee Mandil Dar Kadhis*, AIR 1931 Pat 60. The cases prior to *Maqbul Ahmad's* case AIR 1935 PC 85 must be deemed to be no longer good law. As regards the cases after that, *Maqbul Ahmad's* case, AIR 1935 PC 85 was never considered in them. In 1962 All LJ 1149; AIR 1959 All 699 was cited but was not really considered and the Privy Council decision in *Maqbul Ahmad's* case, AIR 1935 PC 85 upon which *Mukat Behari Lal's* case, AIR 1959 All 699 was based, was not noticed. As regards *Mukat Behari Lal's* case, AIR 1959 All 699 the learned Judge (*Mithan Lal J.*) just disposed it of in one sentence:

"The case of *Mukat Behari Lal* is also based on the same footing and so that too does not lend any support to the views of the learned counsel for the opposite party."

AIR 1938 Lah 317 is a single Judge decision and in the same volume is a Full Bench decision to the contrary already mentioned by us above. The Calcutta decision in AIR 1954 Cal 569 proceeds on the footing that Section 4 of the Act extends the period of limitation which is directly in the teeth of the decision of the Judicial Committee in *Maqbul Ahmad's* case, AIR 1935 PC 85 which was never noticed by the learned Judges of the Calcutta High Court.

8. Strong reliance was placed by Mr. N. Lal on a decision of their Lordships of the Supreme Court in *State of Uttar Pradesh v. Maharaja Narain*, AIR 1968 SC 960. This was a case under Section 12 (2) of the Act and the effect of Section 4 was never considered. Their Lordships have held that Section 12 (2) of the Act enlarges the period of limitation prescribed under Entry 157 of Schedule I. That section simply permits the appellant to deduct from the time taken in filing the appeal the time requisite for obtaining the copy of the order appealed from. This decision, therefore, is clearly distinguishable and has no application to the facts

and to the question of law that arises in the present case.

9. Mr. N. Lal also relied upon an unreported decision of a Division Bench of this Court in Second Appeal No. 420 of 1967 (All) Dudhnath Dube v. Prakhu Dube decided by Rajeshwari Prasad and A. K. Kirty, JJ. on April 19, 1968. In this case, the learned Judges took the view that Mukat Behari Lal's case, AIR 1959 All 699, was a decision under the Limitation Act of 1908 and it was no longer good law in view of the definition of 'period of limitation' and 'prescribed period' given in the Act of 1963. They also thought that the difference in the phraseology of Sections 3 and 4 of the old Act and Sections 3 and 4 of the new Act led to the same conclusion. They pointed out that, under the new Act, dismissal on the ground of limitation would be entailed as a result of the filing of the suit, appeal or application after the prescribed period and not after the period of limitation prescribed by the first Schedule. We fail to see any difference justifying this conclusion, 'period of limitation' has been defined as period of limitation prescribed for any suit, appeal or application by the Schedule and 'prescribed period' has been defined as the period of limitation computed in accordance with the provisions of the new Act. The language employed in Section 4 of the new Act indicates just as the language of Section 4 of the old Act indicated, that it has nothing to do with computing the prescribed period. The language of Section 4 of the new Act does not extend or enlarge the period of limitation any more than the language of Section 4 of the old Act did. Consequently, AIR 1959 All 699 and the other cases in which the same view has been taken, are, in our opinion, still good law, despite the change in the phraseology of Sections 3 and 4 of the new Act and the cases relied upon by Mr. N. Lal in which a contrary view has been taken, do not lay down the correct law,

Under the new Act too, the prescribed period will be computed not in accordance with Section 4 of the Act, but in accordance with Sections 12 and 14 and other similar sections. We, therefore, respectfully disagree with the conclusions arrived at by the Division Bench in the unreported decision mentioned above.

10. Mr. N. Lal has argued that the view that we have taken is bound to result in hardship and injustice in individual cases. His contention is that a person, who wants to file an appeal, is entitled to have full 30 days for filing the appeal and, if for want of funds or other reasons, he has to wait up to the 30th day, and if that day happens to be a day on which the court is closed, his appeal would be barred by time for no fault of his. Our short answer to this argument is that in appropriate cases the appellate Court will extend the benefit of S. 5 of the Indian Limitation Act and condone the delay in filing the appeal.

11. Our conclusion, therefore, is that, technically, the appeal filed in the court below was barred by limitation. The question, however, is whether this is a fit case for interference in revision. In view of the conflicting decisions mentioned above, the defendant no. 1, Municipal Board of Ujhani, could very well have been misled into thinking that copies could be applied for on the reopening of the civil courts after the vacation and the time requisite for obtaining the copies would be excluded and its appeal would be within limitation. This would, therefore, have been a perfectly good ground for condoning the delay in filing the appeal under Section 5 of the Act. We, therefore, decline to interfere in revision.

12. This application in revision is dismissed, but we make no order as to costs.

Revision dismissed.

END

income-tax free shall be payable by the State Government."

It should be noted that both the Trusts which were before the Supreme Court are comprised of income-tax free securities. Since they were issued free of income-tax the interest accrued and received on the said securities, cannot be charged with income-tax in the hands of the receiver of that interest. The Supreme Court, therefore, held that the assessee was exempt from paying income-tax by virtue of the provisions of Section 8. The same two trusts which were before the Supreme Court, viz., the Family and the Miscellaneous Trusts are under consideration in the present assessments also. It follows that the interest realised from the securities that are the subject-matter of the two trusts are exempt from income-tax in the hands of the assessee by virtue of the third proviso to Section 8 and that they are not exempt from taxation on account of Item 8 of the notification dated 21-3-1922.

11. The learned counsel for the assessee, however, admitted before us that the securities comprised in the other three trusts, viz. The Housing Accommodation Trust, Pilgrimage Money Trust and Jewellery for Family Trust are not Income-tax free and interest therefrom is not exempt from income-tax. He, therefore, fairly conceded that the question must be answered against the assessee in so far as the securities in these three trusts are concerned.

12. Consequently, the answer to the second question referred at the instance of the assessee is in favour of the assessee in respect of the securities comprised in the family and the Miscellaneous Trusts, in so far as exemption from income-tax is concerned and against him in so far as super-tax is concerned. In regard to the securities in the other three trusts, the question is answered against him.

13. Now remains the last question. It relates to the inclusion of a sum of Rs. 1 lakh in the income of the assessee. The facts relevant to this item are:— By an indenture made at Hyderabad on 8-10-1949 between the assessee as the settlor of the one part and three named trustees, including the settlor-assessee of the second part, the settlor made a settlement of a sum of Rs. 30 lakhs on his daughter-in-law Princess Niloufer, wife of one of his sons. That amount was deposited with the Government of India, on its agreeing to pay interest thereon at the rate of 1% per annum free of Income-tax, Super-tax and all other taxes whatsoever, to the trustees and also agreeing to pay out of the corpus of the said sum of Rs. 30,00,000/-, various sums from time to time pursuant to an agreement dated 8-10-1949. This arrangement was incorporated in an agreement

dated 8-10-1949 between the Government of India of the first part, the assessee as the settlor of the second part, and the three trustees appointed under the trust deed of the third part. Under this arrangement, the Government of India agreed to pay interest at the rate of 1% per annum and to pay to the trustees out of the corpus of the said sum of Rs. 30 lakhs, until the said corpus is exhausted, such sum every year as together with the interest accrued due on the said sum of Rs. 30 lakhs or on the balance thereof remaining with the Government of India, as would in all make up the sum of Rs. 1 lakh per year. The Government of India further agreed that the interest payable on the aforesaid sum of Rs. 30 lakhs shall be free from Income-tax, Super-tax and all other taxes, dues, duties and assessments and that accordingly the Government of India shall not at any time assess or levy on the settlor or the trustees or any of the beneficiaries under the said deed of Trust, any Income-tax, Super-tax or other taxes etc., in respect of any income or corpus of the said sum of Rs. 30 lakhs deposited with them or any part thereof. Under the trust deed, the trustees should pay the amount of Rs. 1 lakh every year to Princess Niloufer free of Income-tax etc., until her death or re-marriage, whichever event should happen first. In the first eventuality, her beneficial interest was to pass on to such of her issue then living, in accordance with the provisions of the law of succession governing Sunni Muslims, as if the said Princess had died intestate. In case there was no issue on and after the death of the said Princess, the corpus of the said Trust Fund or the balance thereof then remaining in the hands of the Trustees was to be transferred to the settlor, if he be then living, and in the event of the settlor predeceasing the said Princess, it was to be handed over to the Nizam of Hyderabad living at that time. In case of divorce by her husband, if the Trustees were of the opinion that the divorce was not due to any act or default on the part of the said princess, it was open to the trustees to pay the net interest of the Trust Fund or of the balance thereof for the time being to the said Princess, until death or remarriage whichever event should take place first.

14. This arrangement went on till the year 1952 when the marriage of the Princess with the son of the settlor assessee was dissolved on 18-9-1952. Evidently the Trustees were of the opinion that the dissolution of the marriage was not occasioned by any act or default on the part of the Princess. They were, therefore, prepared to continue the payments to her as per the terms of the settlement of 8-10-1949. However, on 18-9-1952 itself, the Princess under a deed of release, transferred her right to receive a sum of Rs. 1

lakh per annum in favour of the assessee for a lump sum payment of Rs. 10 lakhs. It was thus, the assessee received during the relevant assessment years the sums of Rs. 1 lakh per year from the trustees. These are the amounts which are sought to be included by the revenue in the income of the assessee.

15. The assessee resisted this inclusion on two grounds: The first contention was that what was being paid back to him was only his capital and there was no element of income in the annual payment. Secondly he contended that by virtue of the terms of the tripartite agreement of 8-10-1949, these payments were totally exempt from tax and assessment. These contentions were not accepted either by the Income-tax Officer or by the Appellate Assistant Commissioner in appeal. Nor did they find acceptance with the Appellate Tribunal either. The third question referred to us at the instance of the assessee raises the same points for decision by us also.

16. We have no hesitation in upholding the view of the Tribunal that the annual payments of Rs. 1 lakh in the hands of the assessee are income within the meaning of the Act. He paid a lump sum of Rs. 10 lakhs and obtained in his favour, the benefit under the Trust Deed. These annual payments, no doubt, included not only interest but also instalments of capital. It should be noted that the benefit was purchased by the assessee not in his capacity as settlor but only as an ordinary purchaser. It cannot be postulated that such payments in the hands of an ordinary purchaser would not become income. The contention put forward by the learned counsel for the assessee is that these payments were made up of not only interest but also portions of the capital itself. But that feature of the payment does not prevent the amount from being an annuity. The principle stated in *Maharajkumar Gopal Saran Narain Singh v. Commissioner of Income-tax Bihar and Orissa*, 1935-3 ITR 237 = (AIR 1935 PC 143) applies to the present case also. There a person transferred an estate worth nearly Rs. 2 crores in consideration of certain acts to be done and obligations to be discharged by the transferee. One of such obligations is an annual payment of Rs. 2,40,000/- to the transferor for his life. The court held that the owner of the estate had exchanged a capital for a life annuity along with other benefits, which was taxable as income in his hands. It was further found that the annual payments were not instalments of a capital sum and that they were part of the price of the sale. Applying the same principle, it follows that the amounts of Rupees 1 lakh received by the assessee in pursuance of the release deed executed by the princess in his

favour on 18-9-1952 constitute his income.

17. The next part of the question is whether the assessee was entitled to exemption from tax on the income under the terms of the agreement entered into with the Government of India on 8-10-1949? We have briefly referred to the gist of that agreement. It was a tripartite agreement to which the Government of India, the assessee as the settlor and the three trustees of the trust were parties. A copy of the trust deed was also annexed to the agreement. It is common case between the parties that the rate of interest prevailing at the time of the agreement on Government and gilt-edged securities was $3\frac{1}{2}\%$ to 4% per annum. Nevertheless, the interest stipulated on the sum of Rs. 30 lakhs deposited with the Government of India was only 1% per annum. In order to understand the background of the agreement, it becomes necessary to read the following portion of the preamble:

"And whereas for the purpose of completing the said transaction an arrangement has been arrived at with the Government of India under which the trustees are to deposit the sum of Rupees 30 lakhs (Rupees thirty lakhs) with the Government of India on the Government of India agreeing to pay to him interest at the rate of one per cent per annum free of Income-tax, Super Tax and all other taxes whatsoever and also upon the Government of India agreeing to pay to the Trustees out of the corpus of the said sum of Rs. 30 Lakhs (Rupees thirty lakhs) various sums from time to time in manner hereinafter stated."

Clause (2) of the agreement is very material in this context. The relevant portions thereof are in the following terms:—

"The Government of India shall out of its revenue pay to the Trustees interest on the said sum of Rs 30 lakhs (Rupees thirty lakhs) at the rate of one per cent per annum free of Income-tax, Super-tax and all other taxes, dues, duties and other assessments whatsoever from the date on which the said sum of Rs. 30 lakhs (Rupees thirty lakhs) shall be deposited by the Trustees with the Government of India until the said sum of Rs. 30 lakhs (Rupees thirty lakhs) shall be wholly paid out by the Government of India in accordance with the provisions."

It is thus made a part of the agreement that till the sum of Rs 30 lakhs was wholly paid out by the Government, the interest was made completely free of taxes, dues, duties and the assessments.

18. Clause (4) makes the position clearer. It states:—

"The Government of India hereby declares and agrees that the interest payable on the security of these presents shall be free from Income-tax, Super-tax and all other taxes, dues, duties and assessments"

and that accordingly the Government of India shall not at any time assess or levy on the Settlor or the Trustees or any of them or on any of the beneficiaries under the said Deed of Trust any Income-tax, Super-tax or other taxes, dues, duties or assessments in respect of any income or corpus of the said sum of Rs. 30 Lakhs (Rupees thirty lakhs) so deposited or any part or parts thereof and any such income or corpus or any part thereof shall not at any time be included in the income of the Settlor or of Trustees or any of them or of any of the beneficiaries under the provisions of the Indian Income-tax Act or any other Act relating to taxation on the income, gains and profits of any persons in India provided however that if notwithstanding the provisions herein above contained any such tax, dues, duties or assessments shall be charged or levied on either the Settlor or the Trustees or the beneficiaries under the said Deed of Trust or any of them in respect of any income or corpus of the said sum of Rs. 30 lakhs (Rupees thirty lakhs) so deposited or any part thereof or in any part of such income or corpus be included in the total income of any of them for computing his or her total income for the purpose of assessment of his or her income, gains or profits by virtue of the provisions of the Indian Income-tax Act or of any other enactment or law for the time being in force in that behalf in India then the Government of India shall forthwith refund, reimburse and pay to such person the amount of tax, dues, duties or assessments charged or levied on him, or her and/or the amount of additional tax, dues, duties or assessments which shall have been charged or levied on him or her by reason of any part of the said income or corpus being included in the total income of such person for the purpose of assessing his or her total income, gains or profits under the provisions of the Indian Income-tax Act or any other law or enactment for the time being in force in that behalf in India."

19. Reading Cls. 2 and 4 together, it is clear that the payments made in accordance therewith were made free from taxation and assessment. In fact, in Cl. (4), the Government of India undertook not to assess or levy at any time on the settlor or the trustees or any of the beneficiaries, any tax or assessment in respect of any income or corpus of the sum of Rs. 30 lakhs. It has been contended for the Revenue that the exemption was available only to the settlor or the trustees or any of the beneficiaries and is not available to a purchaser of the benefit under the deed. It has been urged that the privilege of exemption from tax was conferred on these three categories of persons purely as a personal benefit and it could not be extended to others. We

are not inclined to accept this contention. If there is any doubt as to whether the benefit of exemption from tax was limited to the three categories of persons alone, the preamble helps in resolving the difficulty. We have already extracted the relevant portion of the preamble. It makes clear that the settlor and the trustees had agreed to deposit a sum of Rs. 30 lakhs with the Government of India at the very low rate of 1% per annum, because that deposit and the payments therefrom were agreed to be made free from tax. It must, therefore, follow that payments made in pursuance of the agreement should be free from tax. It is also very pertinent to note that the word used in clause (4) is "the beneficiaries" and not the "Princess." Had the intention of the agreement been to limit the exemption from tax to the person of the Princess alone, the word 'Princess' would have been used in the place of 'the beneficiaries'. In any case, we are not inclined to agree with the contention advanced for the revenue that the transferee of the benefit could not stand in the shoes of the original beneficiary. The benefit is certainly "an actionable claim" within the meaning of Section 3 of the Transfer of Property Act. When there is a transfer of that actionable claim within the meaning of Section 130 of the Transfer of Property Act, the transferee becomes the beneficiary in the place of the transferor who was the original beneficiary and thus becomes entitled to all the benefits which the transferor enjoyed. We have no hesitation, therefore, in holding that the assessee, by virtue of the transfer made in his favour, became a beneficiary within the meaning of clause (4) of the agreement dated 8-10-1949 and thus was entitled to the exemption from tax by virtue of its provisions.

20. We must also notice another contention urged before us for the revenue. It has been pointed out that there is no provision in the Act or the Rules made thereunder, empowering the Government of India to enter into an agreement of the nature of the arrangement of 8-10-1949, and, therefore, the agreement was entered into without jurisdiction and was void. We cannot go into this question for the simple reason that it has not been referred to us. It should be noted that this argument was never taken by the Revenue at any stage, in any form, before the lower authorities and has been for the first time urged before us. We are not, therefore, called upon to answer this question.

21. From what is stated above, it follows that the answer to the last question is that though the payments of Rs. 1 lakh per year were "income" in the hands of the assessee, he was entitled to exemption

from tax thereon, under the terms of agreement of 8-10-1949.

22. The questions are answered as stated above. In view of the fact that the assessee has succeeded in some questions and failed in others, we make no order as to costs.

Answered accordingly.

AIR 1970 ANDHRA PRADESH 404 (V 57 C 65)

**P. JAGANMOHAN REDDY, C. J., AND
SAMBASIVA RAO, J.**

Kaja Sudhir, Petitioner v. The Principal, Guntur Medical College, Guntur and others, Respondents.

Writ Petns. Nos. 4217, 4249, 4268, 4360, 4956 of 1968 and No. 17 of 1969, D/- 30-1-1969.

(A) Constitution of India. Art. 14 — Equality before law — Rule 3 (a) and Appendix 1 of Rules for selection of candidates for admission to the integrated M.B.B.S. Course, in Medical Colleges in Andhra Area of Andhra Pradesh for year 1968-69 are not unconstitutional — Categorisation of several N.C.C. Certificates in order of preference is based on rational differentia and is not discriminatory. Observations in (1968) 1 Andh WR 56, held obiter. (Paras 9 to 13)

(B) Education — Rules for selection of candidates for admission to the integrated M.B.B.S. Course, in Medical Colleges in Andhra Area of Andhra Pradesh for year 1968-69, Rule 3 (a) and Appendix 1 — Not unconstitutional — Categorisation of several N.C.C. Certificates in order of preference is based on rational classification and is neither discriminatory nor unintelligible — Object being to compensate the candidates having taken part either in Sports or in extra-curricular activities, authority concerned is justified in giving preference to persons having taken part in those activities for a longer period than those who have taken part for a comparatively shorter period. Observations in (1968) 1 Andh WR 56, held obiter. (Paras 9 to 13)

Cases Referred Chronological Paras
(1968) 1968-1 Andh WR 56, A. S.

Rami Reddy v. Principal, Guntur Medical College 8, 12, 13

K. Suryanarayana and Y. B. Tata Rao, for Petitioner in W. P. No. 4217 of 1968; G. Vedanta Rao and N. Narasimha Rao, for Petitioner in W. P. No. 4249 of 1968; M. Adinarayana Raju (for No. 6), R. V. Subba Rao (for No. 3), T. Bali Reddy (for Nos. 7 and 10) and D. Sudhakar Rao (for No. 5), for Respondents in W. P. No. 4249 of 1968; K. Srinivasa Murthy, K. Haradha Rao, for Petitioner in W. P. No.

4268 of 1968; D. Satyanarayana, for Petitioners in W. P. Nos. 4360 and 4956 of 1968; I. Balaiah and N. Narasimha Rao, for Petitioner in W. P. No. 17 of 1969, 2nd Govt. Pleader, for Respondents Nos. 1 and 2 in W.P. Nos. 4217 and 4249 of 1968 and for all the Respondents in other Petitions.

P. JAGANMOHAN REDDY, C. J.:— These six Writ Petitions relate to admissions to the medical colleges in Andhra Area. In Writ Petitions Nos. 4217, 4249, 4268, 4360 and 4956 of 1968, the question is as to the interpretation of Appendix I to Rule 3 (a) of the Rules for admission as amended by G. O. Ms. No. 1499 Health dated 28th June, 1968.

2. Before we deal with the several contentions raised before us, it is necessary to set out the qualifications of each of the petitioners.

3. K. Sudhir, Petitioner in Writ Petition No. 4217 of 1968, has obtained in the P. U. C. examination 230.25 marks in optionals and also obtained a 'B' Certificate in N.C.C.

4. C. Vijayasekhar, petitioner in Writ Petition No. 4249 of 1968, has obtained 182.25 marks in optionals and he is also a 'B' certificate holder. Apart from this, he has been for three years in A.C.C. and has also obtained a certificate for attending Advanced Leadership Course and Annual Training Camp.

5. Pardhasarathi is the petitioner in Writ Petition No. 4268 of 1968 with 228 marks in optionals and is a 'B' certificate holder.

6. Santhi Swarup Nayar is the petitioner in Writ Petition No. 4360 of 1968. He has obtained 228.75 marks in optionals and is also the holder of a 'B' certificate.

7. S. V. Umamaheswara Rao is the petitioner in Writ Petition No. 4956 of 1968. He has passed the H. S. C. Multi-purpose examination obtaining 196.50 marks in optional subjects and is a holder of 'A-I' and 'A-2' certificates.

8. These candidates are competing against eleven candidates who have either obtained 'A-I', 'A-II', 'J-II' or 'C' certificates — all of which are said to be higher than the 'B' certificates obtained by the petitioners. It is the contention of the learned advocates for the petitioners that this Court had, on a prior occasion, in A. S. Rami Reddy v. Principal, Guntur Medical College, 1968-1 Andh WR 56 considered the constitutionality of Rule 3 and the Appendix thereof which are in similar terms to those with which we are now concerned. The Division Bench consisting of one of us and Kumarayya, J., had held the Rule to be discriminatory. Before we deal with this contention, it is necessary to set out Rule 3(a) and Appendix I to the Rules.

3(a). "2% of the seats shall be reserved exclusively for students possessing the

prescribed certificates in N.C.C., and A.C.C. Selection of candidates under this category will be made according to the procedure detailed in Appendix I to these Rules;

x x x x
x x x x

APPENDIX I

The selection of candidates possessing the N.C.C. and A.C.C. certificates will be made in the order of preference indicated below:—

(i) Holders of 'C' certificates for Boys from Colleges, holders of 'A-II' Certificates for boys from High Schools, holders of 'G-II' Certificates for girls from Colleges, holders of 'J-II' Certificates for girls from High Schools.

(ii) Holders of 'B' Certificates for boys from Colleges, holders of 'A-I' Certificates for boys from High Schools, holders of 'G-I' Certificates for girls from Colleges, and holders of 'J-I' Certificates for girls from High Schools.

(iii) Holders of A.C.C. Certificates for boys and girls from Schools.

NOTE:— The candidates with one year training in the Air Wing of N.C.C. shall, for purposes of admission, be treated on par with a candidate possessing 'B' and 'A-I' Certificates of the Army and the Naval Wings subject to the condition that the candidate should produce a certificate from the Director, N.C.C. to the effect that he is proficient in his course, and also gives an undertaking that he would continue and obtain his 'B' certificate in the Air Wing."

9. It is the contention of the petitioners' advocates that this categorisation of the several certificates in order of preference is not based on any rational classification and is discriminatory, in that the Junior and the Senior Divisions of N.C.C. irrespective of proficiency have been grouped together. In the first category of the order of preference, 'C' certificates for boys from colleges which can only be awarded two years after they obtain 'B' certificates in the colleges while studying P.U.C. are grouped together with 'A-II' certificates which are awarded two years after obtaining 'A-I' Certificates from high schools. 'G-II' certificates and 'J-II' certificates are respectively equivalent to 'C' certificates and 'A-II' certificates for girls from colleges and high schools and the same argument applies to them as well. Similarly, in the second category of preference, it is contended that 'B' certificates which are obtained after one year's training in Colleges and a Senior Division in N.C.C. are compared and treated as equivalent to 'A-I' certificates obtained by boys from high schools who have put in one year. In so far as the girls are concerned, the equivalent of these are 'G-I' and 'J-I' certificates res-

pectively. In the third and last category of preference, it is contended that A.C.C. certificates for boys and girls who have put in even three years of training are relegated to this category.

The learned Government Pleader, on the other hand, submits that this classification is based on a rational differentia which has the nexus with the object sought to be achieved, namely, that candidates who have been in the N.C.C. for longer periods and have taken interest are preferred to those who have had lesser number of years of training. With this object the grouping has been done into the several categories of preference. We are also told that it has not been denied that candidates who have obtained 'A-II' certificates in H.S.C. notwithstanding the fact that they cannot obtain the 'B' certificates in P.U.C., nonetheless are in a position to obtain 'B' certificates subsequently in the first year degree course and proceed to get 'C' certificates before they do their B.Sc., degree course just as in the same way as a P.U.C. candidate, who is going in for a degree, can obtain the 'C' Certificate. One of the conditions for obtaining 'C' certificates is that a person must obtain the 'B' certificate which can only be done in the Senior Division of N.C.C. in the college during the first year. If this position is correct we have no doubt it is and because there has been no serious dispute then there is certainly no discrimination between the H.S.C. and P.U.C. boys. Even in the case of candidates completing H.S.C. in schools and who come to the colleges to take P.U.C., they can be awarded "A-I" and "A-II" certificates as these are certificates given for training in schools.

Once it is admitted that there is no disadvantage between the candidates who come from H.S.C. and those candidates who compete on the basis of P.U.C. certificates, it will not be open for this Court to go into the question of categorisation of the preferences since it is found that those preferences are based upon some rational differentia which is not discriminatory. Whether the standard of the total length of training in the N.C.C. both in schools and colleges is taken as the criterion for efficiency or as a qualification for selection, or whether preference is to be given only to the training and certificates obtained in the Senior Division of N.C.C. is a matter which is not within the jurisdiction of this Court. It is a matter entirely for the authority empowered to frame the rules for selection. There is not a rule, the basis of which cannot be disagreed with. But what the Courts have to see is whether in making or framing the rule, the authority concerned has adopted a reasonable classification and has based it on an in-

intelligible differentia which has a reasonable connection with the object sought to be achieved.

10. In the present petitions, we find that while making admissions to medical colleges, certain percentage of seats is given to candidates who have obtained proficiency either in sports or in extra-curricular activities because it is felt that those who have taken part in these activities have done so at the expense of their studies; and therefore do not have the same advantage as those who have exclusively concentrated on getting marks. If this is the avowed object, namely, to compensate those candidates who have taken part in some of the activities referred to above, then the authority concerned is perfectly justified in giving preference to persons who have taken part in those activities for a longer period than those who have taken part for a comparatively shorter period. There is nothing discriminatory or unintelligible in this classification.

11. Sri G. Vedanta Rao, learned Advocate for the petitioner in W. P. No. 4249 of 1968, has produced the opinion of one of the Military Officers to the effect that Senior N.C.C. is a superior training than Junior N.C.C. training. No doubt it may be so. But that is not the only criterion because if that were to be so, there must be no reason why persons who have obtained B.Sc., degrees should not compete or be given preference over those who have passed only P.U.C. This would cut at the very object of the selection which is intended to see that they should be selected at the lowest level or at the threshold of their entrance to the professional colleges. In this view we find no discrimination whatever either in the Rule or in the Appendix which prescribes preferences of various categories.

12. Certain observations made in (1968) 1 Andh WR 56 by a Bench consisting of one of us and Kumarayya, J., have been relied on for holding that Rule 3 is unconstitutional. It may be stated that in that case after the last date for the receipt of applications, the Government changed the Rule pertaining to selection which caused prejudice to the petitioners. The basis of that decision was that the Government was estopped from applying a different rule to that which was prevailing at the time when the applications were called for and not subsequent to the date when the receipt of applications for admission is closed. Kumarayya, J., who spoke for the Bench observed at p. 63:

"At any rate, as we have already noticed 'the Government, possessing as they do, powers to amend, alter and cancel any rule, could not exercise these powers in an unreasonable manner to unjustly

defeat the rights already accrued. They are bound by the doctrine of equitable estoppel. It follows therefore that if the petitioners, according to the rules in force on the last date of applications, are entitled to a seat in the medical college as against the respondents, who are actually awarded such seats, their right cannot be defeated by subsequent amendment to the rules. Apart from any other ground the very idea that the rule should be thus changed to the detriment of some, after all the applications have been received, is obnoxious enough, for if so permitted it will lead not only to arbitrariness but also to unjust results of far-reaching consequences. We therefore hold when the rule in force was valid and was not struck down, the change in the rule to the detriment of some including the petitioners is unjustified and the Government on the principle of equitable estoppel is precluded from retracting from the original position and giving effect to the amended rule to the detriment of the petitioners."

No doubt this was the ratio of that decision. But there are certain observations made in that decision which certainly assist the petitioners, viz.,

"... P.U.C. students who could hope to get only 'B' certificates and not 'C' certificate unless they continue to study for 3 years in college should have been made to suffer by this rule. The highest certificate that they can hope to get is only 'B' certificate and that certificate for purposes of selection has not been placed at least at a par with 'A-II' which is the highest that H.S.C. students can get."

These observations were based upon the material placed before the Bench then.

13. As we have already said earlier, it is not denied that a person applying under the P.U.C. category for admission can nonetheless ask to be considered for admission under the N.C.C. category on a 'C' certificate because it is not necessary that such a candidate should apply immediately after passing the P.U.C.; but he can do so when he gets into the final year of B.Sc. by which time he could not only get 'B' certificate but also 'C' certificate. In fact one of such candidates who has been given a seat, namely, Roop Kumar, has been awarded a 'C' certificate and he got 229.50 marks in P.U.C. Similarly, as we said earlier a person in H.S.C. who has got "A-II" certificate can easily compete with a person who has applied in the category of P.U.C. with a "C" certificate. Nor can it be said that a person who has passed P.U.C. can only get "B" certificate and not "A-II" certificate. We think that the observations made in (1968) 1 Andh WR 56 are no doubt obiter, as such could not be pressed in aid of the contentions urged on behalf of the peti-

tioners that the Appendix has already been struck down; or, at any rate, must be struck down. In this view, we reject the contention that the Rule and the Appendix are unconstitutional. For this reason, the 'B' certificate holders come under the second category of preference and must be compared only with those that are specified in Appendix I.

14. It is stated on behalf of one of the petitioners (W. P. No. 4249 of 1968) that he has put in three years in A.C.C. and is a holder of a "B" certificate which gives him longer training than the others. But we have no material which can afford a basis for holding that A.C.C. certificate is of a higher category or involves a longer period of training or is more efficacious. One of the considerations for grouping certain certificates in the first category of preference is that they are given to boys who have attended the Annual Training Camps. We do not know whether persons who are trained in A.C.C. have to attend such Training Camps. Consequently it is not possible for us to say that they are in the same category of those who have been grouped in the first category; and therefore must be given preference. Therefore none of the petitioners can claim preference to those who have already been given seats.

15. No doubt, the petitioner in W. P. No. 4217 of 1968, K. Sudhir, has a claim to be considered on merits because he has obtained 230.25 marks. Mr. G. Venkata-rama Sastry, II Government Pleader, who has given us the details of marks obtained by others, has frankly conceded on instructions that the petitioner would be in the third rank in the reserved list of candidates and that there are 13 seats available out of which 9 are reserved including the seat reserved for the petitioner himself. In this view, he is entitled to one of the seats. Accordingly we direct that this petitioner should be given a seat.

16. Similarly, Santi Swarup Nayar, Petitioner in W. P. No. 4360 of 1968, has obtained 228.75 marks and if so, he is entitled to a seat on merits and his case for admission can be considered. We cannot direct that a seat should be given to him because we have not got all the details of marks obtained by other candidates, or their marks in English which have to be considered for giving preference in the event of there being a tie. We accordingly direct the 1st respondent Principal of the Guntur Medical College, to consider his case on merits.

17. The contention that because these petitioners had applied for admission as coming under the N.C.C. group, they were not considered for the general seats is not a valid one. The proper course to be

followed by the selection authority, according to the Rule, is to consider the applications of the five petitioners on their respective merits; and if they are not likely to get seats on that footing, then alone their applications can be considered as falling under any one of the special categories.

Writ Petition No. 17 of 1969.

18. The question arising in this writ petition is already concluded by the directions given by us in the judgment in Writ Petition No. 4070 of 1968 delivered on 9th December 1968 in that they may be considered as a class of merit without further categorisation into Scheduled Castes, Scheduled Tribes, Women candidates, sports etc.

19. In the result, W. P. Nos. 4217/68, 4360/68 and 17 of 1969 are allowed with costs. Advocate's fee Rs. 100/- (Rupees one hundred only) in each. W. P. Nos. 4249/68, 4268/68 and 4956/68 are dismissed without costs. We however, fix the Government Pleader's fee at Rs. 100/- (Rupees one hundred only) in each of these petitions.

Order accordingly.

AIR 1970 ANDHRA PRADESH 407
(V 57 C 66)

OBUL REDDI, J.

Nannepuni Seetharamaiah and others, Appellants v. Nannepuni Ramakrishnaiah, Respondents.

Appeal No. 108 of 1964 and Cross Objections, D/-24-2-1969, from decree of Sub. J. Khammam in O. S. No. 6 of 1962.

(A) Registration Act (1908), S. 17 (1) (b) — Documents of which registration is compulsory — Partition deed — Effect of non-registration — Though inadmissible in evidence for ascertaining terms of partition and tracing source of title, the factum of partition can be proved by other evidence. AIR 1960 SC 335 & AIR 1965 Andh Pra 274 (FB), Rel. on. (Para 7)

(B) Hindu Succession Act (1956), S. 25 — His conviction for the offence of murder or abetment of murder under S. 302 I. P. C. not necessary for disqualification — Conviction under S. 324, I. P. C. is enough to disqualify.

Where a person, who had participated in murderous attack on his father along with others who were convicted of murder in that case, was given benefit of doubt and was convicted under Section 324, I. P. C. instead of Section 302 even then the disqualifications prescribed by Sections 25 and 27 will come into play and operate against that person inheriting or deriving any beneficial interest in the property possessed or held by his father.

DN/EN/C71/70/MLD/C

(1904) 14 Mad LJ 297 & AIR 1924 PC 209, Rel. on. (Paras 11, 12)

Cases Referred: Chronological Paras

(1965) AIR 1965 Andh Pra 274

(V 52) = (1965) 1 Andh WR 384

(FB), Kanna Reddy v. Venkata

Reddy

(1960) AIR 1960 SC 335 (V 47) =

(1960) 2 SCR 253, Rukmabai v.

Laxminarayana

(1924) AIR 1924 PC 209 (V 11) =

51 Ind. App. 368, Kenchava v.

Girimallappa Channappa

(1904) 14 Mad LJ 297 = ILR 27

Mad 591, Vedanayaga Mudaliar v.

Vedammal

Y. Suryanarayana, for Appellants; V. Madhava Rao, for Respondents.

JUDGMENT: This appeal preferred by defendants is directed against the judgment and decree of the Subordinate Judge, Khamman in Original Suit No. 6 of 1962 decreeing the suit of the plaintiff for partition and possession of his 1/5 share in Items 1 to 4, 6 and 7 of plaint 'A' schedule and Item 18 of plaint 'B' schedule.

2. The defendants 1 to 3 and the plaintiff are the sons of one Narayana, the 4th defendant is their mother and the 5th defendant is their sister. According to the plaintiff, he and the defendants 1 to 3 were members of a Hindu undivided joint family and therefore he is entitled to partition and separate possession of his share in the joint family properties. The suit was resisted by the defendants contending inter alia that there was a prior partition whereunder there was allotment of shares to each of the sharers and therefore the plaintiff is precluded from seeking the relief of partition and separate possession of his share. The Subordinate Judge held that there was no prior partition as set up by the defendants, and that the plaintiff is entitled to the relief claimed only in respect of Items 1 to 4, 6 and 7 of plaint 'A' schedule and Item 18 of plaint 'B' schedule and passed a preliminary decree accordingly.

3. Mr. Y. Suryanarayana, appearing for the appellants, contended that the evidence on record amply bears out the case of the appellants that there was a prior partition in the year 1955 and that the plaintiff walked out of the family taking his share and as such this partition action is not maintainable. As the plaintiff has also claimed his right to inherit along with his brothers, his father's estate and as it was negated by the Court below he has preferred the cross-objections. Mr. Suryanarayana contended that the plaintiff, being the murderer of his father, cannot inherit the estate of his father and as such he is not entitled to a share in his father's property under Sections 25 and 27 of the Hindu Succession Act.

4. Mr. Madhava Rao, appearing for the respondent-plaintiff, contended that the

plaintiff was not convicted of the offence of murder and therefore, he is not disqualified from inheriting his father's property. It is next urged by Mr. Madhava Rao, that the Court below has rightly negated the case of the appellants (defendants) as the partition documents Exts. B-1 and B-5 set up by them were found to be inadmissible in evidence. Therefore, the main question for consideration is whether there was a prior partition in the year 1955, whereby the plaintiff was allotted a share, which disentitles him from maintaining the present action.

5. The case of the plaintiff as unfolded in the plaint is that his father purchased the plaint schedule properties with the monies realised by sale of the ancestral properties situate in another village that the 1st defendant and others, who were inimically disposed towards him, falsely implicated him in the case relating to the murder of his father in order to deprive him of his share in his father's property, that after he was released from jail, he made several demands asking his brothers to effect a partition and render account for the income realised from the joint family properties and that as they failed to accede to his request, he was forced to lay action for partition and separate possession of his share.

6. It is the specific case of the defendants that the joint family status was disrupted by partition as far back as in the year 1955 and a memorandum was drawn up evidencing physical partition. According to them, the plaintiff, after obtaining his share, sold away an item of that property under an agreement of sale and that he had admitted the partition and sale of an item out of what fell to his share when examined by the Court of Session, Khammam, under Section 342 of the Criminal P. C. and therefore, the action is misconceived and not maintainable.

7. Mr. Suryanarayana relied upon Exs. B-1 and B-5 and contended that they are only memoranda of the partition which was earlier effected by metes and bounds and as such, the court below erred in holding that they are inadmissible in evidence for want of registration. Ex. B-1 is styled as deed of partition of immovable property entered into on 7th June 1955 by five individuals, viz. the four sons and their father Narayana. The particulars of partition were all detailed in this and the items that were allotted to each one of the sharers were also given out describing the boundaries. There is also a recital to the effect that from thenceforth each individual shall pay the land revenue and other taxes on the share allotted to him. It was signed by all the parties to the partition and there are four witnesses who attested the deed and two

of them, D. Ws. 4 and 5. have been examined. Ex. B-5 is an instrument of the same date i.e. 7-6-1955, executed by the plaintiff, defendants and their father whereby they settled Ac. 4-50 cents of land in favour of one Anasuyamma, sister of the plaintiff and defendants. Ex. B-2 is an agreement of sale dated 28-7-1955 entered into by the plaintiff with his brothers agreeing to sell an item of the property which fell to his share on 7-6-1955. Therefore, it is not as if there was any earlier partition and a memorandum was drawn up on 7-6-1955 as now contended by the learned counsel for the appellants. The recitals in the deed Ex. B-2 make it abundantly clear that Exs. B-1 and B-5 were drawn up on 7-6-1955 allotting shares to each of the sharers on the very date of partition. Exs. B-1 and B-5 are documents which require to be compulsorily registered under Section 17 (1) (b) of the Registration Act. The effect of non-registration of these documents is that they will not create, declare, assign, limit or extinguish any right, title or interest in or to the immovable property comprised in the documents. In short, these documents are ineffectual to achieve the object or purpose for which they were drawn up. But the fact that these documents are inadmissible in evidence will not affect the case of the defendants for the reason that they are not precluded from proving the factum of partition by other evidence. They cannot be looked into only for ascertaining the terms of the partition and tracing the source of the title in the property held by each of the sharers. As pointed out by Subba Rao, J. (as he then was) in *Rukma-bai v. Laxminarayan*, AIR 1960 SC 335, doubtless, an unregistered document can effect separation in status.

8. According to Mr. Suryanarayana appearing for the appellants, this is not only a case of separation in status but a case where there was physical partition in June, 1955; and to establish that there was physical partition, he relied upon the evidence of the plaintiff himself and the answers given by him when questioned by the Sessions Judge under Section 342 of the Criminal P. C. The plaintiff, however, tried to wriggle out from the answers given by him in the Court of Session by explaining that he was constrained to make such admission on the advice tendered by his Advocate that, unless he admitted the execution of Exs. B-1, B-2 and B-5, it would be difficult for him to escape capital punishment in that case. It may be pointed out that the defendants do not depend upon the evidence of the plaintiff alone to show that there was physical partition of the lands by metes and bounds. There is the evidence of D. W. 4, one of the attestors, who says that with the help of elders there was physical partition of the properties belong-

ing to the plaintiff and his brothers and father and that he was present on that occasion and had also attested the document in question. The lands were also measured by D. W. 6, another witness, as the father and sons had mutually agreed for division by metes and bounds as per the understanding arrived at by them. D. W. 5's evidence further establishes that there was division of the properties by metes and bounds. D. W. 6, who measured the lands, has stated that those divisions were made after the Telugu New Year's Day in that year and that the plaintiff took possession of the lands allotted to him and so also the plaintiff's sister D. W. 8 is a lessee of the plaintiff and he stated that the land that fell to the plaintiff's share was leased out to him. It is not even suggested to any of these witnesses that there was no partition and that the plaintiff did not walk out with his share, accepting the allotment made by the elders. In this connection, it may be noticed that Ex. B-2, the agreement of sale was executed by the plaintiff one month and twenty days after Exs. B-1 and B-5 were drawn up. The significance of Ex. B-2 is that it establishes not only that there was physical partition as pleaded by the appellants but it was also acted upon by the parties, the plaintiff himself having agreed to sell his property by entering into an agreement as evidenced by Ex. B-2.

9. As pointed out by the Full Bench of this Court in *Kanna Reddy v. Venkata Reddy*, AIR 1965 Andh Pra 274 (FB) an unregistered document cannot be relied upon to prove the terms of disposition of property embodied in that document and the bar is only to that extent and it will not preclude the party to prove physical partition by other evidence. In this case, Mr. Suryanarayana is not relying upon the terms of deed Ex. B-1 for proof of any allotment of the shares. Reliance is placed only on the oral evidence which bears out in no uncertain terms that there was physical partition of the joint family properties. I, therefore, set aside the findings and the consequent decree made by the Subordinate Judge in this regard and hold that the partition action laid by the plaintiff is not maintainable in view of the prior partition.

10. Mr. Madhava Rao next contended that the plaintiff is at least entitled to a share in his father's estate as his father died on 4th July, 1955 subsequent to the date of Ex. B-1, the partition document. Mr. Suryanarayana contended that the plaintiff has forfeited the right to inherit his father's estate as he was responsible for the murder of his father. Therefore, the question that falls to be considered is whether the plaintiff is disqualified from inheriting the property of his father by virtue of the bar imposed by

Sections 25 and 27 of the Hindu Succession Act. Section 25 reads:

"A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder."

It may be necessary to refer to the case in which the plaintiff stood charged along with three other accused for the murder of his father Narayana and his paternal uncle under Section 302 read with Section 34, I. P. C. The Sessions Judge, Khammam convicted the plaintiff and the other accused in S. C. No. 13 of 1959 under S. 326 read with S. 34, I. P. C. while acquitting them of the charge under Sec. 302 read with S. 34, I. P. C. framed against them. They were also convicted under S. 324 read with S. 34 I.P.C. for causing hurt to some of the witnesses. The plaintiff and another accused were further convicted by the Sessions Judge under S. 392 read with S. 397, I. P. C. for robbery of a cart load of paddy from Narayana's possession. The State preferred an appeal against the acquittal of the plaintiff and the other accused of the offence of murder and the plaintiff and the other accused preferred appeals against their convictions. Krishna Rao and Kumarayya, JJ. before whom the connected appeals (Crl. Appeals Nos. 654, 689 and 694 of 1959 and 12 of 1960) came up for hearing found having regard to the nature of the injuries inflicted on the two deceased persons, that the only possible conclusion from the evidence on record was that the injuries of both the deceased were sufficient in the ordinary course of nature to cause death, "although unfortunately the prosecution neglected to directly elicit this fact from P. W. 9, as they ought to have done. An offence of murder was clearly committed in respect of each of the deceased within the meaning of Cl. 3 of Section 300, I. P. C."

Having found thus, the learned Judges then proceeded to observe:

"Having regard to Cl. 3 of Section 300, Indian Penal Code, the learned Sessions Judge was in error in the view he took that for a conviction under Section 302 read with Section 34, I.P.C. the existence of a common intention to beat is insufficient and that a common intention to kill is always necessary. Even if the common intention is merely to beat, if the bodily injury intended to be inflicted by the beating is found to be sufficient to cause death in the ordinary course of nature the mens rea required for liability under Section 302 read with Sec. 34, I. P. C. would be satisfied."

The learned Judges on appraisal of the evidence found:

"All the accused would therefore, be liable under Section 302 read with Section 34, I. P. C. The benefit of doubt arising from the difference between the evidence of P. Ws. 1 and 2 and that of P. Ws. 3 and 4 must go to the accused, especially as the trial Judge's finding with regard to the events in Lakshminarayana's pasture land implies that P. Ws. 1 and 2 were prone to exaggeration."

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"As they formed the plan with the object of overpowering the deceased's party and seizing the paddy, the common intention that may be initially attributed to them would be merely at causing hurt to the deceased and their men. If we found ourselves on the evidence of P. Ws. 3 and 4, it would follow that the acts of accused 2 and 4 were in excess of that common intention and accused 2 and 4 alone would be liable under Section 302, I. P. C. for the murder of the 2nd deceased and the 1st deceased (plaintiff's father) respectively, and accused 1 and 2 would be liable only under Section 324 read with Section 34, I. P. C. on the charge against them relating to these murders."

It is in that view that the plaintiff, who was the 1st accused in that case, was convicted along with another (A-3) under Section 324 read with Section 34, I. P. C. Basing on these findings, it is contended by Mr. Madhavarao for the plaintiff that as the plaintiff was not convicted for the murder of his father, the disqualification prescribed by Sections 25 and 27 of the Hindu Succession Act cannot be made applicable to him. In this connection, it may be pertinent to notice that Section 25 only says that a person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, but not that a person must be convicted of murder or of abetment of murder, to be disqualified from inheriting the property of the person murdered. The principal charge, against the plaintiff and three of his associates, was that all of them, in furtherance of the common intention of all, attacked the two deceased and inflicted injuries which proved fatal. The learned Judges held that murder was clearly committed within the meaning of Section 300, I. P. C. having regard to the injuries found by the Medical Officer who conducted the autopsies on the two deceased persons. If the learned Judges did not convict the plaintiff and another under Section 302 read with Section 34, I. P. C., it was for the reason that he was given the benefit of doubt arising from the difference between the evidence of P. Ws. 1 and 2 and that of P. Ws. 3 and 4 as to what he intended initially when the attack was launched on his father and another. It is for that reason that this Court held that the plaintiff and another only in-

tended causing hurt to the deceased and their men and that the other two accused, by reason of their overt acts, rendered themselves liable to punishment under Section 302, I. P. C.

11. In order to apply the disqualification under Section 25 of the Hindu Succession Act, it is not necessary in my opinion that a person who committed the murder or abetted the commission of murder must also have been convicted of the offence of murder or of abetment of murder under Section 302, Indian Penal Code. That the plaintiff had participated in the murderous attack on his father along with A-2 and A-4 in that case, who were convicted of murder, is not in dispute. It is because of the nature of injuries inflicted by him on his father and the variations found in the version of the direct witnesses that this court found it safe to convict him under Section 324, I. P. C. Section 25 of the Hindu Succession Act does not contemplate punishment for murder to disqualify the murderer from inheriting the property of the murdered. The application of this provision ought not to be approached from the point of view of punishment for murder. This court has held that murder was clearly committed within the meaning of Section 300, I. P. C. The fact that he was given the benefit of doubt arising out of the conflicting versions of two witnesses and convicted under Section 324, I. P. C. does not in any way absolve him from the heinous crime to which he had made his own infamy contribution. Section 25 is introduced in the Hindu Succession Act as a matter of high public policy based on principles of justice, equity and good conscience to make it absolutely impossible for a murderer who deserves to be hanged or to be shut behind the prison bars for life, to derive advantage or beneficial interest from the very heinous act committed by him.

12. In *Vedanayaga Mudaliar v. Vedammal*, (1904) 14 Mad LJ 297, Subrahmaniam Aiyar and Boddam, JJ. dealing with the question of the right of a murderer to inherit the property of the murdered, expressed themselves thus:

"Although there is nothing in any express text of Hindu Law disqualifying a murderer or other person privy to the murder from succeeding to the person who was the victim of murder, the maxim 'Nemo Ex Suo Delicto Meliorem Suam Conditionem facere Potest' according to which the wrongful act (murder) committed by a person standing in the position of heir disentitles him to any beneficial interest in the inheritance is one of universal application and ought to be followed in British India as a rule of justice, equity and good conscience."

The Privy Council, in *Kenchaya v. Giri-*

mallappa Channappa, 51 Ind App 368 = (AIR 1924 PC 209) also held that even if the Hindu Law did not disqualify the murderer from succeeding to the estate he was so disqualified upon the principles of justice, equity and good conscience. Statutory effect has been given to the aforesaid view by introducing the two Ss. 25 and 27 in the Hindu Succession Act on grounds of public policy and principles of justice and morality. Therefore, the disqualifications prescribed by Sections 25 and 27 come into play and operate against the plaintiff inheriting or deriving any beneficial interest in the property possessed or held by his father. I therefore find no merits in the cross-objections and accordingly dismiss them.

13. In the result, the judgment and preliminary decree passed by the Court below are set aside and the appeal allowed and suit dismissed, with costs.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 411 (V 57 C 67)

KRISHNARAO AND
PARATHASARATHI, JJ.

Ayipala Venkataraya Chetty, Appellant
v. Ayipala Ramachandriah Chetty and
others, Respondents.

A. A. O. No. 204 of 1965, D/-25-4-1969
against order of Sub. J. Chittoor, D/-
9-8-1963.

(A) Civil P. C. (1908), O. 33, R. 5 (d-1) (as amended in Madras and adopted in Andhra Pradesh) — Rejection of application on ground of limitation — Enquiry should be confined only to allegations in plaint — (Deletion of R. 5 (d-1) and amendment in R. 5(d) so far as Andhra Pradesh is concerned, suggested). AIR 1948 Mad 433 and AIR 1949 Mad 591 and AIR 1956 Mad 271 and AIR 1956 Mad 677, Dissented from.

The amended sub-clause (d-1) should be read as referring to the allegations in the petition. The enquiry contemplated under the amended Rule 6 is only confined to the prohibitions contained in R. 5 which have reference only to the allegations in the pauper petition and not de hors the said allegations. It is, therefore, not permissible to a court to permit an elaborate enquiry at the instance of the defendants on the basis of pleas raised by them in defence to the suit. Case law discussed. AIR 1948 Mad 433 & AIR 1949 Mad 591 & AIR 1956 Mad 271 & AIR 1956 Mad 677; Dissented from. (Deletion of Rule 5 (d-1) and amendment in R. 5 (d), so far as Andhra Pradesh is concerned, suggested). (Paras 12 to 14)

DN/EN/C67/70/LGC/D

(B) Civil P. C. (1908), O. 33, R. 6 (as amended in Madras and adopted in Andhra Pradesh) — Enquiry into pauperism — Enquiry is confined only to prohibition contained in R. 5 which have reference only to allegations in pauper petition and not de hors the said allegations — Enquiry on basis of pleas raised by defendant is not permitted — (To avoid confusion and uncertainty it is suggested that R. 6 as amended in Madras should be deleted so far as Andhra Pradesh is concerned). AIR 1956 Mad 271 & AIR 1956 Mad 677, Dissented from. (Paras 12 to 14)

Cases Referred: Chronological Paras

(1966) 1966-1 Andh WR 72 = 1966-

1 Andh LT 3, Anjaneya Dasu

Ashramam v. Somasundaramma 10

(1963) AIR 1963 Andh Pra 51

(V 50), Md. Salamatulla v. Fazlur

Rahaman 9

(1962) AIR 1962 SC 941 (V 49) =

1962 Supp (2) SCR 675. Vijay

Pratap Singh v. Dukh Haran Nath

Singh 11

(1956) AIR 1956 Mad 271 (V 43) =

ILR (1956) Mad 1035, Anganna v.

Angammuthu 8, 13

(1956) AIR 1956 Mad 677 (V 43) =

69 Mad LW 555, In re, K. Annamalai

Chettiar 8, 13

(1955) AIR 1955 Andhra 155 (V 42) =

1955 Andh WR 261, Venkatasubbaiah

v. Thirupathaiah 1, 7, 10, 13, 14

(1949) AIR 1949 Mad 591 (V 36) =

1949-1 Mad LJ 61, Ponuswami v.

Alamelammal 6, 7

(1948) AIR 1948 Mad 433 (V 35) =

1948-1 Mad LJ 400, Mythili Ammal

v. Mahadeva Ayyar 6, 7

W. V. V. Sundara Rao, for Appellant;

G. Venkatarama Sastry, for Soundararajan

for Nos. 2 and 3; K. B. Krishna Murty,

A. Venkatarama Reddy, for No. 10; B.

Monohar, for No. 15; M. Ramachandra

Reddy, for Nos. 13, 14, 29 and A. Ranga-

charyulu, for Nos. 33 to 36, for Respon-

dents.

KRISHNARAO, J.:— This appeal in-

volves the determination of the scope and

interpretation of O. 33, R. 5 (d-1) and R. 6

Civil P. C. as amended in Madras and ad-

opted in Andhra Pradesh. Though the

question raised was directly decided by a

Division Bench of the Andhra High Court

in Venkatasubbaiah v. Thirapathaiah, 1955

Andh WR 261 = (AIR 1955 Andhra 155)

and followed in a subsequent Division

Bench decision of the Andhra Pradesh

High Court, Sri Manohar, learned counsel

appearing for one of the respondents in

this appeal, challenged the correctness of

the view taken by this Court and contend-

ed that the view taken by this Court re-

quires reconsideration by a Full Bench

in view of the decision of the Madras High

Court dissenting from the view taken by

the Andhra High Court. It has therefore,

become necessary to consider whether the

view of this Court requires reconsidera-

tion.

2. The facts out of which the above Civil Miscellaneous Appeal arises are as follows: The appellant filed a suit O. P. No. 76 of 1960 in the Court of the Subordinate Judge, Chittoor for partition of the suit properties and for recovery of a share therein, with a prayer to permit him to sue as a pauper under O. 33, R. 1, Civil P. C. The plaint contains various allegations according to which the plaintiff claims a share in the suit properties. It was alleged inter alia in the plaint that there were attempts at partition which according to the plaintiff were either abortive or incomplete. The suit was contested by the various respondents stating that the suit was barred by limitation, that there was an actual registered deed of partition and that some of the defendants acquired title by adverse possession. The learned Subordinate Judge framed two points for consideration: (i) whether the petitioner is a pauper; and (ii) whether the petition is barred in law and if so, whether the petition is liable to be rejected. On the first point it was found that the plaintiff was a pauper and the said finding is not questioned before us. But on the second point, it was held that in view of a previous partition which was proved by the respondents, the plaintiff's suit should be dismissed. It was further held that the first respondent who was the manager of the plaintiff's branch was debarred from enforcing the partition and that the plaintiff was also precluded from claiming partition. In coming to the finding on the second point, the lower appellate court permitted the respondents to adduce documentary evidence to substantiate their allegations in defence, namely, that there was a prior completed partition, that the first respondent was the manager of the plaintiff's branch and that he lost his right to claim a partition. On behalf of the plaintiff he filed into court an extract showing his date of birth and another document. In addition to this documentary evidence, oral evidence was also received on the question whether the plaintiff is entitled to any relief in the suit for partition. In view of the finding on the second question, the O. P. was rejected by the trial Court. Against the said order of rejection, which amounts to a rejection of the plaint, the plaintiff filed the above C. M. A. in this court. As the value of the suit is Rs. 84,000/- this appeal is posted before us for disposal.

3. The learned counsel for the appellant Sri W. V. V. Sundara Rao challenged the correctness of the order of the trial court on the ground that the enquiry conducted with respect to the second point for determination by the court below was beyond the scope of O. 33, R. 6 and that the said enquiry should be

confined merely to the prohibitions set out in Rule 5 (d) or (d-1) which are founded only on the allegations contained in the plaint. In other words, his argument is that de hors the allegations in the plaint, the Court should not permit the defendants to adduce evidence in support of their allegations which raise disputed questions of fact on the determination of which depends the plaintiff's right to obtain a decree in the suit. According to the learned counsel, the scope of the enquiry and the right of the defendants to let in evidence at this stage should be confined only to the matters disclosed from the allegations in the plaint and not otherwise.

4. Before considering the rulings touching this point, it is necessary to set out the relevant provisions of the Code of Civil Procedure which are as follows:—

Order 33, Rule 5: The court shall reject an application for permission to sue as a pauper—

- (a) where it is not framed and presented in the manner prescribed by Rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (d-1) (Madras, Andhra Pradesh and Kerala) where the suit appears to be barred by any law, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Rule 6 (as amended in Madras, Andhra Pradesh and Kerala) Notice of day for enquiring into the applicant's right to sue as a pauper — Where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall 'nevertheless' fix a day (of which at least ten days' clear notice shall be given to the opposite party and to the Government Pleader) for receiving such evidence as the applicant may adduce to prove that the application is not subject to any of the prohibitions in Rule 5 and for hearing any evidence which may be adduced to the contrary.

The Allahabad High Court added the following explanation to Order 33, Rule 5.

Order 33, Rule 5:

"Explanation.— An application shall not be rejected under clause (d) merely on the ground that the proposed suit appears to be barred by any law."

The above amendments were effected by the Madras High Court in 1923. The rules as amended were subsequently adopted by the Andhra and the Andhra Pradesh High Courts. It is obvious that the Kerala High Court also adopted the rules as amended by the parent High Court at Madras.

5. It will be noticed from the above rules that in addition to the newly added sub-clause (d-1), the scope of the enquiry under Rule 6 has been enlarged giving power to the Court to receive evidence not only in respect of the question of pauperism covered by sub-clause (b) of Rule 5 but also with respect to any of the other prohibitions contained in Rule 5. We will now refer to the decisions which have considered the scope of the above amendment.

6. In *Mythili Ammal v. Mahadeva*, AIR 1948 Mad 433, Satyanarayana Rao, J. sitting single held that it would be open to the defendants to show that the suit is barred either by *res judicata* or by limitation and that accordingly they would be entitled to adduce evidence on the said questions. It does not however appear from a reading of the judgment what the allegations in the plaint were and whether the question of *res judicata* was raised for the first time by the defendants and whether the plea of limitation depends upon the determination of any disputed questions of fact requiring evidence. The judgment merely shows that the trial Court was wrong in holding that the said question should be decided only with reference to the allegations in the plaint. The view of the trial Court was rejected and a direction was given to permit the defendants to adduce the necessary evidence. Except referring to the amended Rule, we do not find any discussion as to the scope of the Rule in the judgment of the learned Judge. This ruling was followed by the same learned Judge sitting single in *Ponnuswami v. Alamelammal*, AIR 1949 Mad 591, in which it was observed that a court is not justified in shutting out evidence by the opposite party to show that the suit sought to be instituted in *forma pauperis* is barred by limitation more than 12 years having elapsed from the date of the alienation impugned in the suit. It is not possible to gather from the judgment whether the suit was barred on the very allegations in the plaint, but the learned Judge is of the opinion that the defendant should be permitted to substantiate his defence plea of limitation by adducing evidence even in an enquiry under Order 33, C.P.C.

7. We will next refer to the judgment of a Division Bench of the Andhra High Court consisting of Subba Rao, C. J., and Bhimasankaram, J., in 1955 Andh WR 261 = (AIR 1955 Andhra 155), a case

arising out of a suit filed in forma pauperis for partition. In the plaint it was alleged that the alienations were not supported by consideration and were not supported by any legal necessity or binding purpose. The trial Court made an elaborate enquiry and held that the petitioner had no cause of action with respect to certain items of property and accordingly dismissed the suit in so far as the suit related to those properties. On appeal before the High Court, the question was whether such an elaborate enquiry was contemplated under Order 33, Rule 6 as amended in Madras. After tracing the history and the reasons for the amendment introducing sub-clause (d-1), Subba Rao, C. J. who delivered the judgment on behalf of the Division Bench observed that clauses (d) and (d-1) only indicate what has been the law all along, viz., that a court shall decide whether the petition discloses a subsisting cause of action and though Rule 6 gives an opportunity to the defendants to adduce evidence, the evidence contemplated under the said rule is intended only to prove that the application is not subject to any of the prohibitions in Rule 5, meaning thereby such prohibitions in respect of which evidence is necessary for the petitioner to establish, that a particular prohibition does not affect his petition. In other words, it was pointed out that Rule 6 as amended gives full effect to the intention of the framers namely to give an opportunity to the parties to adduce evidence only on the prohibition mentioned in Rule 5. The word 'appears' occurring in sub-clause (d-1) has been interpreted as confining the scope of the enquiry to something which is "manifest" on the allegations in the plaint. The following observations contained in the judgment of Subba Rao, C. J. may also be usefully set out in this connection:

"If, on the other hand, the construction now sought to be put upon Madras Rule 6 by the learned counsel for the respondents is accepted, the distinction between a pauper petition and a suit disappears. Order 33 has been enacted to serve a treble purpose (i) to protect the bona fide claims of a pauper, (ii) to safeguard the interests of revenue, and (iii) to protect the defendant's right not to be harassed. By enabling the Court to prevent persons with property from suing as paupers or third parties who acquire an interest in the claims of paupers from using the names of the paupers and to dismiss petitions which do not *ex facie* disclose a subsisting cause of action, the interests of bona fide paupers are safeguarded and defendants are protected from unnecessary harassment. The procedure prescribed also protects revenue, for an enquiry if it is found that the petitioner is not a pauper, he will have to pay court-

fee. On the other hand, if a Court should make an enquiry and decide on the evidence, even before the suit is numbered, whether the petitioner has a subsisting cause of action, the entire suit should be heard before leave is granted. The words "subsisting cause of action" will be comprehended the entire dispute between the parties the question whether the plaintiff has a right to the relief claimed, whether the defendant has infringed that right and whether the suit claim is barred by limitation by *res judicata* or any other statutory law would have to be decided on the evidence. If the petition was dismissed on such an enquiry, the petitioner would have got a trial without payment of court-fee. If the petition was allowed on such an enquiry, the same questions should be decided again if the suit was numbered. There would be two trials on the same evidence and perhaps two conflicting decisions and the Court's time would unnecessarily be wasted. This could not have been the intention of the framers of Madras Rule 6 and we cannot attribute that intention to them."

In this view, the Division Bench dissented from the view taken by Satyanarayana Rao, J., in his decisions cited supra AIR 1948 Mad 433 and AIR 1949 Mad 591.

8. The next case to be considered in point of time is *Anganna v. Angamuthu*, AIR 1956 Mad 271, in which Govinda Menon, J., delivering the judgment on behalf of the Division Bench consisting of himself and Basheer Ahmed Sayeed, J., dissented from the view expressed by Subba Rao, C. J. in the aforesaid case 1955 Andh WR 261 = (AIR 1955 Andhra 155) and held that the enquiry under the amended Rule 6 is not confined within the narrow limits pointed out by Subba Rao, C. J. but that the said rule is intended to enable the opposite party to adduce any evidence to show that the suit is barred. As regards the word "appears" in Rule 5, sub-clause (d-1), it was pointed out by Govinda Menon, J. that it merely connotes that no finality is attached to the decision at that stage and nothing more. In the case before them, the defence raised was one of limitation and it does not appear from the judgment whether the suit was barred on the basis of the mere allegations in the plaint. Differing from the view expressed by Subba Rao, C. J. of the Andhra High Court, Govinda Menon, J. followed the prior decisions of Satyanarayana Rao, J. sitting single which were dissented from by Subba Rao, C. J. In coming to this conclusion, Govinda Menon, J., relied upon certain extracts from the reports of the Rule Committee in connection with the amendment of Rule 6 to the following effect:

"The Committee are of the opinion that the safeguard provided in Rule 5 will not be effective if the enquiry were to

proceed 'merely on the allegations in the plaint'. Therefore, they have made provisions by appropriate amendment to Rule 6 for enabling the defendant to assist the Court in determining the existence or otherwise of the prohibitions in Rule 5."

Again a single Judge of the Madras High Court (Ramaswami, J.) in re, K. Annamalai Chettiar, AIR 1956 Mad 677, rendered subsequent to the decision of the Division Bench of Govinda Menon and Basheer Ahmed Sayeed, JJ., suggested a via media course without referring to the said Division Bench decision of the same Court. It was held by Ramaswami, J., that the court has the power to enquire at the initial stage of pauperism into a question of limitation allowing evidence to be adduced by both sides, that the scope of the enquiry is a matter within the discretion of the trial Judge and that such an enquiry should be limited within the ambit of the word 'appears' occurring in clause (d-1), 'appears' meaning 'be visible' and 'be manifest' connoting something more than what is 'ex facie' patent and something less than discovery after deep delving into the evidence in the case and that it is something betwixt and between the extremes and the line of demarcation will be dependant upon the circumstances of each case and the exercise of sound judicial discretion.

9. Coming back to the Andhra Pradesh High Court it was held in a decision of a single Judge (Jaganmohan Reddy, J., as he then was) in Md. Salamatulla v. Fazlur Rahman, AIR 1963 Andh Pra 51, that irrespective of the question whether the issues involved are of a simple or complicated nature, the allegations in the plaint would determine the question whether a cause of action has arisen or not. The question as to scope of enquiry under Rule 6 did not however come up for decision in the said case. But it is significant to note that the allegations in the plaint are held to be the basis for ascertaining whether a plaint disclosed a cause of action or not.

10. Turning to the latest decision of a Division Bench of this Court consisting of Satyanarayana Raju, J. and Kumarayya, J. in Sri Anjaneya Dasu Ashramam v. Somasundaramma, (1966) 1 Andh WR 72 we find that the view expressed by Subba Rao, C. J. in 1955 Andh WR 261 = (AIR 1955 Andhra 155) is followed though no reference was made to the dissenting judgment of Govinda Menon, J. of the Madras High Court. In the case before the Division Bench, the trial Court permitted the defendants to adduce documentary evidence in support of the plea that the suit was barred by limitation. Kumarayya, J. delivering the judgment on behalf of the Division Bench held as follows:

"A prima facie case as to this bar should be found on the averments in the petition itself and not on those in the counter which has to be proved at the trial. Though the words "in the petition" are not specifically used in clause (d-1), the very fact that the penalty in Rule 5 of rejection is in relation to the application itself, it must necessarily follow that the suit should appear, from the application itself, to be barred by limitation. We have already noticed that notwithstanding the absence of the said words in clause (d), a Division Bench of this Court has considered the 'allegations' used in that sub-clause (d) to be allegations in the application itself.....We are therefore of the opinion that the penalty in Rule 5 would be attracted if the suit appears to be barred by any law on the averments in the petition itself. The trial court, therefore, went wrong in considering the counter or the documents in respect thereof".

11. Finally, we wish to refer to a decision of the Supreme Court in Vijai Pratap v. Dukh Haran Nath, AIR 1962 SC 941, a case which went up from the Allahabad High Court in which considering the scope of Order 33, Rule 5(d) as it stood in the Civil Procedure Code, it was held by Shah, J. who delivered the judgment on behalf of the court to the following effect:

"By the express terms of Order 33, Rule 5, Clause (d) the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the statute, the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown; the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit."

In the above case, the Supreme Court was no doubt not considering a rule like the one as amended in Madras. But nevertheless, the principle underlying sub-clause (d) of Rule 5 has been authoritatively stated by the Supreme Court.

12. The views expressed in the above rulings may be summed up as follows: According to this Court, the expression 'his allegation' occurring in sub-clause (d) refers to the petitioner's allegations in the plaint. Sub-clause (d) under which the pauper petition is liable to be rejected if the allegations wherein do not show a cause of action is very wide in its scope while the cases contemplated by the amended sub-clause (d-1) namely the suit being barred by any law are only particular instances where the petition does not disclose a cause of action. Hence the amended sub-clause (d-1) should be read as referring also to the allegations in the petition. The enquiry contemplated under the amended Rule 6 is only confined to the prohibition contained in Rule 5 which have reference only to the allegations in the pauper petition and not de hors the said allegations. It is therefore not permissible to a court to permit an elaborate enquiry at the instance of the defendants on the basis of pleas raised by them in defence to the suit. According to the Madras High Court, one view is that the enquiry under the amended Rule 6 is not confined within the 'narrow' limits laid down by this Court but the defendants are permitted to adduce any evidence to show how the suit is barred. A third and intermediate view was taken in the Madras High Court according to which the limit of the enquiry lies in between the views expressed by this Court and the Division Bench of the Madras High Court and that the limit of enquiry is entirely in the discretion of the court. The scope of the enquiry under Rule 5 (d) without reference to the above amendment as laid down by the Supreme Court is to the same effect as the view expressed by this Court as regards the amended rule.

13. On a consideration of the above decisions, we have no hesitation in following the view of this Court in 1955 Andh WR 261 = (AIR 1955 Andhra 155) as laying down the correct interpretation of the relevant rules and we are unable with due respect to accede to the view expressed by Govinda Menon, J. in AIR 1956 Mad 271 or the view expressed by Ramaswami, J., in AIR 1956 Mad 677. We do not also agree with the comment of the learned counsel Shri Manohar that the conclusions arrived at by Subba Rao, C. J. were based only on the provisions of Rule 5 but not on the amended Rule 6 whereas the ruling of the Madras High Court in AIR 1956 Mad 271 (supra) placed strong

reliance upon the language of the amended Rule 6. On the other hand, on a scrutiny of the judgment of Subba Rao, C. J. we find that Rule 6 has been interpreted in so many terms with reference to the provisions of Rule 5 and we do not agree that the final conclusion was based solely on the provisions of Rule 5. We also find that Govinda Menon, J. while dissenting from the view of Subba Rao, C. J. did not make any reference to the various grounds and reasons which constituted the foundation for the conclusions arrived at by Subba Rao, C. J. We are also convinced that the test laid down by Ramaswami, J. according to which the limits of the enquiry should be left to the discretion of the trial Judge is not a safe and proper guide.

Having regard to the various reasons given by Subba Rao, C. J. in 1955 Andh WR. 261 = (AIR 1955 Andhra 155) with which we are in entire agreement, we are of the opinion that the view expressed therein is the only reasonable construction to be placed on the amended Rule 6 and if the contrary view expressed by the Division Bench of the Madras High Court is to be accepted, a trial Court has virtually to conduct a miniature trial of the whole suit and it may not be possible to put any stop or limit to the nature or quantum of evidence which the parties may desire to adduce. Turning to the instant case, we find that there was no allegation in the petition that there was a prior partition evidenced by a registered document. It is not therefore open to the court to take evidence in support of the defence plea that there was a prior partition evidenced by a registered document. Even if the petition did contain an allegation regarding a prior partition, it will be open to the plaintiff to say either that it was not acted upon or that there were valid grounds for reopening the same. Hence the enquiry conducted by the lower court is beyond the limits of the view expressed by the Andhra High Court with which we are in entire agreement.

14. Before parting with this case, we wish to express our opinion as to the desirability of applying the amended Madras Rules 5 (d-1) and 6 in Andhra Pradesh. Taking the amended clause (d-1) we feel that the word 'appears' does not admit of a precise definition. It is explained as meaning 'manifest' or 'appearing on the face of'. But it is equally difficult to determine the limits of what is apparent and what is not, the expression is as much inscrutable and elusive as the familiar expression 'error apparent on the face of the record'. Sub-clause (d) of Rule 5 is indeed wide enough to cover cases where a suit may be rejected on the ground that it is barred by law.

There is, therefore, no real need to introduce sub-clause (d-1). The object of introducing an amendment to a rule is to clarify any ambiguity or lacuna in the existing rules. But unfortunately the amended Rules 5 (d-1) and 6, far from clarifying the existing Rule, tend to create confusion. In the first place, the amended Rule does not afford any guide as to how and on what material the bar of the suit should be determined. If the rule is intended to refer only to certain statutory bars which preclude the court from entertaining a suit and if such a question is to be decided solely on the allegations in the pauper petition, no difficulty arises.

The expression 'bar' connotes a bar on the court from entertaining the suit or against the person approaching the court for relief initially. But it is quite a different thing to say that on an adjudication of the disputes raised in the suit, the plaintiff is denied relief which he wants in the suit. In one sense it can be said that a plaintiff who fails to establish his case is precluded from getting any relief before the court. Hence it is necessary to distinguish between a bar of the suit and the plaintiff failing to obtain a relief before the court on some other ground. The expression 'barred' used in Rule (d-1) cannot, therefore be regarded as referring to a case where a plaintiff is precluded from obtaining relief if he fails on the merits of his claim. Instances of bar of a suit can be easily visualised such as (i) where the jurisdiction of a civil court is specifically ousted by the statutory provisions like the Andhra Tenancy Act, Rent Control Act, Sales Tax Act, etc., and (ii) provisions in the C.P.C., like Section 11, Order 2, Rule 2, Order 9. Rule 9, Order 23, Rule 1(3) etc. If the petition does not disclose any facts even assuming that the same are intentionally suppressed, the court will not be in a position to reject the petition on the ground that it is barred by law. In such cases, it is not desirable at the initial stage to permit the defendants to adduce evidence in respect of their pleas raised in defence in order to establish a bar to the suit. If it is possible to reject the petition as barred by law on a mere reading of the petition, there should be no objection to the court doing so either on hearing the petitioner alone or on hearing the respondent if such assistance is required. In such cases the enquiry will be confined only to questions of law. But if the petition discloses facts which relate to a plea of bar of suit and the petitioner nevertheless explains how the suit is not barred, in such cases, the defendants may be permitted to adduce evidence to the limited extent touching the allegations in the petition to show that the petition is really barred.

To take an example, the petitioner alleges that there was an adjudication in a prior suit but that it does not operate as *res judicata*. In such a case, the defendant may produce the judgment or the pleadings in the prior suit and satisfy the court that the suit is barred by *res judicata*. Similarly where a petition alleges that there was a prior suit and that the cause of action in the subsequent suit is different, it will be open to the defendant to place before the court the pleadings in the previous suit and establish that the suit is barred under Order 2, Rule 2, C.P.C. In all other cases, where a plaintiff is precluded from filing a suit by virtue of any express provisions of statute, there will be no difficulty in deciding the question. But where the defence is that the suit is barred by limitation, several complicated questions arise, for a plea of limitation is sometimes based upon disputed questions of fact. If on a reading of the allegations in the petition it is possible to hold that the suit is barred, it will be always open to the court to reject the same. But in cases where evidence may have to be taken in order to decide the question of limitation, the case presents some difficulty. Even accepting the limited view taken by Subba Rao, C. J. in 1955 Andh WR 261 = (AIR 1955 Andhra 155), it may not be possible in practice to prescribe any limits for the enquiry which has to be conducted. To illustrate this difficulty, let us take the case of a suit for money brought on the basis of a promissory note where the plaintiff relies upon certain acknowledgments or payments as saving the suit from the bar of limitation, the only defence raised being a denial of the truth of the endorsements or acknowledgments. If the plaintiff is directed to satisfy the court *prima facie* in support of his allegations, the plaintiff-petitioner may have to adduce evidence of a hand-writing expert and if the defendant is naturally given the liberty to adduce rebutting evidence, the whole trial will be over even before the suit is registered.

To take another example, in a suit for ejectment, the plaintiff alleges that there was trespass on the part of the defendant on a date within 12 years of the suit. If the allegations in the plaint are to be taken as the basis, there was no bar of limitation. But if the defendant is permitted to adduce any evidence to rebut the allegations in the plaint, the court may have to take evidence of both parties on the question of possession both oral and documentary on which the court has to give a finding whether the plaintiff was in possession within 12 years of the suit, as required by Article 142 of the Limitation Act. In such a case also, the suit is completely disposed of even before it is registered. It is needless to multi-

ply the illustrations as it is not our purpose and it is also not possible to attempt at a fixation of the limits of the enquiry contemplated by Rule 6 or the ambit of the expression 'appears to be barred' in sub-rule (d-1). So far as sub-rule (d-1) is concerned, it may be deleted and it will be sufficient to amend (d) as follows:

"Where the allegations in the petition show that the suit is barred by law, or do not show a cause of action."

But as regards Rule 6 as amended, we have no hesitation in suggesting that the amended Rule should be deleted so far as we are concerned, that is to say, the enquiry should be confined only to the question of pauperism as contemplated by Rule 6 of the C.P.C. as it stands, thereby avoiding an enquiry whether prima facie or regular as regards the other prohibitions contained in Rule 5. In this connection, it may be noted that the ruling of the Supreme Court cited supra emphasises the need to look to the plaint allegations alone at the stage of an enquiry under Order 33, C.P.C. We therefore suggest that in order to avoid confusion and uncertainty it is necessary and desirable that Rule 6 as amended (Madras) should be deleted so far as Andhra Pradesh is concerned.

15. For the above reasons, we set aside the order of the lower court including the findings therein and direct the Court below to register the petition as a plaint and proceed to dispose of the same according to law. As the petition is already nine years old by now, we direct the lower court to dispose of the same as expeditiously as possible. The appellant is entitled to his costs throughout.

PARATHASARATHI, J.:—16. I agree with the reasoning and conclusions of my learned brother. The question raised in this appeal relates to a rule of practice, and it cannot be gainsaid that it should be expressed in the Code of Procedure in such language as would tend to certainty and uniformity in its application. If the provisions in the Code, as they stood before the Rules 5 and 6 were amended, had produced a baffling diversity or conflict, the amendments have, by no means helped the evolution of a better rule; on the other hand, confusion has become worse confounded, and it has become necessary to recast the rules or revert to the unamended rules.

17. The expression 'barred by any law' is not unambiguous in its import and is not capable of easy or precise application. Does it connote only a legal impediment in the form of an objection like a plea of limitation or *res judicata*? Or, is it to be extended to other cases of which an example may be given? Supposing the suit is for recovery of possession of pro-

perty in a case where a statute has prohibited the alienation in question except as a prior sanction of prescribed authority, and such sanction is not alleged to have been obtained by the suitor. Does the application in such a case come within the expression 'barred by law'? Instances of this nature can be multiplied. The question is, what is the category or type of impediment that is contemplated by the expression 'barred by law'.

18. The word 'appears' in clause (d-1) has been productive of conflicting decisions. It is a word with multiple shades of meaning and the context in which it occurs does not limit its import in any manner. Rule (d-1) has been introduced by the Madras amendment, because it was considered that clause (d) of the Code in its unamended form was inadequate. It is open to question whether the clause (d) in the unamended form is not sufficient to eliminate vexatious or harassing actions by paupers. Is not the expression 'does not disclose a cause of action' of sufficient amplitude to protect the interests of defendants? It must be remembered that the provisions of Order 33 are designed to enable indigent suitors with a grievance to seek legal redress. The legislative intentment is not to shut out a bona fide litigant by a too meticulous or deep probe at the outset into the merits of the case. That is why the clause (d) of the Code provides that 'his allegations' i.e., the averments made by the pauper petitioner should be subjected to a test to ascertain whether they disclose a cause of action. In other words, if a triable claim emerges from the averments of the petitioner and there is no manifest hurdle under law to the trial of that claim, the pauper is given a chance by the legislature to invoke the Court's aid. That being the basic objective of the legislature, would it be consistent with it to amend the rule so as to make it incumbent on him to overcome a preliminary skirmish, the result of which should be to show that there is no bar to the action under law? This, it should be remembered, is only the first round and a second contest at the regular trial is inescapable. Does it stand to reason and is it consistent with justice that the indigent suitor should be put to the expense of two trials, the one preliminary and the other more elaborate? It is, therefore, necessary to re-examine the position whether clause (d-1) is to be retained, especially because in the majority of the States there is no such rule and the absence of such a rule does not seem to have occasioned hardship. Nor has it promoted unhealthy litigation as far as one could judge the result.

19. It might be said that the effect of clause (d-1) is not to enlarge the scope

of inquiry very much beyond the limits indicated by clause (d) in the unamended form. If clause (d-1) does not contemplate widening of the limit of enquiry, and it is intended to cover the same field as clause (d), it is obvious that there is no need for a superfluous provision which, in actual practice, has contributed to a good deal of uncertainty and conflict of judicial opinion. On the other hand, if it is accepted that clause (d-1) is intended to enlarge the field of inquiry, it is obvious that to do so is not consistent with the provisions of clause (d) and is also not consistent with the legislative policy and intentment. The position, therefore, is that clause (d-1) must be regarded as superfluous if it covers the same field and must be said to be inconsistent with the provisions of clause (d) if the intention is to enlarge substantially the area of conflict at the initial stage.

20. Rule 6 has been amended so as to provide for the Court receiving evidence that may be adduced by the applicant to prove that his application is not subject to any of the prohibitions in Rule 5 and also for evidence in rebuttal thereof. With reference to the prohibitions in Rule 5 other than those mentioned in clauses (d) and (d-1), there arises no difficulty. When the case of pauperism pleaded by a petitioner is challenged, or when it is shown that he has fraudulently disposed of property or has entered into an agreement in the manner prohibited by clause (e), it is necessary to have an inquiry into the matter; and if at such inquiry both the parties are allowed to lead evidence, the adjudication relates to matters which are not germane to the merits of the case. It is only with reference to the prohibition in clauses (d) and (d-1) that difficulty arises. It would be desirable to specify in Rule 6 that the evidence adduced by the petitioner or the rebuttal evidence adduced by the respondent should be limited to matters contained in Rule 5 with the exception of clauses (d) and (d-1). Even if the retention of clause (d-1) in the present form is considered necessary, the alternative of limiting the inquiry as to the prohibitions under Rule 5 to cases other than those covered by clauses (d) and (d-1) should be considered. It is, therefore, necessary to consider whether Rule 6 should not be recast in such a manner as to exclude from its scope inquiry into the matters covered by clauses (d) and (d-1) of Rule 5.

Appeal allowed.

AIR 1970 ANDHRA PRADESH 419
(V 57 C 68)

KUPPUSWAMI, J.

G. Madhava Rao and others, Petitioners v. The Regional Transport Authority, Kurnool represented by its Secretary and others, Respondents.

Writ Petns. Nos. 4809, 4813, 4820, 5136, 5387, 5413, 5416, 5419 and 4636 of 1968, D/- 3-2-1969.

(A) Motor Vehicles Act (1939), Section 62(c) — Temporary permits — Particular temporary need — Scheme for nationalisation of bus transport in the particular District pending consideration for a considerable time — Representations from public for increase of buses on existing routes and for plying of buses on new routes — Held there was sufficient temporary need justifying grant of temporary permits. AIR 1966 SC 156 & W. P. No. 3756 to 3758 of 1968 (AP), Relied on. (Para 6)

(B) Motor Vehicles Act (1939), Section 62(c) — Temporary permits — Successive grants of temporary permits. (Constitution of India, Art. 226).

The Regional Transport Authority cannot abuse its power by going on granting temporary permits in quick succession and not take speedy action for completing the procedure under Section 57 for granting regular permits and if upon the facts of any particular case it appears that the Regional Transport Authority is so abusing its powers, its action is liable to be corrected by granting a writ. AIR 1966 SC 156 & W. P. No. 84 of 1968, D/- 4-4-1968 (AP), Relied on. (Para 6)

(C) Motor Vehicles Act (1939), Sections 62, 47 — Temporary permits — Grant of — Provisions of Section 47 apply — Opportunity must be given to existing operators to make representations against issue of temporary permits. Case law discussed. (Para 24)

(D) Motor Vehicles Act (1939), S. 47(3) — Limiting number of stage carriages — Section 47(3) does not render it obligatory on the part of the authority to limit number of stage carriages though if such limit is fixed, grant of permit has to be subject to that limit. (Para 28)

(E) Motor Vehicles Act (1939), S. 47(1) — Right of representations — Right of persons providing transport facilities near proposed route — Under S. 47(1) representations of persons providing passenger transport facilities not only along the proposed route but also near the proposed route have to be taken into consideration. (Para 29)

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(in W P Nos. 4809, 4813 and 4820 of 1968)
and Mrs. K. Amareswari, A. S. C. Bose
and P. Rajagopalachari (in W. P. Nos.
5126, 5387, 5413, 5416, 5419 and 4636 of
1968) for Petitioners; 4th Govt. Pleader,
for No. 1 (in all Petitions); K. Srinivasa
Murthy and G. Veerareddy, for No. 2 (in
W. P. No. 4209 of 1968), for Nos. 2 to 14
(in W. P. No. 4813 of 1968), for Nos. 2 to 4
(in W. P. No. 4820 of 1968) and C. Audi-
narayana Reddy, for No. 2 (in W. P. Nos.
5126 and 4636 of 1968), for Respondents.

ORDER:— In these Writ Petitions the
validity of the notifications made under
Section 62 of the Motor Vehicles Act call-
ing for applications for the grant of a
temporary permit for various routes in
the District of Kurnool is challenged.
Though in some cases the notifications are
different, the contentions urged against
the validity of the notifications are identi-
cal and therefore, all the Writ Petitions
were heard together.

2. It is sufficient, therefore, to set out
the contentions in the main Writ Petition
No. 4809 of 1968. The petitioner in that
Writ Petition alleges that he is the holder
of a stage carriage permit on the route
Kurnool to Chazalamarni. The District
of Kurnool is very much affected by
drought conditions and the operators are
already finding it difficult to find sufficient
traffic for existing buses. While so, the
Government issued instructions to the Re-
gional Transport Officers to grant as many
temporary permits as possible so that the
revenues of the State may be augmented.
In pursuance of those directions ap-
plications for the grant of temporary per-
mits are being periodically called and the
present impugned notification dated 23-10-
1968 is one such. The conditions neces-
sary for the grant of a temporary permit

under Section 62 of the Motor Vehicles
Act do not exist. Further, temporary per-
mits have already been issued in succe-
sion. In almost all the routes covered by
the impugned notification and in cases like
the route Nandyal to Atmakur temporary
permits were issued on four occasions suc-
cessively. This shows that the respondent
is clearly abusing its power to grant tem-
porary permits.

A further contention is raised that the
procedure adopted for the granting of
temporary permits is merely to call for
applications and consider the applications
in a meeting of the Regional Transport
Authority or on some occasions even by
circulation. No opportunity is provided
for the existing operators like the peti-
tioner to make any representations in the
matter of issuing temporary permits as
contemplated in Section 47 of the Motor
Vehicles Act. Further, the respondent is
considering the applications ignoring
Rule 212 of the Andhra Pradesh Motor
Vehicles Rules. For all the above reasons,
it is stated that the impugned notification
calling for applications for temporary per-
mits is illegal and without jurisdiction.
The petitioner, therefore prays for the
issue of a writ or order or direction pro-
hibiting the respondent from proceeding
further in pursuance of the notification
dated 23-10-1968 calling for the applica-
tions for the grant of a temporary permit
on the route Kurnool to Nandikotkur.

3. In the counter-affidavit filed by the
Secretary, State Transport Authority,
Hyderabad, it is stated that a draft scheme
for nationalisation of bus transport in
Kurnool District was notified and the same
was pending consideration for a considera-
ble time before the Government and was
finalised only recently by G. O. Ms.
1103/dt. 1-7-1968 approving the scheme
regarding some of the routes and allowing
the other routes to be operated by the
private operators. Till the final approval
of the scheme by Government, it was not
known which routes were going to be
nationalised and which were not in the
District. The Regional Transport Autho-
rity could not therefore notify new routes
or increase the number of buses on exist-
ing routes and grant permits on pucca
basis as the scheme might be approved at
any time and as there was considerable
uncertainty as to which routes will be
nationalised and which will not be. On
all the routes for which applications were
called for, for the grant of temporary
permits, the traffic survey has revealed the
need either to increase the buses on the
existing routes or put buses on the new
routes as the case may be, but early steps
could not be taken for grant of permits
on pucca basis in the circumstances afore-
said.

There were number of representations
from the public to the effect that the ex-

isting transport facilities are inadequate and to increase the buses on those routes and also to ply buses on the new routes for which applications for grant of temporary permits were called for. The steps for following the procedure and for grant of permits on pucca basis (would have — Ed.) taken considerable time. The needs of the public are sought to be met till pucca permits are granted by grant of temporary permits for further period. Thus, there is a temporary need to justify the grant of temporary permits under Section 62 (c) of the Motor Vehicles Act. The department after examination of the traffic potential on all the routes was satisfied about the need to increase transport facilities in these areas by plying some more buses. The allegation that the permits were granted for augmenting the revenues of the State is denied. The grant of successive temporary permits was under unavoidable circumstances and there was ample justification for the same. Hence, there is no abuse of power as alleged by the petitioner.

4. The respondent also contended that Section 62 of the Act which deals with the grant of temporary permits, does not envisage an opportunity being given to the existing operators, nor are they entitled to be heard. Section 47 of the Act which deals with the grant of pucca permit has no application to the case of grant of temporary permits and the notification cannot be attacked on the ground that the petitioner and other existing operators are not being given an opportunity either to make representations or that they are not being heard.

5. As is apparent from a perusal of the affidavit and the counter-affidavit the main contentions urged against the impugned notification are the following:—

1. That the requirements of Section 62 for the issue of temporary permits are not satisfied and the power conferred under that section is being abused by the issue of the impugned notification; and
2. In any event the impugned notification is contrary to the provisions of the Act, inasmuch as no opportunity has been given to the existing operators to make their representations against the issue of temporary permits and their being not heard in that connection.
6. Contention No. 1.

In order to appreciate this contention it is necessary to set out Section 62 of the Motor Vehicles Act which is in the following terms:

"62. Temporary permits: A regional Transport Authority may without following the procedure laid down in Section 57, grant permits, to be effective for a limited period not in any case to exceed four

months to authorise the use of a transport vehicle temporarily—

- (a) for the conveyance of passengers on special occasions such as to and from fairs and religious gatherings, or
- (b) for the purposes of a seasonal business, or
- (c) to meet a particular temporary need,
- (d) pending decision on an application for the renewal of a permit; and may attach to any such permit any condition it thinks fit:

xx xx"

It is clear that the notification in question cannot be brought under clauses (a), (b) and (d) but it is sought to be justified as coming under clause (c), i.e., to meet a particular temporary need, which has been set out in the counter-affidavit, to have arisen in the following circumstances. The scheme for nationalisation was pending consideration for a considerable time and was finalised recently. Till that time it was not known which routes were going to be nationalised and which were not. At the same time there were representations from the public for the increase of buses, on the routes already existing and to ply buses on new routes. The traffic potential justified the increase of the transport facilities. Therefore, pending steps for nationalisation of the buses in such routes where the Government approves the scheme and pending issue of a pucca permits after due notification etc. on the routes which were decided by the Government not to be nationalised it was felt that temporary permits should be issued.

In such circumstances it has been held in *M. P. S. R. T. Corpn. v. R. T. Authority*, AIR 1966 SC 156 that S. 62 (c) applies. In that case applications for temporary permits were called for as the public were agitating for the need of town bus operations and the particular need had to be met temporarily till regular operations are introduced. The High Court took the view that temporary permit cannot be granted for any route when there is a permanent need for providing transport facilities on that route and it was decided to invite applications for that purpose. This view was held to be not correct by the Supreme Court. It observed:

"There is no reason why the clause in Section 62(c) that the Regional Transport Authority may grant a temporary permit "to meet a particular need" should be given any special restricted meaning. There is no antithesis between a particular temporary need and a permanent need and if the Regional Transport Authority considered it in the circumstances there was temporary particular need and granted a temporary permit, the action cannot be challenged."

This decision was followed by this Court in *W. P. Nos. 3756 to 3758 of 1968*

(AP) where it was held that there is nothing in Section 57 or Section 62 of the Motor Vehicles Act postulating that unless an enquiry regarding the need for the grant of a pucca permit is completed, the question of granting temporary permits cannot be taken up. In that case it was also pointed out that the formalities as required under M. V. Act, 1939 for the grant of pucca permit would take some time more and there is demand from the travelling public to provide additional transport facilities immediately on the route in question as they could not get accommodation in the existing bus, and it was desirable to meet this temporary need by granting a temporary permit on this route. It was held that the enquiry to the need or otherwise regarding the grant of a pucca permit cannot be a ground for withholding the grant of temporary permits. I am therefore of the view that there was sufficient temporary need in this case justifying the grant of temporary permits under Section 62(c) of the Act.

It was also sought to be argued that the temporary permits are being issued in succession and in some cases they were issued on four occasions successively and therefore it is clear that the provisions of Section 62 of the Act were being abused and under the guise of granting temporary permits to satisfy a particular temporary need, permits were being renewed indefinitely from time to time. This, itself according to the petitioner showed that the true reason for granting the permits was not any temporary need, but to augment the revenues of the State. The Supreme Court, however in AIR 1966 SC 156 has observed that all that Section 62 enjoins is that at any one time the Regional Transport Authority is not permitted to issue to any person a temporary permit for a period exceeding 4 months, but the mere fact that the Regional Transport Authority has granted a temporary permit for a second time and the total duration of the two permits is more than 4 months would not invalidate the second permit. Following this decision it was held by this Court in W. P. No. 84 of 1963, D/- 4-4-1968 (AP) that where temporary permits were being granted every four months because scheme for nationalisation of the routes in question and other routes was pending with the Government, that was a sound reason for granting successive permits and it could not be said that there is any abuse of Section 62 of the Act.

It is true as pointed by the Supreme Court that the Regional Transport Authority cannot abuse its power by going on granting temporary permits in quick succession and not take speedy action for completing the procedure under Section 57 of the Act for granting regular permits

and if upon the facts of any particular case it appears that the Regional Transport Authority is so abusing its powers, its action is liable to be corrected by granting a writ. In this case nothing has been placed before me to substantiate the allegation that there has been abuse of power in granting successive temporary permits. On the other hand, the counter-affidavits, the terms of which have already been set out, give the reasons for granting temporary permits. For all the reasons stated above, I am unable to agree with the contention that the requirements of Sec. 62 are not satisfied or that the power conferred under that Section is being abused.

7. Contention 2: It is next contended by the Petitioner that the temporary permits cannot be granted without providing an opportunity to the existing operators to make their representations. This contention is based upon Section 47(1) of the Act which directs that the Regional Transport Authority shall in considering an application for a stage carriage permit, take into consideration any representations made by persons already providing passenger transport facilities by any means along or near the proposed route or area or by any association representing persons interested in the provision of road transport facilities recognised in this behalf by the State Government, or by any local authority or police authority within whose jurisdiction any part of the proposed route or area lies. It is admitted by the respondent that no such opportunity was given to make any representations in terms of this section, but it is contended that Section 47 has no application at all to the case of a temporary permit, which is governed only by the provisions of Section 62 of the Act and that section does not contemplate giving of an opportunity to anyone, much less to the existing operators to make their representations in the matter of granting of temporary permits. It is therefore, to be considered whether Section 47 of the Act applies to the grant of temporary permits.

8. Section 47 occurs in Chapter IV of the Motor Vehicles Act which is headed 'Control of Transport Vehicles' and consists of Sections 42 to 63.

9. Section 42 declares that no owner of a transport vehicle shall use or permit the use of the vehicle in any public place save in accordance with the conditions of a permit granted or countersigned by the authority concerned.

10. Section 45 provides that every application for a permit shall be made to the Regional Transport Authority of the region in which it is proposed to use the vehicle or vehicles.

11. Sections 46 and 48 deal with the application for a stage carriage permit

and the grant of a stage carriage permit.

12. Sections 49 to 51 deal with contract carriage permits, Sections 52 and 53 with private carrier's permit, and Sections 54 to 56 with public carrier's permit.

13. Section 57 relates to the procedure in applying for and granting permits of all types.

14. Section 58 deals with the duration and renewal of permits.

15. Section 59 deals with the general conditions attaching to all permits, Section 60 with the cancellation and suspension of permits, and Section 61 with the transfer of permit.

16. No distinction is made in these sections between a regular permit and a temporary permit. The sections refer generally to permits, indicating any particular type of permit whenever it is necessary to do so. In this connection it is important to bear in mind the following definition of 'permit' under Section 2(20) of the Act; 'permit' means the document issued by the Commissioner or a State or Regional Transport Authority authorising the use of a transport vehicle as a contract carriage, or authorising the owner as a private carrier or public carrier to use such vehicle." This would clearly include even a temporary permit. As the expression used in Section 47 is 'stage carriage permit' it would follow that it would apply to all permits for use of such carriages whether they are a regular permit, or temporary permits. Is there anything in the language of Section 47 or in the context in which the expression 'stage carriage permit' occurs to limit the operation of the section to 'regular permits' only and not include temporary permits within its purview?

17. It is argued that Section 47 occurs after Sections 45 and 46 and can refer only to permits referred to in those sections. This argument presupposes that Sections 45 and 46 apply only to regular permits and have no application to temporary permits. I do not see any reason why the application of these sections should be limited to regular permits only. In these sections the expression used is 'a permit' which according to the definition would include 'a temporary permit' also. On the other hand, wherever it is necessary to exclude temporary permits from the operation of a particular section, care has been taken to say so in express terms. For instance Section 57(8) refers to an application to vary the conditions of any permit, other than a temporary permit. Section 58 directs that a stage carriage permit or a contract carriage permit other than a temporary permit issued under Section 62 shall be effective without renewal for such period, not less than three years and not more than five years as the Regional Transport Authority may specify in the permit. Similarly,

Section 58-B refers to a private carrier's permit or a public carrier's permit other than a temporary permit. Section 59-A prescribes the form of every permit other than a temporary permit issued under Section 62. These instances where a temporary permit is expressly excluded from the operation of the section point to the conclusion that, but for such exclusion the expression 'permit' would embrace not only regular permits but temporary permits. A reading of the various provisions in the chapter also leads to the conclusion that these provisions would equally apply to temporary permits. For instance, Section 45 prescribes that every application for a permit shall be made to the Regional Transport Authority and Section 46 prescribes the particulars which an application for a permit should contain. These provisions are equally necessary in connection with a temporary permit. It may be that some of these and other provisions by their very nature cannot be made applicable to temporary permits. But that is not a reason why it should be held that these sections have no application to temporary permits. The same reasoning holds good in respect of Section 47 which directs that in considering an application for a stage carriage permit, the Regional Transport Authority shall have regard to the several matters mentioned in that section. These matters have to be considered even in the case of application for a temporary permit, except in so far as they are obviously inapplicable owing to the nature of the provision, to the case of a temporary permit. The position is the same with regard to the sections dealing with private carrier's permits, public carrier's permits or contract carriage permits.

18. In Section 62 of the Act it is specifically provided that the procedure laid down in Section 57 need not be followed. But there is no such exemption in the case of the requirements of other sections. It has to be remembered that Section 62 deals with temporary permits for all types of transport vehicles, whether they be stage carriages or contract carriages or private carriers or public carriers. The fact that mention is made only to Section 57 indicates that the other sections applicable to any particular case should be followed.

19. It was then argued that whereas Section 48 which deals with the grant of stage carriage permits is made subject to the provisions of Section 47, it does not state that Section 62 is subject to the provisions of that section. This argument in my opinion is without force.

20. Sections 49 to 51 which deal with the contract carriage permit correspond to Sections 46 to 48 which deal with stage carriage permits. Section 51 is made subject to the provisions of Section 50.

In the same way Section 48 is made subject to the provisions of Section 47. Similarly, in the case of public carrier permits Section 56 is made subject to the provisions of Section 55. As has already been noticed Section 62 deals with the grant of temporary permits of all types of transport vehicles and therefore, would be subject to the provisions relating to all the different types of permits which preceded the Section and if the language similar to Ss. 48, 51 or 56 were used it would be necessary to mention a number of sections which preceded Section 62. Perhaps, it was not considered necessary to expressly state that this was subject to the provisions of various other sections in the Act, as the sections in an Act have to be read together and no express provision is necessary to mention that a particular section is subject to another provision. The mere fact that in some cases it has been so stated, does not mean that in all other sections which do not contain a similar clause the said section must be applied without due regard to other provisions.

21. It was contended by the learned Government Pleader that if the provisions of Section 47 have to be complied with, especially those relating to the taking into consideration of any representations, the very object and purposes of the provision relating to the temporary permits would be defeated. It was stated that the period of a temporary permit can in no event exceed four months and the grant of temporary permits was for the purpose of convenience of the passengers on special occasions like fairs and religious gatherings, for the purpose of seasonal business, to meet a temporary need and pending decision on an application for renewal of a permit. It was argued that a temporary permit being designed to cover such a situation, it is of the utmost importance that it should be granted expeditiously and if the procedure adopted under Section 47 is to be followed, the lapse of time consequent upon such procedure would defeat the very purpose for which the temporary permits are granted. Instances like earth-quake or floods were given as illustrations to point out that if the procedure under Section 47 is to be followed before the grant of temporary permits on such occasions, considerable hardship would be caused to the public. I do not think that extreme illustrations of this kind serve any useful purpose. These temporary permits are normally intended to be given on special occasions such as fairs, and religious gatherings or for the purposes of seasonal business or to meet a particular temporary need etc. These occasions are known sufficiently in advance and it is not impossible to comply with the provisions of Section 47 and

hear representations if any, before the granting of temporary permits.

22. Further a provision is made in Section 42(3) of the Act whereunder it is stated that there is no necessity even for a permit in certain cases, for instance in the case of any transport vehicle used solely for police, fire brigade or ambulance purposes or for the conveyance of corpses or a transport vehicle used for towing a disabled vehicle or for removing goods from a disabled vehicle to a place of safety, or any transport vehicle used for any other public purpose prescribed in this behalf. It is therefore possible for the Government to make rules to the effect that there is no need even for a permit where a transport vehicle is used in connection with earth-quake or in the event of floods or such conditions of great emergency.

23. It is not right to judge the applicability of Section 47 to temporary permits granted under Section 62 merely with reference to the requirements under Section 47(1) in regard to representations made by the persons already providing transport facilities etc. Section 47 also provides that the Regional Transport Authority shall in considering an application for a stage carriage permit have regard to the various matters like the interests of the public, the advantages to the public of the services to be provided, adequacy of other passenger transport services, the benefit to any particular locality or localities likely to be afforded by the services etc. If the argument that Section 47 will not apply to the grant of temporary permits under Section 62 were to be accepted, then there would be no criteria at all in considering several applications made for the issue of temporary permits. Even if conditions under Section 62 are satisfied, it may be that there are more than one application for the issue of temporary permit in any particular route and it could not have been the intention of the framers of the Act that such an application should be considered without any criteria and it should be left to the sweet will and discretion of the authority to grant the permit to whomsoever they like.

24. For all these reasons I have no hesitation in rejecting the contention of the learned Government Pleader that the requirements of Section 47 need not be complied with while granting permits under Section 62. This view of mine finds support in the decision in *Ambala Ex. S. T. Co-op. Society v. Punjab State*, AIR 1959 Punj 1 (FB). In that case in repelling the argument that the power conferred under Section 62(d) of the Act (as amended by the Punjab Legislature) which enabled the authority to grant temporary permit in any such circumstances as may in the opinion of such

authority justified granting of such permits, was uncontrolled or unrestricted and therefore void, it was observed that the power of issuing temporary permits is controlled by Section 55 and Section 56 of the Act and the Legislature had in the aforesaid provisions indicated the basis for the exercise of the same. Section 55 provides that the Regional Transport Authority shall in considering an application for a public carrier's permit take into consideration any representations made by persons already providing goods transport facilities by any means, whether by road or otherwise in the proposed area or along or near the proposed route etc. In that case their Lordships were dealing with a public carrier's permit and therefore they referred to Sections 55 and 57.

The same reasoning holds good in the case of temporary stage carriage permit in which case Section 62 will be controlled by the provisions of Sections 46 to 48. This decision was followed in a recent decision in *Prem Bus Service v. R. T. A. Patiala*, AIR 1968 Punj 344 where it was held that the requirements of Section 47 have to be followed in the grant of temporary stage carriage permit under Section 62 in the same manner and to the same extent as is required in the grant of regular stage carriage permit. It was further held that a statutory duty is cast on the Regional Transport Authority to take into consideration any representations made by the persons already providing passenger transport facilities by any means along or near the proposed route, as required by Section 47 (1). A similar view has been taken by the Rajasthan High Court in *Kotah Transport Ltd. v. R. T. Authority*, AIR 1954 Raj 33 in which it was held that provisions of the Sections 45 to 48 would apply also to the case of the issue of temporary permits. In *Abdul Gafoor v. State of Rajasthan*, AIR 1962 Raj 174 it was held that it is in consonance with the principles of natural justice that the persons who are already holding permits in certain routes and are likely to be affected by the grant of temporary permits must be given an opportunity of being heard in the matter.

25. The learned Government Pleader drew my attention to the decision in *C. S. S. Motor Service v. State of Madras*, 1952-2 Mad LJ 894 = (AIR 1953 Mad 279) in which it was held that the factor to be considered in granting of a permit is not whether the existing operators will suffer by competition but whether the extension of service will be in the interests of the public. Similarly in *Surendra Singh v. State of U. P.*, AIR 1966 All 455 it was observed that no operator on a particular route can be heard to say that if the strength of the route is increased his financial interest would suffer and conse-

quently the increase should not be allowed.

26. These decisions in my view have no application. It is one thing to say that the interests of the existing operators cannot be taken into account in considering the question whether a permit should be issued or not, but it is quite another thing to say that their representations need not be considered. The consideration of the representations is specifically provided for in Section 47(1). Further such representations need not be limited to how they may be affected by the issue of a permit, but may also relate to the various factors referred to in Section 47(1) in which case it would be necessary for the authorities to consider those representations in so far as they are relevant to Section 47(1).

27. In this case no doubt the petitioners have come to the court even when the notifications calling for applications for the temporary permits were issued without waiting to see whether an opportunity would be given to the existing operators to make their representations and whether these representations would be taken into consideration. But the attitude of the Government as expressed in the counter-affidavit clearly shows that they have all along been of the view and are still of the view that it is not necessary to give the petitioners any such opportunity or take into consideration any representations made by them. This view according to me is not justified.

28. Another contention that was sought to be raised though feebly, is that as the limit of the number of stage carriages generally or of any specific type for which such carriage permits may be granted in the region has not been fixed by the Regional Transport Authority in this case, temporary permits cannot be granted until such limit is fixed. I do not see any force in this contention. Section 47(3) authorises the Regional Transport Authority to limit the number of stage carriages having regard to the matters mentioned in sub-section (1). It does not render it obligatory on the part of the authority to do so. If, no doubt such a limit is fixed the grant of any permit, whether it be under Section 48 or under Section 62, in view of what has been stated above has to be subject to that limit. But, so long as no such limit is fixed the authority is empowered to grant permits unfettered by Section 47(3). The decision of the Supreme Court in *Abdul Mateen v. Ram Kailash Pandey*, AIR 1963 SC 64 is only an authority for the proposition that where a limit has been fixed under Section 47(3) by the Regional Transport Authority and thereafter the said authority proceeds to consider applications for permits under Section 48 read with Section 47, the Regional Transport

Authority must confine the number of permits issued by it within those limits. I do not consider this as an authority for the extreme contention urged on behalf of the petitioners that until such a limit is fixed, no permits and in particular, temporary permits can be granted.

29. Mr. Srinivasamurthi who appeared for respondents-operators in W. P. 4813/68 who were granted temporary permits contended that the routes in question in which they were granted permits were the routes 9 to 12, 16, 17 and 19 to 22 with which the petitioners in the Writ Petition were not at all concerned and therefore they are not entitled to question the grant of temporary permits for these routes. But under Section 47(1) the representations of persons providing passenger transport facilities not only along the proposed route but also near the proposed route have to be taken into consideration. It is the case of the petitioners that they are providing passenger transport facilities near the proposed routes and therefore it cannot be said that their representations need not be considered.

30. As I have negated the contention of the petitioners that the conditions for the issue of temporary permits do not exist or that there has been an abuse of the power to grant temporary permits under Section 62 the request of the petitioners to issue a writ prohibiting the respondent from proceeding in pursuance of the notifications calling for applications for grant of temporary permits cannot be granted. But, in view of my decision on the second contention, the respondent has to provide an opportunity to the petitioners to make their representations before the applications for the grant of temporary permits are considered on merits. A writ will be issued accordingly.

31. There will no order as to costs.

Writ issued.

AIR 1970 ANDHRA PRADESH 426 (V 57 C 69)

FULL BENCH

NARASIMHAN, KRISHNA RAO AND
KUPPUSWAMI, JJ.

J. Devaraja Rao and others, Appellants
v. Income-Tax Officer, Anantapur and
another, Respondents.

Writ Appeal No. 111 of 1964, D/- 2-1-1970, decided by F.B. on Order of Ref. made by Jaganmohan Reddy, C.J. and Sambasiva Rao, J., D/- 26-6-1964.

(A) Hindu law — Debts — Father — "Pious obligation" of son — Income-tax arrears in respect of father's separate business prior to partition between father and son — Son is bound to pay under doctrine of pious obligation. AIR 1959

Mad 71 & AIR 1959 Andh Pra 631, Rel. on.
(Para 17)

(B) Hindu law — Texts — Interpretation of "Smritis" — Unsafe to apply dictionary meaning to words in text of "smritis".

In interpreting 'smritis' which were rendered thousands of years ago it is not safe to merely take the dictionary meaning and apply it to the texts. It has to be remembered that 'smritis' also deal with religious and moral law. (Para 6)

(C) Hindu law — Debts — Father — Pious obligation of son — Tax debts — Income-tax arrears — Debt binding on son.

Even if some type of taxes or duties (sulka debt) were exempt from the doctrine of pious obligation for certain reasons which appealed to the ancient smriti text writers, it is for the court to decide in the context of the present society whether any particular tax liability is of such a nature as could be treated as one tainted with illegality or immorality or opposed to right conduct as to bring it within the exceptions to the general rule that the son is liable to pay the father's debt. The liability to pay arrears of income-tax cannot be regarded as one such. On the other hand it is obligatory on the son that he should pay taxes which are legitimately due to the State by his father. Even from ancient times till the present day the liability to pay tax to the State is regarded as one of the foremost duties of the citizens. Arrears of income-tax due by the father in respect of separate business prior to partition between him and his son can be recovered from the son after the partition under the doctrine of pious obligation. Case law and Hindu Religious Texts discussed. (Paras 8, 9)

Cases Referred: Chronological Paras

- (1960) AIR 1960 SC 954 (V 47) =
1960-3 SCR 842, Luhar Amritlal
Nagji v. Doshi Jayantilal Jethalal 5, 11
(1959) AIR 1959 SC 282 (V 46) =
1959 SCR 1384, S. M. Jakati v.
S. M. Borkar 6, 11, 12
(1959) AIR 1959 Andh Pra 631
(V 46) = 36 ITR 47, Chaganti
Raghava Reddy v. State of Andhra 15
(1959) AIR 1959 Mad 71 (V 46) =
35 ITR 142, M. R. Radhakrishnan
v. Union of India 15
(1955) AIR 1955 Mad 382 (V 42) =
ILR (1955) Mad 1179, Perumal
Chetti v. Province of Madras 6, 9
(1943) AIR 1943 PC 142 (V 30) =
70 Ind App 171, Hemraj v. Khem-
chand 4, 6, 11
(1926) AIR 1926 Mad 323 (V 13) =
ILR 49 Mad 211, Nidavolu
Achutan v. Ratnajeev 6, 10
(1912) ILR 39 Cal 862 = 16 Cal
WN 519, Chhakauri Mahton v.
Ganga Prasad 1

(1907) ILR 32 Bom 348 = 10 Bom

LR 297, Durbar Khachar v.

Khachar Harsur

(1898) 25 Ind App 54 = ILR 20 All

267 (PC), Rao Balwant Singh v.

Rani Kishori

(1857) 6 Moo Ind App 393 = 18

WR 81 (PC), Hanuman Prasad v.

Mt. Babooe

P. Rama Rao, for Appellants; T. Ananta Babu, for Respondents.

KUPPUSWAMI, J.— This appeal was referred to a Full Bench by a Division Bench consisting of Jaganmohan Reddy, Chief Justice (as he then was) and Sambasiva Rao, J., in view of the importance of the question that arises in this case, namely whether the arrears of income-tax, due by the father in respect of a separate business prior to a partition between him and his sons can be recovered from the sons after the partition under the doctrine of pious obligation.

2. This appeal is against the order of Gopalakrishnan Nair, J., dismissing a Writ Petition praying for the issue of a Writ of Mandamus directing the respondent to forbear from collecting certain arrears of income-tax by attachment and sale of their properties. The father of the petitioners, appellants herein was one Venkateswara Rao. He and his divided brother Lakshman Rao carried on business in partnership under the name and style of Govindarao & Sons. For the years 1945-46, 1946-47 and 1947-48 this firm was assessed to a total income-tax of Rs. 92, 178-44. The firm was dissolved by an agreement between the two partners in the end of 1948. The tax was not paid by the partners in spite of demand. On 20-11-1952 Venkateswara Rao and his sons who constituted a joint family partitioned their family properties, each of them taking a separate share. No arrangement was made for payment of the arrears of income-tax due by the father, Venkateswara Rao, as a partner of the aforesaid firm. Eventually the Income-tax Officer issued a certificate under Section 46(2) of the Income-tax Act for recovery of the tax due by proceeding against the properties of the father which the father as well as the sons obtained in the partition. The properties were attached and were sought to be brought to sale.

The sons, thereupon filed Writ Petition No. 1221 of 1963 before this Court praying for the issue of a writ of mandamus directing the authorities to forbear from proceeding with the recovery of the arrears of income-tax. Several contentions were raised before Gopalakrishnan Nair, J., all of which were negatived by him. It is sufficient to mention only the third contention raised before him, as that is the only contention that is pressed before us, i.e. the doctrine of pious obli-

gation of the sons of a Hindu to discharge the pecuniary liability of their father which is not tainted by illegality or immorality does not extend to the liability of the father to pay arrears of income-tax. Gopalakrishnan Nair, J., negatived this contention stating that the debts due to the Government undoubtedly stand on a higher footing than a debt due to a private individual or institution and the pious obligation of the sons to discharge their father's debt would extend also to the above debt due to the State. In the result he dismissed the Writ Petition. The same contention is reiterated before us in this Appeal.

3. Under ancient Hindu Law as laid down by the 'Smritis' the non-payment of a debt was regarded as a sin, the consequences of which follow the debtor even after his death. A text which is attributed to Brihaspathi says "He who having received a sum lent or the like does not repay it to the owner, will be born hereafter in the creditor's house a slave, a servant, a woman or a quadruped." There are other texts which say that a person in debt goes to hell. Hindu Law-givers therefore imposed a pious duty on the descendants of a man including his son, grandson, and great grandson to pay off the debts of their ancestor and relieve him of the afterdeath torments consequent on non-payments. In the original texts a difference was made in regard to the obligation resting upon sons, grandsons and great grandsons in this respect. The son was bound to discharge the ancestral debt as if it was his own together with interest and irrespective of any assets that he might have received. The liability of the grandson was much the same except that he was not to pay any interest. The great grandson was liable only if he received assets from his ancestor. This doctrine as formulated in the original texts which usually referred to as the doctrine of pious obligation has been modified in some respects by judicial decisions. Under the decisions as they now stand there is no difference between, son, grandson and great grandson so far as the obligation to pay the debt of the ancestor is concerned. But none of them has any personal liability in the matter irrespective of receiving any assets. To this general obligation of discharging the father's debts, several exceptions were laid down by the Smriti writers. It is useful to set down the various texts which deal with this:

MANU. VIII. 159.

प्रातिभाष्यं द्यादानमाक्षिकं सौरिकंच यत् ।

दण्डशुल्कवशेषं न पुत्रो दातुमर्हति ॥

But money due by a surety, or idly promised, or lost at play, or due for spirituous liquor, or what remains unpaid of a

fine and tax or duty, the son (of the party owing it) shall not be obliged to pay.

GAUTAMA. XII. 41.

प्रातिभाष्यं वणिक् शुल्कमयश्च दण्ड न पुत्रान् प्राभवेयुः॥

Money due by a surety, a commercial debt, a fee (due to the parents of the bride), debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons (of the debtor).

YAJNAVALKYA. II. 89. (47)

सुराशमयूतं कृतं दण्डशुल्कवशित्वम् ।

वृथादानं तथैव पुत्रं दद्यात् पतृकम् ॥

A son has not to pay, in this world his father's debt incurred for spirituous liquor for gratification of lust, or in gambling, nor a fine nor what remains unpaid of a toll; nor (shall he make good) idle gifts.

NARADA :

न पुत्रेण पिता दद्यात् दद्यात्, पुत्रस्तु पैतृकम् ।

कामक्रोधसुराशूनं प्रातिभाष्यकृतादिना ॥

A father must not pay the debt of his son but a son must pay a debt contracted by his father excepting those debts which have contracted from love, anger, spirituous liquor, games, or bailments.

BRIHASPATI. XI. (10-118. Gaekwad's Edition, 1941).

सारक्षिकं वृथादानं कामक्रोधप्रतिभृतम् ।

प्रातिभाष्यं दण्डशुल्कदण्डं पुत्रं न दापयेत् ॥

Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for idle gifts, for promises made under influence of love or wrath, or for suretyship; nor the balance of a fine or toll (liquidated in part of their father.)

VYASA OR USANAS.

दण्ड वा दण्डशेषं वा शुल्कं तच्छेषमेव वा ।

न दातव्यं तु पुत्रेण यच्च न व्यावहारिकम् ॥

The son has not to pay a fine or the balance of a fine, or a tax (or toll), or its balance (due by the father), nor that which is not proper.

This text is attributed to Vyasa according to Ratnakara and to Usanas according to Mitakshara and will be referred to in this Judgment as the text of Usanas. The translations are according to Ghosh in his book on Hindu Law.

4. These passages and in particular the last mentioned one which uses the general expression "न व्यावहारिकं" (Na Vyavaharikam) have been the subject of several decisions including those of the Privy Council and of the Supreme Court. Though the expression used is 'Na Vyavaharikam' it is ordinarily referred to by a single expression 'Avyavaharika' which means the same thing. There has been

a considerable difference of opinion as to the true meaning of this expression — Colebrooke translated these words as meaning "debt for a cause repugnant to good morals". Mandlik translated it as "not proper". In *Darbar Khachar v. Khachar Harsur*, (1907) ILR 32 Bom 348 it was translated as "a debt which as a decent and respectable man the father ought not to have incurred." In *Chhakauri Mahton v. Ganga Prasad*, (1912) ILR 39 Cal 862 Justice Mookerjee preferred to read it as "not lawful, usual or customary". But the Privy Council in *Hemraj v. Khem Chand*, 70 Ind App 171 = (AIR 1943 PC 142), after referring to the translation of Colebrooke, and Mandlik and the judgments of the Court in India interpreting the term "avyavaharika", observed that having regard to the principles underlying the rule of pious obligation which forms the foundation for the son's liability, the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term as used in the Smriti text and may well be taken to represent its correct meaning. In their Lordships' view the term does not admit of a more precise definition. It was held that when a particular debt is called in question, it would be the duty of the courts to examine its nature in the light of the principles mentioned in the judgment, which are not exhaustive but only basic, and to see whether in the circumstances it is of the kind which give exemption to the son from the liability to pay it, on the ground that it is repugnant to morals. In that decision it was also observed that the duty cast on the son being religious or moral, the character of the debt should be examined from the standpoint of justice and morality.

5. The Supreme Court in *Luhar Amrit Lal Nagti v. Doshi Jayantilal Jethalal*, (1960) 3 SCR 842 = (AIR 1960 SC 964) also expressed the same view.

6. Colebrooke's translation was also accepted by the Supreme Court in *S. M. Jakati v. S. M. Borkar*, AIR 1959 SC 282. They observed that it is the pious duty of the sons to discharge their father's debts not tainted with immorality or illegality. In *Perumal Chetti v. Province of Madras*, AIR 1955 Mad 382 Chief Justice Rajamannar delivering the judgment of the Division Bench observed:

"We have our doubts if that term had a precise and definite meaning even in the days of the Smritis. It is like "just and convenient", "reasonable and prudent", "justice, equity and good conscience". To give the latest example it is an expression as elastic and indefinite as the expression "reasonable restrictions" in Article 19 of our Constitution. Colebrooke translated the expression "avyavaharika" as "repugnant to good morals".

There have been other translations, like 'improper' and 'not lawful, usual or customary'. "Vyavahara" is a word which has more than one meaning. But we agree with Mr. Venkata Subramania Aiyar that the word has reference to the ideal of good conduct according to the notions prevailing at the material time. But we are unable to hold that any debt which the father ought not to have strictly contracted is necessarily a debt which is 'avyavaharika.' There should be an element of moral turpitude involved in the debt. It is only then that it could be called 'avyavaharika'.

Whatever may be the difference in the translations of this expression, it is now clear that the expression 'avyavaharika' has been understood as repugnant to good morals or tainted with immorality or illegality or involving some moral turpitude. Even if a wider meaning such as 'improper' is given there can be no doubt that the liability in the present case, namely, the liability of the father to pay arrears of income-tax which had accrued in respect of the business which he was carrying on cannot be said to be 'avyavaharika'. In our opinion it is impossible to argue that the liability to pay taxes legally due to the Government is an 'avyavaharika' debt within the meaning of the texts as interpreted by the judicial decisions, some of which have been referred to above. It is stated that the assessment was made on an estimated income but even so the tax so levied would still be tax legitimately due at it has been held that even an estimate cannot be arbitrary and must rest on some rational basis. There would be some scope for argument if a penalty or fine had been levied due to the negligence or laches of the assessee or due to his non-compliance with any provision of law. As that is not the case here we express no opinion on that matter. We may also state that Mr. Rama Rao also did not seriously contend before us that the said liability would be in the nature of an 'avyavaharika' debt not binding upon the son. His main argument however, was that the exemption from liability of the son under the doctrine of pious obligation is not only in respect of an 'avyavaharika' debt, but in respect of the various classes of debts, mentioned in the several texts referred to earlier. He submitted that one class of debts which is specifically mentioned in the text of Usanas and the other texts is 'sulka'. According to the dictionary meaning as well as the meaning given by the various recognised translators of the texts from time to time, the expression 'sulka' would also include a tax. As the smritis expressly state that the son is not liable to pay the 'Sulka' which remained unpaid by the father it is argued that the son is not liable for the

arrears of income-tax payable by the father in this case. It is very difficult at this distance of time to find out what the 'smriti' text writers meant by the expression 'sulka'. The dictionary meaning as given in Apte's Dictionary is 'toll, tax, customs duty particularly levied at ferries, passes, roads. The other meanings of 'sulka' given are 'gain, profit, money advanced to ratify a bargain, purchase price of a girl; money given to the parents of a bride; a nuptial present; marriage settlement or dowry presents given by the bridegroom to his bride.' In the various translations, sometimes, the expression 'toll' is used, sometimes 'tax', sometimes 'duty'. In arriving at the meaning of the expression used in the texts it is important to bear in mind the context in which these passages occurred. As observed already these texts refer to the exceptions to the general rule that a son is liable to pay the debts of his father. As pointed by the Privy Council in 70 Ind App 171 = (AIR 1943 PC 142) most of the debts mentioned in the texts as debts which he need not pay, are of objectionable character, even if some type of taxes or duties were exempt from the doctrine of pious obligation for certain reasons which appealed to the ancient Smriti text writers; it is for the court to decide in the context of the present society whether any particular tax liability is of such a nature as could be treated as one tainted with illegality or immorality or opposed to right conduct as to bring it within the exceptions to the general rule that the son is liable to pay the father's debt. We have no hesitation in holding that the liability to pay arrears of income-tax cannot be regarded as one such. On the other hand it appears to us that it is obligatory on the son that he should pay taxes which are legitimately due to the State by his father. Even from ancient times till the present day the liability to pay tax to the State is regarded as one of the foremost duties of the citizens. We cannot believe that the ancient law givers who laid so much stress upon the duty of the son to his father's debt would have exempted him from payment of the taxes legally due by the father to the State. It has been repeatedly held that the son is liable to pay the debts of the father incurred during the course of trade which he had lawfully carried on. It does not stand to reason that while the son is liable to pay the debts of the father so incurred, he is not liable to pay the tax due in respect of the profits of that trade, or debts incurred by the father for the purpose of the payment of those taxes. In interpreting these 'Smritis' which were rendered thousands of years ago it is not safe to merely to take the dictionary meaning and apply it to the texts. In this connection

it has to be remembered that these 'Smritis' also deal with religious and moral law. According to Hindu conception 'Dharma' is of widest significance and includes religious, moral, social and legal duties and can only be defined by its contents. The Hindu 'Dharma sastra' therefore deals with religious and moral law as well as civil and criminal law. It is true that the Smriti writers knew the distinction between 'vyavahara' or the like, the breach of which results in judicial proceedings, and the law in the widest sense. But having regard to the fact that all the old texts and commentaries are apt to mingle religious and moral considerations, not being positive laws, with the rules intended to be positive laws, their Lordships of the Privy Council have repeatedly emphasised the necessity for caution in the interpretation of 'Smritis', vide Rao Balwant Singh v. Rani Kishori, (1898) 25 Ind App 54 (PC). In Nidavolu Achutan v. Ratnajee, AIR 1926 Mad 323, Couts-Trotter, C. J. observed that the governing provision in the texts is that which excludes from the rule debts that are not 'vyavaharika' and particular instances given in the Smritis must be treated as a mere expression of opinion on the part of the authors as to what class of debts would fall under general words.

7. Strange in his book on Hindu Law seems to think that the reason that debts due for tolls are excepted may be that they are to be regarded as ready money payments, for which credit will have to be given at the risk of him by whom they ought to have been received.

8. In Mayne's Hindu Law it is stated that the expression 'sulka' in the Smritis is ambiguous. It is sometimes translated as a toll or a tax. Another meaning of the word 'sulka' is a nuptial present, given as the price of a bride. Reference is made to Haradatta's translation where he assigns the meaning of bride price to 'sulka' and to the fact that this translation is supported by Sarvajna Narayana in his gloss on the text in Manu. Mayne is of the opinion that this stands to reason as a promise of bride price is not enforceable even according to the modern decisions and being unapproved marriage neither the liability to pay the bride price nor a debt incurred for the purpose of paying it can be lawful or proper (vyavaharika). Even if the meaning is not restricted to the last mentioned one, namely, the bride price, we are of the opinion that having regard to the context in which it occurs, 'sulka' must be confined only to such liability, though in the nature of tax or a duty, which would involve some moral turpitude on the part of the father or the incurring of which would be tainted with illegality or immorality.

9. The Bench of the Madras High Court in AIR 1955 Mad 382 had to consider whether court-fee payable by the father in a litigation which he carried on comes within the expression 'Danda' used in the text which as has been noticed is also one of the specifically enumerated class of debts mentioned in the text. It was observed that the conception of the court-fee at the present day is radically different from 'Danda' which was imposed on the parties to a litigation in the days of 'Smritis', and that whatever the theory underlying the court-fee may be, it is clearly not in the nature of punishment. They observed that the conception of 'Dharma' and Nyaya changes and the liability even under the 'Smritis' would have to be judged by the present day notions and if judged by those notions, it could not be said that the liability to pay court-fee was in anyway inconsistent with right conduct. We are of the view that the same approach should be made in interpreting the expression 'sulka' in the same texts.

10. If the expression 'sulka' were to be regarded as meaning any tax or duty, we would hold that the texts in so far as they refer to 'sulka' have become obsolete. In this connection we may again refer to the decision in AIR 1926 Mad 323 where it was argued that as "commercial debt" is one of the exceptions mentioned in the text of Gautama the son is not liable to pay, under the doctrine of pious obligation, any commercial debt. Couts-Trotter, C. J., observed that a modern court would be free to consider the particular instances given as obsolete under the conditions of today. He observed "I am clearly of opinion that commercial debts fall into that category and we ought to say that the pious obligation extends to them. It may well be that in the time of Gautama it was thought that to engage in trade was degrading at any rate in the case of higher castes, but no one could pretend that that view would be entertained today."

11. Mr. Ananta Babu contended on behalf of the respondents that the only question for consideration of the court is whether a particular debt is 'avyavaharika' or not and if it is satisfied that the debt is not 'avyavaharika' it has to uphold the son's liability to pay the father's debts. He contended that though the Smriti texts mentioned several classes of debts, specifically therein enumerated, in view of the judicial decisions ever since the decision in Hanoomanprasad v. Mt. Babooe, (1857) 6 Moo Ind App 393 (PC) the position is that the courts have been considering only whether a particular debt is 'avyavaharika' or not and not whether any debt falls under anyone of the other enumerated categories mentioned in one or other of the texts. He

relied upon the decision of the Privy Council in 70 Ind App 171 = (AIR 1943 PC 142) and of the Supreme Court in (1960) 3 SCR 842 = (AIR 1960 SC 964) and AIR 1959 SC 282 in support of this contention. In the first case the Privy Council observed that if on examination it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son. In (1960) 3 SCR 842 = (AIR 1960 SC 964) it was observed that in this branch of law several considerations have been introduced by judicial decisions which have substantially now become a part and parcel of Hindu Law as it is administered; it would, therefore, not be easy to disengage on said considerations and seek to ascertain the true effect of the relevant provisions contained in ancient texts considered by themselves. They said that they were not prepared to decide the point raised purely in the light of ancient Sanskrit Texts.

12. In AIR 1959 SC 282 it was observed in paragraph 12 as follows :

"In Hindu Law there are two mutually destructive principles, one the principle of independent coparcenary rights in the sons which is incident of birth, giving to the sons vested right in the coparcenary property, and the other the pious duty of the sons to discharge their father's debts not tainted with immorality or illegality."

These decisions lend support to the contention of Mr. Ananta Babu to a considerable extent that the question of liability of the son has to be decided with respect to the question whether the debt is 'avyavaharika' or not or in other words whether the debt is tainted with illegality or immorality. At the same time we have to observe that in these decisions their Lordships were not considering the exact question raised before us, namely, whether even assuming that a particular debt is not 'avyavaharika' or tainted with immorality or illegality, the son is exempted from liability by reason of the fact that it is one of the enumerated class of debts mentioned in smritis dealing with the exemption. If the liability is to depend solely on the question whether it is 'avyavaharika' or not there would be no need at all to examine the question whether any particular debt falls within any of the enumerated categories. But we have several decisions wherein are considered questions whether a particular debt is a surety debt within the meaning of the texts, or whether it is 'Danda' or whether it incurred 'in love or wrath' etc.

13. It is unnecessary to pursue this line of argument further as practically the same result has been arrived at by our holding that in interpreting the enu-

merated class of exemptions we have to bear in mind the context in which they appear in the various texts and therefore, they should be confined to cases where some moral turpitude on the part of the father was involved or there could be said that the incurring of the debt was tainted with some illegality or immorality.

14. The two decisions in which the question relating to the liability of the son to pay arrears of income-tax payable by the father directly arose for consideration may now be referred to.

15. In *M. R. Radhakrishnan v. Union of India*, 35 ITR 142 = (AIR 1959 Mad 71) the Division Bench of the Madras High Court held that there was no element of moral turpitude in not paying income-tax due. The assessment actually made was not in any sense a penalty or fine imposed for non-production of accounts or for suppression of material information. That was the case in which the income-tax was levied on an estimated income. Dealing with the argument that it came directly within the expression 'sulka' it was observed that it is impossible to be certain of the meaning of this word as it occurs in the Smritis. It may mean either a toll or a tax or a nuptial present given as the price of a bride. They pointed out that the appellant's counsel did not develop the point, nor did he cite any authority for the position that the word 'sulka' occurring in the Smriti text would apply to arrears of income-tax. Though there is no full discussion on this subject in that decision we are inclined to agree with the ultimate decision for the reasons which we have given earlier.

16. In *Chaganti Raghava Reddy v. State of Andhra*, 36 ITR 47 = (AIR 1959 Andh Pra 631) it was contended that as the assessments were according to the best judgment not being on merits it was in the nature of penalty arising out of the misdeeds of the father and consequently the sons were not liable to such debt of the father. This contention was negatived. Though there is no discussion on this question the conclusion is in accordance with the view which we have expressed above.

17. For all the reasons above stated we are of the opinion that *Gopalakrishnan Nair, J.*, was right in holding that the arrears of income-tax due by the petitioner's father in respect of separate business prior to partition between him and his son can be recovered from the son after the partition under the doctrine of pious obligation.

18. No other question has been argued before us.

19. The writ appeal is dismissed with costs. Advocate's fee Rs 250/-.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 432
(V 57 C 70)

CHINNAPPA REDDY, J.

Indian Detonators Ltd., Kukatpalli,
Petitioner v. Indian Detonators Ltd.,
Workers' Union and others, Respondents.

Writ Petn. No. 771 of 1968, D/- 14-10-1969.

(A) Industrial Disputes Act (1947), Section 19(3) — Period of operation of settlement — Award cannot be award for one purpose and settlement for another purpose — Settlement merging into award ceases to be settlement and operates as award — It will be in operation for period provided by statute — Expression "subject to the provisions of this section" refers to provisions applicable to award and not to settlements. (Para 5)

(B) Industrial Disputes Act (1947), Section 2(p) — Settlement — Procedure to be followed — Parties arriving at settlement and reporting same to Tribunal — Act prescribes no procedure to be followed in such case. (Para 4)

Cases Referred: Chronological Paras
(1961) AIR 1961 Mad 212 (V 48) =

1960-2 Lab LJ 558, Workers, 32

Textile Mills in Coimbatore v.

Dhanalakshmi Mills Ltd., Tiruppur 5

(1958) AIR 1958 SC 1018 (V 45) =

1959 SCR 1191, State of Bihar v.

D. N. Ganguli 4

P. R. Ramachandra Rao, for Petitioner;
V. Jagannadha Rao, for Respondent No. 1;
2nd Govt. Pleader and C. Seetharamiah,
for Respondents Nos. 2 and 3.

ORDER:—The Indian Detonators Limited is the petitioner in this application for the issue of a writ of Certiorari in which a decision of the Industrial Tribunal, Hyderabad is questioned. The case of the petitioner is as follows:—

There was an Industrial Dispute between the Indian Detonators Limited and its workmen, represented by the Indian Detonators Limited Employees' Union. The Industrial Dispute was referred by the Government to the Industrial Tribunal for adjudication. Before the Tribunal could take up the dispute for adjudication the parties, that is, the management and the Employees' Union arrived at a settlement which they agreed should be in force till 30-6-1969. One of the terms of the settlement was that the workmen should not, during the period of operation of the settlement, make any demands involving a financial burden on the management. The parties requested the Tribunal to pass an award in terms of the settlement and the Tribunal did so on 29-4-1966.

On 16-6-1967, a rival and newly registered Union called the Indian Detonators Limited Workers' Union presented a

charter of demands to the Management. Some of the demands involved financial burden on the management. Conciliation proceedings failed and the Conciliation Officer submitted a report to that effect to the Government. At that stage the Government entertained a doubt whether the settlement embodied in the award of 29-4-1966 would be in force till 30-6-1969 or whether it would be in force for a period of one year only from the date of award. The Government therefore referred the question for the decision of the Tribunal under Section 36-A of the Industrial Disputes Act. The Tribunal held that the necessary consequence of the settlement merging in the award was that it would be in force for a period of one year only from the date of award. The management questions the decision of the Tribunal and contends that the award was in force till 30-6-1969.

2. The Workers' Union submits that the earlier settlement was a collusive settlement between the management and the Employees' Union and that the Employees' Union represented no more than 15 out of 558 workmen and all the 15 were drivers of motor vehicles. On the other hand the Workers' Union represented 507 out of 558 workmen. The period for which an award may be in force is determined by statute and it is not open to the management to bargain out of the statute.

3. In order to appreciate the question at issue it is necessary to refer to a few statutory provisions. The definition of a 'settlement' in Section 2(p) of the Act comprehends a settlement arrived at in the course of conciliation proceedings as well as a written agreement between the employer and the workmen arrived at otherwise than in the course of conciliation proceedings. Under Section 12 of the Act it is the duty of the Conciliation Officer to endeavour to induce the parties to come to a fair and amicable settlement of an existing or an apprehended industrial dispute. Without delay, he is to investigate the dispute and all matters affecting the merits and the right settlement of the dispute. He is to report to the Government whether a settlement is arrived at or not. If he reports that there is no settlement, the Government is to decide whether a reference is to be made to a Tribunal, Board, or Labour Court. Section 10 authorises the Government to refer any existing or apprehended industrial dispute for adjudication to a Tribunal, Board or Labour Court.

Section 15 prescribed the duties of a Tribunal and Section 16(2) prescribes the form of the award of a Tribunal. Section 2(b) defines an award as meaning an interim or a final 'determination' of any industrial dispute or any question relating

thereto. Section 18 provides that a settlement arrived at by an agreement between the employer and the workmen otherwise than in the course of conciliation proceedings shall be binding on the parties to the agreement. Where, however, a settlement is arrived at in the course of conciliation proceedings or where a Tribunal makes an award, the settlement or award shall be binding not only on the parties to the dispute, but, where one of the parties is composed of workmen it shall also be binding on all persons employed in the establishment or part of the establishment, as the case may be, on the date of the dispute and all persons who subsequently become employed in that establishment or part.

Thus while a settlement arrived at in the course of conciliation proceedings and an award are binding on every workman of the establishment a settlement arrived at otherwise than in the course of conciliation proceedings is binding only on the parties to the agreement. This distinction is of great importance. Under Section 19, a settlement, whether it is arrived at in the course of conciliation proceedings or otherwise than in the course of conciliation proceedings, comes into operation on the date agreed upon by the parties to the dispute and shall be binding for the period agreed upon by the parties. If no date or period are agreed upon it shall come into operation on the date on which the memorandum is signed by the parties and shall be binding for a period of six months from that date. An award of a Tribunal, however, becomes enforceable on the expiry of 30 days from the date of publication of the award by the Government. This is provided by Section 17(a) of the Act.

Section 19(3) of the Act provides that the award shall remain in operation for period of one year from the date on which the award becomes enforceable. The Government is clothed with the power to reduce the period during which an award shall remain in operation. The Government is also vested with the power to extend the period of operation of an award by any period not exceeding one year at a time, so, however, that the total period of operation of an award does not exceed three years.

4. From a perusal of the provisions referred to above, it is evident that the Industrial Disputes Act does not prescribe the procedure to be followed by an Industrial Tribunal if the parties to the dispute before it arrive at a settlement and report such settlement to the Tribunal. As pointed out by their Lordships of the Supreme Court in State of Bihar v. D. N. Ganguly, AIR 1958 SC 1018, industrial peace and harmony being the primary objects of the Act, it would be unreasonable

for a Tribunal to insist upon dealing with the dispute on the merits notwithstanding its settlement. Their Lordships said:—

"It is true that the Act does not contain any provision specifically authorising the industrial tribunal to record a compromise and pass an award in its terms corresponding to the provisions of Order XXIII, Rule 3 of the Code of Civil Procedure. But it would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on the merits even after it is informed that the dispute has been amicably settled between the parties. We have already indicated that amicable settlements of industrial peace and harmony are the primary objects of this Act. Settlements reached before the conciliation officers or boards are specifically dealt with by Sections 12(2) and 13(3) and the same are made binding under Section 18. There can, therefore, be no doubt that if an industrial dispute before a tribunal is amicably settled, the tribunal would immediately agree to make an award in terms of the settlement between the parties."

This does not, however, mean that an Industrial Tribunal would mechanically accept a settlement arrived at between the parties and pass an award in terms of the settlement. Since an award has the effect of binding not only the parties to the dispute, but also all other workmen of the establishment it is the duty of a Tribunal in such an event, to consider whether the settlement arrived at is fair, just and equitable. An award, according to the definition, is a determination of the dispute. If there is no determination there can be no award. Where an agreement arrived at between the parties is presented to the Tribunal it may adopt it as its own determination and pass an award in terms of the agreement. But then it must apply its mind to the terms of the agreement and decide whether the agreement is a fair and just settlement of the dispute. It may then adopt it as its own award. This position was explained by Ramachandra Iyer J., in Workers, 32 Textile Mills in Coimbatore v. Dhanalakshmi Mills Ltd., Tiruppur, AIR 1961 Mad 212. In that case the learned Judge observed:—

"The question that has to be decided is whether the compromise entered into on 23rd March, 1957 by the Indian National Trade, Union Congress Unions, could be held to finally terminate the industrial dispute and whether there has been a valid award in regard to it. The Industrial Tribunal merely adopted the compromise, and passed an award in terms thereof. There was no finding arrived at by the Industrial Tribunal after hearing all the parties as to whether that

agreement was a fair and just settlement of the dispute, so that it could be adopted as an award by the Tribunal itself

There has been no determination as such by the Industrial Tribunal of the question referred to it There is no power in the Industrial Tribunal similar to one conferred under Order 23, Rule 3 of the Civil Procedure Code to record a compromise. What the Industrial Tribunal is empowered, is to pass an award which is defined as interim or final determination.

It is implicit in the word 'determination' that it should be judicial, implying that the Tribunal exercises its own judgment. This does not, however, mean that the Tribunal is precluded from taking note of a compromise entered into between the workers and the management. Where there is a compromise, it should consider whether, in its opinion, the compromise could be adopted as its own determination of the dispute, that is, whether it is fair, just and equitable between the parties.

This is necessary as the award would affect parties other than those actually appearing before the Tribunal. Section 18 of the Act states that an award which has become enforceable shall be binding on the parties to the industrial dispute, namely, the management and all the workmen. The binding nature of the award does not depend on any particular worker or the union to which he belongs eo nomine a party."

5. In the present case the agreement was reported to the Tribunal and an award was passed in terms of the agreement. The question is whether the award was in force till 13-6-1969 or whether it was in force for a period of one year only from the date of publication of the award. According to the respondents once the agreement merged into the award it ceased to be a settlement and it could only operate as an award in which case it was in force for a period of one year only from the date of publication of the award. On the other hand it was urged by the learned counsel for the management that under Section 19(3) while an award was to remain in operation for a period of one year from the date of publication, Section 19(3) itself mentioned that it was 'subject to the provisions of this Section'. Therefore, it was urged that an award in terms of a settlement would, like a settlement, be in operation for the period agreed upon as provided by Section 19(2) of the Act.

I am afraid it is impossible to agree with this contention. An award cannot be an award for one purpose and a settlement for another purpose. A settlement which merges into an award loses its character

as a settlement once it becomes an award. It will operate as an award and it will be in operation for the period provided by the statute. The expression 'subject to the provisions of this section' in Sec. 19(3) of the Act refers only to those provisions which are applicable to award and not to settlements. Such provisions are contained in the two provisos to Section 19(3), in Section 19(4) and in Section 19(6). The learned counsel for the petitioner contended that it would be unreasonable to hold that while a settlement arrived at in the course of conciliation proceedings would be binding for the period agreed upon, an award in terms of a settlement would be binding for a period of one year only. He questioned why a greater sanctity should be attached to a settlement arrived at in the course of conciliation proceedings rather than to an award of an Industrial Tribunal embodying the terms of settlement even after a determination that the terms were just and fair.

Possibly it is because a Conciliation Officer has greater freedom of action, and, before he reports to the Government that a matter has been settled by agreement between the parties he investigates with a view to find out whether the agreement represents the agreement of all the workmen. An Industrial Tribunal, notwithstanding that its award is binding on all the workmen, may not have the same freedom to make a roving investigation to find out whether the agreement represents the agreement of all the workmen, though its award is binding on all the workmen. On the other hand, the plain truth may be that the situation was not contemplated by the legislature. But effect must be given to the provisions of the statute as they stand and I must hold that the award was in operation for a period of one year only.

In the result the Writ Petition is dismissed, with costs. Advocate's fee Rs. 100/-.

Petition dismissed.

AIR 1970 ANDHRA PRADESH 434
(V 57 C 71)

CHINNAPPA REDDY AND
MADHAVA REDDY, JJ.

Rangapalli Basamma, Petitioner v. Gift Tax Officer, Hindupur, Respondent.

Writ Petn. No. 1745 of 1967, D/- 8-4-1970

Gift Tax Act (1958). Ss. 13, 16 and 19(3) — Sections 13 and 16 are applicable to legal representatives — Gifts made by deceased person escaping assessment — Notice to all legal representatives necessary — Assessing Officer must make dif-

IN/IN/D992/70/BDB/T

gent efforts to find them out — Only then action on few would represent the estate — Failure to find out legal representative — Notice on one legal representative only is invalid.

Section 19(3) makes Sections 13 and 16 applicable to legal representative. If an action is proposed to be taken under Section 16 on the ground that the gifts made by a deceased person have escaped assessment notice to all legal representatives of the deceased is necessary.

(Para 4)

In order that few of several legal representatives may sufficiently represent the estate there must be a diligent and a bona fide inquiry by the assessing officer to ascertain the legal representatives. Section 19 of Gift Tax Act is similar to Section 24-B of Income-Tax Act (1922). (1967) 64 ITR 106 (Andh Pra), Followed; (1965) 57 ITR 168 (SC) & AIR 1949 FC 195, Applied.

(Para 5)

It is therefore the duty of a Gift Tax Officer to make an enquiry regarding the existence of legal representatives other than the person to whom a notice is issued, if not before the notice is issued at least after the person files a writ making express allegations that there were other legal representatives. To say in counter-affidavit that there are no legal representatives is most unsatisfactory and such notice issued without proper enquiry would become invalid.

(Para 2)

Cases Referred: Chronological Paras

(1967) 64 ITR 106 (AP), I.-T. Officer v. Muram Reddy Sulochannamma 4

(1965) 57 ITR 168 (SC), First Addl.

I.-T. Officer v. Buseela Sadanandan 5

(1949) AIR 1949 FC 195 (V 36) = 1949 FCR 396, Tirthalal v. Shusan

Kemoyardasi 5

(1927) AIR 1927 Lah 94 (V 14) =

100 Ind Cas 418, Muhammad

Hassan v. Inayat Hussain 4

(1905) 32 Ind App 23 = ILR 32

Cal 296 (PC), Khirajmal v. Daim 4

C. J. Roy and O. Adinarayana Reddy, for Petitioner; T. Anantababu, for Respondent.

CHINNAPPA REDDY, J.:— The petitioner is the widow of late Sri Siddappa of Gorantla who died on 23-11-1961. Late Siddappa left behind him his widow, the petitioner his daughter Gowramma by a deceased wife, and his permanently kept mistress Mudiramma. About five years prior to his death Siddappa made a gift of Rs. 1,38,000/-, Rs. 69,000/- to T. M. Nagaraju son of Bhagirathamma, daughter of the petitioner and Rs. 69,000/- to Mallikarjunappa and Viswanadhappa, sons of Gowramma. Bhagirathamma predeceased her father. By a will dated 10-6-1957 Siddappa bequeathed the properties mentioned in the A Schedule annexed to the will to Gowramma with limited interest and thereafter to her sons, properties

mentioned in the B Schedule to the petitioner with limited interest and thereafter to her daughter and her daughter's sons and the properties mentioned in the C Schedule to Mudiramma with absolute rights. After the death of Siddappa the Assistant Controller of Estate Duty passed an order dated 8-10-64 treating the petitioner as the accountable person and determining the net value of the estate at Rs. 2,08,354/-. The Assistant Controller treated the sum of Rs. 1,38,000/- as an asset of the estate on the ground that the gifts of cash to the grandsons were not bona fide gifts because no gift tax was paid thereon.

On 8-3-65 the Assistant Controller issued notices to the petitioner Gowramma and Mudiramma calling upon them to pay the proportionate estate duty which he determined at Rs. 5430-96 in the case of Gowramma, Rs. 5405-52 in the case of the petitioner and Rs. 167 in the case of Mudiramma. Meanwhile the accountable person, namely the petitioner, preferred an appeal to the appellate Controller of Estate Duty objecting to the inclusion of the sum of Rs. 1,38,000/- in the estate of the deceased. The appellate Controller allowed the appeal on 24-8-65 and held that the amount could not be treated as an asset of the estate.

The Department preferred an appeal to the Income-tax Appellate Tribunal. The Tribunal rejected the appeal by its order dated 16-6-67. The Tribunal upheld the gifts as true and valid. The Tribunal also relied on the circumstance that the will D/- 10-6-57 made no reference to the cash of Rs. 1,38,000/- and inferred therefrom that the amount of cash had ceased to be part estate of Siddappa. After the disposal of the appeal by the appellate Controller and during the pendency of the Department's appeal before the Appellate Tribunal the Gift Tax Officer, Hindupur issued notices to the petitioner under Section 16(1) of the Gift Tax Act intimating her that a gift which was assessable to tax for the assessment year 1958-59 had escaped assessment and proposing to assess the said gift. The petitioner thereupon filed the present application for the issue of a Writ of Mandamus to prohibit the Gift Tax Officer from taking proceedings in pursuance of these notices.

2. The petitioner alleged in the affidavit filed in support of the Writ Petition that there were three legal representatives of the deceased Siddappa, herself, Gowramma and Mudiramma and that the Gift Tax Officer issued a notice under Section 16(1) of the Gift Tax Act only to her and not to the other two legal representatives. She therefore stated that the notice issued to her was bad in law. The Gift Tax Officer filed a counter-affidavit referring to the fact that in the

estate duty proceedings the petitioner was treated as the accountable person and stating that he had no knowledge of any other legal representatives of the deceased except the petitioner. According to him, there was no satisfactory reason to believe that there were other legal representatives of the deceased apart from the petitioner. He put the petitioner to strict proof of the allegation that there were other legal representatives.

To say the least, the counter-affidavit of the Gift Tax Officer is very unsatisfactory. It was his duty to make an enquiry regarding the existence of legal representatives other than the petitioner if not before issuing the notice to the petitioner, at least after the petitioner filed the present Writ Petition making an express allegation that there were other legal representatives. To say that he had no satisfactory reason to believe that there were other legal representatives, is only to pretend to be blind to glaring facts. In his counter-affidavit the Gift Tax Officer referred to the proceedings of the Assistant Controller of Estate Duty, the appellate Controller of Estate Duty and the appellate Tribunal. The order of the Appellate Tribunal referred to the will executed by late Siddappa wherein he referred to his daughters, grandchildren and his mistress, apart from the petitioner. The Assistant Controller of Estate Duty had made an order apportioning the duty payable between the petitioner, (and Mudiramma?).

3. In the face of these facts we do not see how the Gift Tax Officer could venture the statement that he had no knowledge that there were other legal representatives and that there was no satisfactory reason to believe that there were other legal representatives. It can only mean that the Gift Tax Officer was indifferent and did not care to enquire into the question as to who were the legal representatives of Siddappa and to acquaint himself with the necessary and relevant facts. Sri Ananta Babu, learned counsel for the Department tried to urge that even if there were other legal representatives, there was nothing to indicate that the Gift Tax Officer was in a position to know who the others were or that there were other legal representatives in existence on the date of the issue of notice. We are not a little surprised at this argument because if notices were issued to the petitioner, Gowramma and Mudiramma by the Assistant Controller of Estate Duty apportioning the duty between them and if the reason for the notice of the Gift Tax Officer was the infructuous attempt of the Assistant Controller to levy estate duty we see no reason why the Gift Tax Officer should have assumed that the petitioner alone was alive and that the others were not.

4. The question for consideration is what is the effect of the failure of the Gift Tax Officer to enquire and find out all the legal representatives of late Siddappa on the notice issued to the petitioner. Under Section 16(1) (a) of the Gift Tax Act where a Gift Tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of the gifts made any taxable gift has escaped assessment, he may at any time within eight years serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Section 13.

Under Section 19 of the Act where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person, to the extent to which the estate is capable of meeting the charge, the gift tax payable by such person or any sum which would have been payable by him under the Act. The third sub-section of Section 19 also provides that the provisions of Sections 13, 14 and 16 shall apply to an executor, administrator or other legal representative as they apply to any person referred to in those Sections. 'Legal Representative' is defined in Section 2(xvi-b) of the Act as having the same meaning assigned to it as in Section 2 (ii) of the Code of Civil Procedure. Section 2 (ii) of the Civil Procedure Code defines a 'legal representative' as meaning a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

We have already said that Section 19(3) makes Sections 13 and 16 applicable to legal representative. One of the results of the applicability of Sections 13 and 16 to a legal representative is the necessity to give notices to all the legal representatives if action is proposed to be taken under Section 16 of the Act on the ground that the gifts made by a deceased person have escaped assessment. Considering the provisions of Section 24-B of the Income-tax Act of 1922 which are similar to the provision of Section 19 of the Gift Tax Act a Division Bench of this Court consisting of Manohar Pershad, C. J. and Sharfuddin Ahmed, J. affirming a judgment of Gopalakrishnan Nair, J. held in *Income-Tax Officer v. Muram Reddy Sulochannamma*, (1967) 64 ITR 106 (AP) that a notice served on some out of several legal representatives was bad in law. The learned Chief Justice observed:—

"The question whether notice to one legal representative is sufficient or not or whether all the legal representatives have

to be served with notices had come up before a Bench of the Madras High Court in the case of *E. Alfred v. First Addl. Income-tax Officer, Salem* and it has been held that in cases where an assessment under the Indian Income Tax Act is sought to be reopened and where the assessee is dead before the issue of a notice under Section 34 of the Act, the assessment could be completed only according to the provisions of Section 24-B (2) of the Act. The liability imposed under Section 24-B (2) of the Act attaches itself to all the legal representatives of a deceased on whom notices are served and as such all legal representatives of the deceased assessee are liable to be served with such notices."

A reference was made to the observations of Sir Shadi Lal C. J. in *Muhammad Hassan v. Inayat Hussain*, AIR 1927 Lah 94:

"These words mean the representation before the court of the plenary interest of the deceased party. Sometimes that interest may be represented by a single individual but it may also be represented by a number of persons as the case may be. But there should be a complete representation of the interests of the deceased person, whether through a single individual or through a number of persons, so that there cannot be a partial representation of that interest. In other words, the expression, 'legal representative', means and includes one person as well as several persons according as they represent the whole interest of the deceased person."

The learned Chief Justice also referred to the observations of the Privy Council in *Khierajmal v. Daim*, (1905) 32 Ind. App. 23 (PC):

"Ordinarily therefore, it is necessary to implead all the legal representatives of the deceased person on the record and a few of them do not represent the whole interest of the deceased. and, if all are not made parties to the suit or appeal, it results in the abatement of these proceedings. On similar principles, before an arbitrator can proceed further with the reference and give a binding award he should give notice to all the legal representatives of the deceased party and attempt to make them parties to the reference by notice though he may not be bound to follow the strict procedure of law required for substitution of parties under Order 22 of the Code of Civil Procedure."

Holding that the estate of the deceased in the case before them could not be said to be represented by the person on whom the notices were served, the Learned

Judges further held that the failure of the Income-tax Officer to issue notices to some of the legal representatives rendered the notices to other legal representatives also invalid. We are bound by the decision of the Division Bench. Sri Ananta Babu, at one stage, faintly suggested that the decision required reconsideration. He did not however pursue the argument and no good reason was shown to us why we should take a different view.

5. In *First Additional Income-tax Officer v. Buseela Sadanandan*, (1965) 57 ITR 168 (SC) their Lordships of the Supreme Court accepted the statement of the law made by Mahajan, J. in *Tirthalal v. Shusan Kemoyardasi*, AIR 1949 FC 195 that if there were two or more legal representatives of a deceased person, all must be impleaded to make the representation complete. Their Lordships however added that if a party after diligent and bona fide enquiry ascertained who the legal representatives of a deceased defendant were and brought them on record within the time limited by law, there would be no abatement and the impleaded legal representatives would sufficiently represent the estate of the deceased.

Basing his submission on this statement Sri Ananta Babu submitted that it was enough if the proceeding was initiated within the prescribed time against one of several legal representatives and that notices could be issued to other legal representatives later. Their Lordships of the Supreme Court took care to say in the above mentioned case that in order that few of several legal representatives may sufficiently represent the estate there must be a diligent and bona fide enquiry to ascertain the legal representatives. We have already pointed out that there was no bona fide attempt by the Gift Tax Officer to ascertain the legal representatives of Siddappa.

The petitioner was not a universal legatee under the will. She was given, but a life estate, in some items of property. The will and the proceedings and the Assistant Controller of Estate Duty apportioning the estate duty showed that there was also a daughter living. The petitioner was therefore not the sole residuary heir either. Viewed from any angle the petitioner was not the sole legal representative and that should have been patent even to the Gift Tax Officer. We have therefore no option but to allow the Writ Petition. The petitioner is entitled to her costs. Advocate's fee Rs. 100/-.

Petition allowed.

AIR 1970 ANDHRA PRADESH 438
(V 57 C 72)OBUL REDDI AND
MADHAVA REDDY, JJ.

Raja Bomadevara Veeraraja Venkata Narasimha Rao, Petitioner v. State of Andhra Pradesh represented by Collector, Krishna Chilikalapudi and another, Respondents.

Leave to Appeal to Supreme Court Petn. No. 53 of 1970, D/-10-4-1970 against order of High Court in W. A. No. 29 of 1968, D/-14-10-1969.

Constitution of India, Art. 133(1) — Final Order — Meaning of — Question is not whether order has far-reaching consequence adversely affecting rights of parties but whether, by itself, it has determined rights of parties — Order in writ appeal reversing order in writ petition that delay in filing an application was not condonable is not a final order. AIR 1950 FC 77 & AIR 1953 Mad 727, Rel. on; AIR 1966 SC 1445, Distinguished. (Paras 2, 5 & 6)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 SC 733 (V 55) =		
1968-2 SCJ 548, M. M. Thakkar v. State of Gujarat		6
(1966) AIR 1966 SC 1445 (V 53) =		
1966-3 SCR 198, Ramesh v. Gendalal		4
(1953) AIR 1953 Mad 727 (V 40) =		
ILR (1954) Mad 164, H. Chandanmull and Co. v. Mohanlal M. Mehata		6
(1950) AIR 1950 FC 77 (V 37) =		
1949 FCR 842, Mohd. Amin Bros. v. Dominion of India		3
(1949) AIR 1949 FC 1 (V 36) =		
1947 FCR 180 = 49 Cri LJ 625, S. Kuppaswami Rao v. King		3
(1933) AIR 1933 PC 58 (V 20) =		
60 Ind. App. 76, Abdul Rahman v. D. K. Cassim and Sons		3
A. Venkataramana, for Petitioner; Govt. Pleader, for Respondents.		

OBUL REDDI, J.:— The question involved in this application for grant of leave to appeal to the Supreme Court is whether an order passed on an application made under Section 15(2) (a) of the Estates Abolition Act read with Section 5 of the Limitation Act excusing the delay in filing an appeal before the Tribunal is a 'final order'. The facts necessary for the disposal of this question may be briefly set out:— The State of Andhra Pradesh filed an application before the Tribunal under Section 15(2) (a) of the Estates Abolition Act read with Section 5 of the Limitation Act to condone the delay in filing the appeal. The Tribunal, having regard to the facts presented before it found that sufficient cause was shown for condoning the delay, and therefore it was a fit case where the discretion should

be exercised in favour of the State which filed the application. That order of the Tribunal was challenged in Writ Petition No. 16 of 1965. Our learned brother Chinnappa Reddy, J. before whom it came up for hearing, quashed the order of the Tribunal holding that the Tribunal had not exercised the discretion but had sur-rendered it, and that it was wholly unjustified in condoning the delay. That order was assailed before us in Writ Appeal No. 29 of 1968 and disagreeing with our learned brother, we came to the conclusion that it has not been shown that the Tribunal had acted either arbitrarily or capriciously in exercising its discretion or that it committed any error apparent on the face of the record in condoning the delay and that it had condoned the delay for sufficient reasons. In that view of the matter, we set aside the order of the learned Single Judge and allowed the appeal. It is this order that the petitioner proposes to challenge in the Supreme Court by obtaining a certificate under Art. 133 of the Constitution.

2. Mr. A. Venkataramana, the learned counsel appearing for the petitioner, contended that in so far as the order on the application for condonation of delay is concerned, there is a finality inasmuch as the order of this Court is not appealable and, therefore, the petitioner, is entitled to ask for a certificate under Art. 133(1) of the Constitution as the value of the subject-matter pertaining to the appeal before the Tribunal exceeds Rs. 20,000/-. There is no controversy so far as the value of the subject-matter is concerned as the extent of land involved is about 750 acres in Krishna District. The only question is whether the order in the Writ Appeal is a 'final order' in the sense that it finally decides the rights of the parties. The judgment of ours upholding the order of the Tribunal in our opinion, is not a 'final order' as there is no final adjudication of the rights of the parties.

3. The expression 'final order' was construed by B. K. Mukherjee, J. (as he then was) in Mohd. Amin Bros v. Dominion of India, AIR 1950 FC 77 and the learned Judge observed at p. 78:

"The expression 'final order' has been used in contradistinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in S. Kuppaswami Rao v. King, 1947 FCR 180 = AIR 1949 FC 1 = 49 Cri LJ 625 and the law on point, so far as this Court is concerned seems to be well-settled x x x x x To quote the language of Sir George Lowndes in Abdul Rahman v. D. K. Cassim and Sons, 60 Ind.

App 76 = AIR 1933 PC 58, "the finality must be a finality in relation to the suit. If after the order, the suit is, still alive suit in which the rights of the parties have still to be determined, no appeal lies against it".

The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way no finality could attach to the order."

4. Mr. Venkataramana relied upon two decisions of the Supreme Court in support of his contention that the present order finally decides the question involved in the sense that the Government would have had no right to prefer an appeal in which event the order of the Assistant Settlement Officer would have remained final. In *Ramesh v. Gendalal*, AIR 1966 SC 1445 at p. 1449 Hidayatullah, J. (as he then was) had occasion to deal with the question whether an order made by the High Court in exercise of its jurisdiction under Art. 226 is a final order or not. His Lordship's observations which have been strongly relied upon may be extracted:

"We are concerned here with the exercise of extraordinary original civil jurisdiction under Art. 226. Under that jurisdiction, the High Court does not hear an appeal or revision. The High Court is moved to intervene and to bring before itself, the record of a case decided by or pending before a Court or tribunal or any authority within the High Court's jurisdiction. A petition to the High Court invoking this jurisdiction is a proceeding quite independent of the original controversy. The controversy in the High Court, in proceedings arising under Article 226 ordinarily is whether a decision of or a proceeding before, a Court, a tribunal or authority, should be allowed to stand or should be quashed, for want of jurisdiction or on account of errors of law apparent on the face of the record. A decision in the exercise of this jurisdiction, whether interfering with the proceeding impugned or declining to do so is final decision in so far as the High Court is concerned because it terminates finally the special proceeding before it. But it is not to be taken that any order will be a final order. There are orders and orders. The question will always arise what has the High Court decided and what is the effect of the order. If, for example, the High Court declines to interfere because all the remedies open under the law are not exhausted, the order of the High Court may not possess that finality which the article contemplates. But the order would be final if the jurisdiction of a tribunal is questioned and the High Court either upholds it or does not. In either case the

controversy in the High Court is finally decided. To judge whether the order is final in that sense it is not always necessary to correlate the decision in every case with the facts in controversy especially where the question is one of jurisdiction of the Court or tribunal. The answer to the question whether the order is final or not will depend on whether the controversy is finally over but whether the controversy raised before the High Court is finally over or not. If it is, the order will be appealable provided the other conditions are satisfied, otherwise not."

5. This is not a case, as has been pointed out by their Lordships, where the jurisdiction of the Tribunal has been questioned but a case where the discretion exercised by the Tribunal was assailed on the ground that judicial discretion was not properly exercised. We would certainly have had no hesitation in holding that our order is a 'final order' if the jurisdiction of the tribunal was questioned and a decision was given on that.

6. The other decision relied upon by the learned counsel is *M. M. Thakkar v. State of Gujarat*, (1968) 2 SCJ 548 = (AIR 1968 SC 733) which, in our view, is not of much assistance to him. Their Lordships dealing with the question as to whether a judgment or an order is final or not, observed thus:

"The question as to whether a judgment or an order is final or not has been the subject-matter of a number of decisions; yet no single general test for finality has so far been laid down. The reason probably is that a judgment or order may be final for one purpose and interlocutory for another or final as to part and interlocutory as to part. The meaning of the two words 'final' and 'interlocutory' has therefore to be considered separately in relation to the particular purpose for which it is required. However generally speaking a judgment or order which determines the principal matter in question is termed final. It may be final although it directs enquiries or is made on an interlocutory application or reserves liberty to apply."

In this connection, the learned Counsel for the petitioner sought to place reliance on the observation of Rajamannar, C. J. in *H. Chandanmull & Co. v. Mohanlal M. Mehata*, AIR 1953 Mad 727, that the question is not free from doubt. But it should not be forgotten that, in that case too, the learned Chief Justice was of the view that an order refusing to excuse the delay in filing an application cannot be treated except as a procedural order. Though it may have far-reaching consequences and adversely affect the rights of the parties, by itself it cannot be held to have decided the rights of the parties. Therefore, the question is not whether our order has far-reaching consequence adversely af-

fecting the rights of the parties, but whether by itself, it can be held to have determined the rights of the parties. Since there has been no determination of the rights of the parties and their rights cannot be determined on an application of this nature, which is purely procedural to condone delay, there is no final order. We are therefore, unable to certify that this is a fit case to grant leave to appeal to the Supreme Court. The petition is accordingly dismissed.

Petition for leave dismissed.

AIR 1970 ANDHRA PRADESH 440
(V 57 C 73)

SHARFUDDIN AHMED AND
PARTHASARATHI, JJ.

Kasturi Lakshmi Bayamma, Appellant v. Sabnis Venkoba Rao and others, Respondents.

Appeal No. 377 of 1964, D/- 14-3-1969.

(A) Civil P. C. (1908), O. 6, R. 4 read with O. 7, R. 6 — Particulars to be given where necessary — Fraud — Plea of, as a ground for exemption from limitation as required by O. 7, R. 6 — Plaintiff must set forth particulars of fraud alleged — Mere general words such as fraud or collusion are quite ineffective to give legal basis for plea in absence of particular statements of fact. (1880) 5 App Cas 685 (1897), Rel. on. (Paras 8, 9)

(B) Limitation Act (1908), S. 18 — Plea of fraud as a ground of exemption from limitation — It is necessary for plaintiff to give particulars of fraud alleged — General allegations not enough — Particulars should be such as to make out that plaintiff was kept in dark about her right to sue — Held on allegations in plaint that there was nothing to sustain plea that there were fraudulent representations so as to prevent plaintiff having knowledge of her right to sue. (Paras 8, 9, 13)

(C) Limitation Act (1908), S. 18 — Plea of fraud as a ground from exemption from limitation — Suit to set aside transfer by guardian — Relief of partition claimed only against alienees — Fraud relevant to sustain claim against transferees can only be a fraudulent design of concealment on their part or alternatively that they were accessory to fraud committed by guardian or that they were not transferees in good faith and for valuable consideration — Plaint not disclosing any of these allegations — Held that so far as alienees were concerned plaintiff was not entitled to invoke benefit of S. 18. (Para 14)

(D) Limitation Act (1908), Art. 44 — Article applies not only to transfers of Hindu minor's property by legal guardian

but also to transfers by de facto guardian — Observation in AIR 1949 FC 218 held obiter and dissented from. AIR 1940 Mad 33 (FB) & (1912) ILR 34 All 213 (PC), Distinguished. (Para 18)

(E) Hindu Law—Minority and guardianship — De facto guardian has in certain circumstances competence to transfer ward's estate — Alienation is only voidable in same manner as alienation made by de jure guardian — AIR 1926 Mad 457 & AIR 1915 Mad 296, Rel. on. (Paras 19, 21)

(F) Limitation Act (1908), Art. 44 — Transfer of minor's property by de facto guardian with concurrence of minor's lawful guardians amounts virtually to a transfer by lawful guardians themselves — Suit to set aside transfer is governed by Art. 44. 1969-1 Mad LJ 177 & AIR 1915 Mad 296, Rel. on. (Paras 23, 24 & 26)

(G) Limitation Act (1908), S. 18 read with S. 8 and Art. 44 — Starting point — Sale by de facto guardian of minor's property in 1938 — Plaintiff attaining majority in 1942 — Suit by plaintiff in 1954 to set aside sale on ground that it was not for necessity or for benefit on allegation that she was kept concealed of her right to sue by fraud of defendant — Plaintiff getting knowledge of right to sue in 1947 when she obtained certified copies of sale deed — Held that in the absence of any specific plea that there was fraudulent representation in 1942 or thereafter, no question of extension of time under S. 18 can really arise and suit filed more than three years after attaining majority was barred by time under Art. 44 read with S. 8 — At any rate suit should have been filed within three years after 1947 when plaintiff obtained knowledge of her right to sue assuming that plaintiff was kept from her knowledge of right to sue till 1947 due to fraud of defendant. (Paras 28, 29)

Cases Referred: Chronological Paras
(1969) 1969-1 Mad LJ 177 = 81
Mad LW 406, Mayilasami Chettiar v. Kalimaal 26
(1950) AIR 1950 Mad 390 (V 37) =
1950-1 Mad LJ 78, Ethilavulu Ammal v. Pethakkal 17, 20
(1949) AIR 1949 FC 218 (V 36) =
1950-1 Mad LJ 586, Sriramulu v. Pundarikakshayya 18
(1940) AIR 1940 Mad 33 (V 27) =
ILR (1940) Mad 358 (FB), Chennappa v. Onkarappa 18
(1928) AIR 1928 Mad 226 (2) (V 15) =
1927 Mad WN 356, Ramaswamy Pillai v. Kasinatha Iyer 20
(1926) AIR 1926 Mad 457 (V 13) =
ILR 49 Mad 768, Seetharamama v. Appiah 19
(1915) AIR 1915 Mad 296 (V 2) =
ILR 38 Mad 867, Muthukurnara Chetty v. Anthony Udayan 19, 23

- {1915} AIR 1915 Mad 659 (2) (V 2) =
 ILR 38 Mad 1125, Thayammal v.
 Kuppanna Koundan 20
 {1912} ILR 34 All 213 = 39 Ind
 App 49 (PC), Matadin v. Ahmad
 Ali 20
 {1880} 5 AC 685, John Wallingford
 v. Mutual Society 9
 I. V. Narasimha Rao, for Appellant; P.
 Satyanarayana (for Nos. 4, 7, 9, 13) and
 P. V. Seshayya, (for Nos. 1 to 3) for Res-
 pondents.

PARTHASARATHI, J.:— The main question for decision in this appeal relates to a plea of limitation, which along with other defences, was successfully urged in the trial Court to non-suit the plaintiff. The plaintiff, and the 12th defendant who took no part in the proceedings, are sisters and their father is the 1st defendant in this action. Their mother died in 1932. At a time when both the daughters were still minors, the 1st defendant conveyed on 11-7-1938 under six separate deeds, the property belonging to them to the defendants 4 to 9. He purported to act on their behalf as guardian though by that time both of them were married. The plaintiff, who is younger in age, was however still living with her father, the consummation of the marriage apparently not having taken place, by the date of the sales. They are impugned on the ground that they were not justified by necessity. Nor were they effected for the benefit of the minors or for proper price. The father is charged with having acted in bad faith and the sale proceeds had not been accounted for.

2. The sales that are impeached were effected in 1938 and this action in forma pauperis was commenced on April 20, 1954. The age of the plaintiff was given as 27 years as on the date of the plaint. That would imply that she attained the age of majority in 1945. The plaintiff avers that the several acts relating to management by the 1st defendant and the nature of her title were concealed from her knowledge and that the plaintiff was told when she questioned her father that there was no property of her mother. The plea advanced in the pleading is that by reason of the fraud and deception practised by her father, she was kept in the dark as to her right to sue and she came to know about her right only about the middle of the year 1947. The suit is thus said to be saved from the bar of limitation. No relief for setting aside of the sales is prayed for and the plaintiff asked for partition and possession of her half share of the property. Her sister did not join in the suit. Nor did she support the case of the plaintiff by appearance at the trial or participation in the proceedings.

The 1st defendant denied the charges of fraud and deception. He asserted that the sales were effected with the approval

and knowledge of the plaintiff's husband and father-in-law and the price realised was adequate. The sales were effected because it was beneficial to sell the property. The moiety of sale proceeds of the plaintiff was paid over to the plaintiff's father-in-law and husband. The alienees filed a separate pleading and resisted the suit.

3. The Subordinate Judge, Ongole, who tried the suit held that the suit is barred by limitation. The learned Judge also held that the sales in dispute were effected by the 1st defendant as guardian of the plaintiff and the 12th defendant and that the transactions are valid and binding on the plaintiff. The learned Judge also found that there was a deliberate over-valuation of the suit property by the plaintiff and that at the time of the institution of the suit, the market value of the property was about Rs. 500/- per acre.

4. The plaintiff has preferred this appeal and the main point for determination is, whether the suit was brought within the time allowed by law.

5. It is necessary to set out certain relevant facts before considering the argument of the learned counsel for the appellant. The elder sister of the plaintiff, who is impleaded as the 12th defendant, refused to join the plaintiff in the institution of the suit. Nor did the 12th defendant, raise any dispute at any time questioning the validity of the alienations effected by her father. The 12th defendant did not participate at the trial and chose to remain ex parte. The dispute relates to the sale of about 13 acres of dry land comprised in S. No. 6 and situate at Mamidipalem village in Ongole Taluk. The lands were admittedly held by the plaintiff's mother, who, it appears acquired title to them under a will made by her grandmother, Kolluri Chenchamma on the 24th of July, 1924. The plaintiff's mother granted a lease under Ex. B-4 on the 17th of June, 1927 under which the rent reserved for the entire extent of land was Rs. 70/- per year. The tenant appears to have complained in a post-card Ex. B-5 addressed by him to the 1st defendant on 15th May, 1931 that the rent was exorbitant.

6. The 12th defendant is stated to have been born in 1921; and it would, therefore, appear that shortly after the sales, she attained majority. In the pleading of the 1st defendant, he gives the date of birth of the plaintiff as 11-11-1924. The 1st defendant was a clerk serving under the District Board and was not a resident of the village where the lands were situate. The 1st defendant also pointed out in his pleading that the testatrix, who made the will in 1924, had only a woman's estate and there was thus a cloud on the title, because of the incompetence of the

testatrix. If that were the correct position, the will would be inoperative and by the date of the death of the plaintiff's mother in 1932, she did not prescribe for title by adverse possession. This flaw in the title was one of the considerations that weighed with the 1st defendant in effecting the sales. The income was not regularly realised and it was never more than Rs. 70/- per year. They were dry lands of poor quality and only 3 acres out of the total extent was stated to be of comparatively better quality. The rest of the extent was of saline soil.

7. The plaintiff's father-in-law was not a stranger to the 1st defendant. The two families were related to each other even prior to the plaintiff's marriage, and it was not a distant relationship either. The plaintiff's father-in-law was no other than the 1st defendant's sister's husband.

8. In paragraph 4 of the plaint, it is alleged, inter alia, that the documents of title relating to the property were never made available to the plaintiff and they were in fact suppressed by the 1st defendant who is charged with having taken undue advantage of the minority of the plaintiff by abusing the fiduciary capacity in which he was placed. It is also said that the moneys realised by the sales were never accounted for. The plaintiff avers that till 1947, she never knew and could never know on account of the deception and fraud practised by the 1st defendant that her mother died possessed of the properties. The sales were effected without any necessity therefor. The plaintiff was not apprised of the sales and was kept in the dark about them. They were effected for very low amounts. It is necessary to set out a few sentences from the paragraph:

"The petitioner was also being told by the 1st respondent that he had no property and that the petitioner's mother had no property and it was very difficult for him to get on with his petty salary. The petitioner, believed the said representations. The non-disclosure of the petitioner's mother's property, the non-accounting for the realisations therefrom, the non-disclosure of several acts of management in respect of the petitioner's property, and the non-disclosure of the several alienations made by the 1st respondent and the deliberate false representations that the plaintiff's mother had no property made by the 1st respondent are tantamount to fraud in the eye of law." When fraud is alleged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. In the present case, fraud is alleged as a ground upon which the plaintiff justifies the institution of the suit long after the expiry of the period normally allowed for the institution of the suit. Though

no specific reference to the provisions of Section 18 of the Limitation Act is made in the plaint, it is manifest that the pleading proceeds upon the hypothesis that the right to institute the suit has been kept from the knowledge of the plaintiff by means of fraud practised on her. The requirements of Rule 6 of Order 7, Civil Procedure Code, are clear. It is necessary that the plaint should show the ground upon which the exemption from the normal period of limitation is claimed. The question is whether the plaint in this case fulfils the requirements of law.

9. As observed by Lord Selborne in *Wallington v. Mutual Society*, (1880) 5 AC 685 at p. 697:

"With regard to fraud, if there be any principle which is perfectly well settled it is that general allegations however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

It is not the mere use of general words such as 'fraud' or 'collusion' that can serve as the foundation for the plea. Such expressions are quite ineffective to give the legal basis in the absence of particular statements of fact which alone can furnish the requisite basis for the action. In the present case, it is necessary to scrutinise the averments in the plaint minutely in order to ascertain whether the particulars constituting the fraud are set out with reasonable precision. If the general words, of which we find there is a superfluity, are omitted, what is it that remains in the pleading of the plaintiff?

10. The first averment is to the effect that the documents of title relating to the property were never made available to the petitioner and that they were suppressed by her father. Assuming that this allegation is correct, does it establish fraud? The fact that the documents of title in the hands of the 1st defendant were not handed over to the plaintiff, does not necessarily indicate a fraudulent purpose. It is obvious that when the property was sold, the title deeds, if any, would be made over to the purchasers. That apart, in the case on hand, the 1st defendant purported to convey the property only on the basis that it belonged to the plaintiff and the 1st defendant and not on any other footing. When the impugned sales themselves proceeded on the basis that the property that was conveyed belonged to the minors that there was no need to prove the title of the minors and absence of title deeds was no impediment to the plaintiff or persons interested in her in taking action to challenge the validity of the alienations. It is clear that the omission to deliver the documents of title, even if those documents were with the 1st defendant, would

not amount to fraud, because the sale was made explicitly on the footing that it was the property of the minors alone that was sold.

11. The next complaint that we find in the pleading is that the 1st defendant took undue advantage of the minority of the petitioner and abused his fiduciary capacity and failed to account for the moneys realised by him. None of these charges can have any bearing on the question whether the plaintiff is entitled to the extension of time under Section 18 of the Limitation Act. It will be readily appreciated that all these complaints, even if true, do not make out that the plaintiff was kept in the dark about her right of suit.

12. The next grievance that is set out is that the sales were effected without necessity and without accounting for the profits realised by the 1st defendant. This averment again has no bearing on the point in issue. It is next said that the plaintiff was not informed about the sales. We do not conceive it to be the duty of the guardian to notify the ward about the sales either during minority or after the ward attains majority. There is no such obligation cast on the guardian under law, and the omission to apprise the plaintiff of the sales does not ipso facto assume a fraudulent colour. The plaintiff herself was not very positive in her averment as to fraud. In the passage extracted above, after referring to certain features, the plaintiff only described them as being tantamount to fraud in the eye of law. It is obvious that none of the features mentioned by the plaintiff with the exception of the alleged false representations can constitute fraud.

13. It is no doubt alleged that there were deliberate false representations made by the 1st defendant that the mother left no property. But no particulars are given as to when such representations were made. The allegation is very vague and is not in conformity with the requirements of Rule 6 of Order 7. It is well settled that in order to make out extension of time for the institution of suit on the ground of fraud, it should relate to the active concealment of the right of the plaintiff to institute the action. It is necessary to make out that as a result of the fraudulent design, the plaintiff has been prevented from exercising the right to sue in respect of the particular property. A mere allegation that there was a misrepresentation made by the 1st defendant that the mother had no property, is inadequate to make out that there was any concealment, by fraudulent design, from the plaintiff becoming aware of her right to impeach the alienations in question. It may be that the assertion that there was no property of the mother was made in the sense that after the sales

there was no further property of the mother in the hands of the 1st defendant. The averment is highly dubious and equivocal. There is nothing to sustain the plea that there were fraudulent representations so as to prevent the plaintiff having knowledge of her right to challenge the alienations in question. It is an accepted principle that charges of fraud must be clear and specific and should contain detailed particulars. A general allegation that there had been a misrepresentation, without specifying the time when it was made, the occasion for the query and the answer, and the precise representation that is said to have been made, cannot be of any avail when the provisions of Section 18 of Limitation Act are sought to be invoked. There is nothing to show that there has been a design or a conspiracy to conceal the particulars relating to the sales. Mere silence or a passive attitude on the part of the 1st defendant or that the 1st defendant withheld the information as to the sale, are insufficient because what is required under Section 18 is that the person having a right to institute the suit has been kept from gaining the knowledge of such right.

14. Another drawback in the plaint is that no fraud or wilful concealment of facts is attributed to the defendants 4 to 9 against whom alone the claim for partition is to be proved. Nowhere in the plaint is there any indication that the defendants 4 to 9 were accessory to the fraud, committed or practised by the 1st defendant. There is consequently no basis for the enlargement of the period of limitation so far as the defendants 4 to 9 are concerned. The right to partition is claimed against them and it is they who are said to be in unlawful possession of the property. The fraud that is relevant to sustain the claim against them can only be a fraudulent design of concealment on their part; or, alternatively, it must be made out that they were accessory to the fraud committed by the 1st defendant or that they are not transferees in good faith and for valuable consideration. The plaint does not disclose any act or omission on their part to show that they are guilty of fraud or accessory thereto. Nor is it the case of the plaintiff that there was no consideration at all for the sale. We are accordingly of opinion that even on the basis of the averments in the plaint, no case for the application of the provisions of Section 18 has been made out. In any case, so far as the defendants 4 to 9 are concerned there is a conspicuous absence on the part of the plaintiff of any averment to entitle her to the benefit of the provisions of Section 18 against them.

15. We are of opinion that the appeal should fail even on this short ground.

But as the other questions also had been argued, we shall deal with them too.

16. It is admitted by the plaintiff that certified copies of the sale deeds were obtained in or about July 1947. It follows that whatever may have been the position prior to July 1947, after that date, the plaintiff did not suffer from any disability occasioned by the fraud of the 1st defendant. It is stated in paragraph 9 of the plaint, that after the plaintiff came to learn of the transactions, notices were caused to be issued early in 1948. The reference, apparently, is to Ex. B-6 dated 6th January, 1948. The plaintiff admitted that she could not pursue promptly her remedies because her father-in-law passed away after 1948 and the family was thrown in debt. The question that arises for consideration is, whether the inaction of the plaintiff from July 1947 till April, 1954 irrespective of any other fact does not render this action time-barred. This would depend upon the provision of the Limitation Act which is applicable to the case. It was contended before us by the learned counsel for the appellant that by the date of the sales, the plaintiff had been married and therefore the legal guardian was the husband. It is pointed out that as a consequence of the marriage, the 1st defendant could no longer effect the alienations as the legal guardian and therefore, the sales are void and do not come within the purview of Art. 44 of the Limitation Act, 1908.

17. It was pressed before us that the case is governed by the ratio of the decision in *Ethilavulu Ammal v. Pethakkal*, 1950-1 Mad LJ 76 = (AIR 1950 Mad 390). *Satyanarayana Rao, J.*, was in that case dealing with a surrender made on behalf of a minor Hindu widow by the father as her guardian. The learned Judge applied the principle well known to Hindu law, that a surrender by a widow is not a transfer. She simply withdraws herself from the ownership and the succession is accelerated by her voluntary effacement. A surrender does not achieve or bring about a transfer of property. Moreover, it must be a voluntary act of the limited owner herself and not of any other person. The decision to efface her interest in the estate is to be of the widow alone. It was these considerations that impelled the learned Judge to hold that there was no transfer of property at all and the case would not attract the provisions of Article 44 of the Limitation Act. After expressing his decision on this principle the learned Judge nevertheless proceeded to state that the father was, if at all, only a de facto guardian of the widowed daughter and a transfer effected by such a person would not bring the case within the scope of Article 44. When the decision was reached that there was

no transfer of property at all, the further question whether a de facto guardian's transfer is one within the meaning of Article 44 at all did not call for any decision. The observations on this aspect made by the learned Judge, cannot be considered to be the ratio decidendi of that case.

18. The learned Judge was not unmindful of the language of Article 44 which provides for the setting aside of alienations by guardians. No distinction is made in Article 44 between de facto or lawful guardians. There is no warrant for reading the provisions of Article 44 so as to restrict its operation to transfers effected only by lawful guardians other than de facto ones. The expression used by the legislature is 'guardian' simpliciter. It admits of no doubt that a de facto guardian has competence, in certain circumstances to convey the ward's estate. Ever since the early decision in *Hanuman Pershad's case*, Courts have always recognised the validity of alienations made by a de facto guardian. We are unable to accept the reasoning of the learned Judge in support of his observation that a de facto guardian's sale is outside the purview of Article 44. Nor are we persuaded that the reliance placed by him on the decision in *Chennappa v. Onkarappa*, ILR 1940 Mad 358 = (AIR 1940 Mad 33) (FB) is apposite. Cases relating to the power of acknowledgment of a debt, rest on a different basis and do not furnish an acceptable analogy. The observations of the Federal Courts in *Sriramulu v. Pundarikakshayya*, 1950-1 Mad LJ 586 = (AIR 1949 FC 218) go to show that the reasoning of *Satyanarayana Rao, J.* in his obiter dicta, runs counter to the settled proposition as to legal competence of a de facto guardian. At pages 604-605, the Federal Court observed:

"The dealings of such a guardian with regard to the estate of the infant would, in Hindu Law, be not regarded as void altogether but would be voidable only; and the same tests would be applied in determining the validity of such acts as are applied in the case of a de jure guardian. To this extent and this extent only, a de facto guardian is to be treated as having the same position as a de jure guardian in Hindu law."

19. There is a long and unbroken current of authority to sustain the view that the Hindu Law recognises the power of a de facto guardian to deal with the property of a minor in cases of necessity. Courts have repeatedly held that alienations by such guardians are only voidable in the same manner as alienations made by a de jure guardian. See *Seetharamanna v. Appiah*, ILR 49 Mad 768 = (AIR 1926 Mad 457) and *Muthukumara Chetty v. Anthony Udayan*, ILR 38 Mad 867 = (AIR 1915 Mad 296).

20. There are, however, some decisions which laid down that Article 44 is inapplicable to alienations made by de facto guardians and they were relied upon by Satyanarayana Rao, J. Mention may be made of the decisions in *Thayammal v. Kuppanna Koundan*, ILR 38 Mad 1125 = (AIR 1915 Mad 659 (2)) and *Ramaswamy v. Kasinatha Iyer*, AIR 1928 Mad 226 (2). It is difficult to sustain the ratio of these decisions. The reliance placed by the learned Judges who decided ILR 38 Mad 1125 = (AIR 1915 Mad 659) (supra) on the Privy Council decision in *Mata Din v. Ahmed Ali*, ILR (1912) 34 All 213 is based upon a faulty appreciation of the effect of the decision of the Privy Council. The Privy Council had to deal with a case under Muhammadan Law, where the acts of a de facto guardian are held to be completely unauthorised or void. The application of that principle to the position of a de facto guardian in Hindu Law is misconceived and is opposed to a long current of authority. The subsequent decisions in AIR 1928 Mad 226 (2) (supra) and 1950-1 Mad LJ 76 = (AIR 1950 Mad 390) (supra) have merely adopted the ruling in ILR 38 Mad 1125 = (AIR 1915 Mad 659) (supra) without reference to the erroneous premises on which it rested.

21. The alienations made by a de facto guardian are on a par with those made by a de jure guardian. If they lack justification, they are in both cases voidable. And, when they are voidable, the application of Article 44 is an inescapable corollary. To hold that the alienations made by a de facto guardian are voidable but at the same time they are outside the purview of Article 44, is to take up an inconsistent position. This incongruity was not justified in the above cases by reference to any provision of law or principle.

22. It is, however, unnecessary for us to labour the point further, in view of the distinguishing feature of the case on hand. In respect of the property now in dispute, there was no doubt that the 1st defendant was allowed by the lawful guardians of the two married daughters to make the alienations to the defendants 4 to 9. The position virtually is that the lawful guardians themselves effected the sales. We see no reason to depart from the conclusion of the trial Court that the 1st defendant acted with the consent of the lawful guardians.

23. In ILR 38 Mad 867 = (AIR 1915 Mad 296) (supra) while the father of a minor son and his lawful guardian was alive, the mother effected a sale of the property of the minor son. The property was settled jointly on the minor and his mother and the minor was described in the deed of settlement as being under her protection. The learned Judges observed at page 875:

"The son was to live with his mother. It may be that the Zamindar did not part with his guardianship altogether and that the mother's power as guardian was restricted to the property but there can be no doubt that she did become his guardian under Ex. N. with respect to the properties comprised in it."

24. The position in this case is similar, that, in so far as the alienations are concerned, the de facto guardian was authorised by the lawful guardians to act in the manner that he did. We see no reason to differ from the finding of the lower court that the 1st defendant had acted with the concurrence of the lawful guardians before he effected the sales.

25. This conclusion is rendered irresistible by some significant but unexplained features in this case. Firstly, there is the indisputable fact that the 12th defendant never felt aggrieved by the sales. She was aged 17 at the time and was mature enough to judge for herself the propriety of her father's act. It is hardly likely that she and her husband would have refrained from taking action if the father's dealings were vitiated by any sinister or improper conduct or if she was not in receipt of her share of the realised price. Secondly, there is the clinching circumstance that in the lawyer's notice Ex. B-6 dated 6-1-1948, issued under the instructions of the plaintiff's father-in-law, nothing was said in disparagement of the sales. No dispute was raised about them and the notice was confined to a claim to another item of property. It is necessary to bear in mind that the plaintiff's father-in-law was a clerk in the District Court, Rajahmundry. He did not lack the means of judging the propriety of the transaction and was intimately associated with the 1st defendant by reason of antecedent relationship. He could not have been handicapped by lack of competent legal advice, which he could have for the mere asking. Nor did he labour under any ignorance of the essential facts of the transaction. Even after the copies of the sale deeds were obtained and a notice was issued by a lawyer, he did not choose to assail the transactions of sale. There is the further circumstance that the plaintiff's husband does not choose to give evidence denying his approval of the sales, though the 1st defendant urged the plea in his pleading. The cumulative effect of all these facts or omissions is decisive and we have no reason to reject the case of the 1st defendant that the sales were made by him in his name because he was authorised to effect them by the sons-in-law and daughters.

26. The sales are, in substance, though not in form, alienations made by the de jure guardians. In a recent decision of the Madras High Court in *Mayilasami*

Chettiar v. Kalimaal, 1969-1 Mad LJ 177 the consent of the lawful guardian was expressed in the form of an attestation of the deed executed by a de facto guardian. It was deemed sufficient to assimilate the transaction to an alienation made by the former. After reviewing some of the earlier authorities, the learned Judge observed:

"Thus, it is amply clear that even where there is a legal guardian in existence, any alienation of minor's property by a de facto guardian would be valid if it is for necessity."

27. In the case on hand, the alienation was not for necessity but it was made because it was adjudged to be beneficial to the interests of the minor. The annual income which was not steady or constant was only Rs 70/-. The title itself was doubtful. The lands were of poor quality. The plaintiff's husband was in the East Godavari District, whereas the 12th defendant's husband was employed in the Hyderabad State. The 1st defendant himself was in service in a different place. The lands, if not wholly unproductive, were manifestly of inferior quality. The sales were consequently binding on the minors in the circumstances of the case. We are of opinion that the provision of the Limitation Act that is applicable is Article 44.

28. It is a matter of admission that there was no question of the plaintiff having been kept in ignorance of her right after July, 1947. The suit should have been instituted before the end of July, 1950 but it was actually laid on April 20, 1954. If Article 44 is applicable and in our opinion that is the true position, the suit cannot be said to be saved from the bar of limitation even if the plaintiff's story as to fraudulent misrepresentation or omission is accepted as true. This is because the maximum length of time for which extension is possible is only three years from July 1947.

29. In this view of the question, it is not necessary to determine the correctness of the approach made by the lower Court. It only remains to point out that the plaintiff having been a minor on the date of sales, the criterion really should be whether the period of limitation to challenge or set aside the sales did not begin to run from the date of sales, and to consider whether there was any supervening fraud that held the cause of action in abeyance. Normally speaking, there could not have been any question of the plaintiff having been defrauded till she attained the competence to sue. It should be borne in mind, that the plaintiff's case is that the right to sue was kept concealed from her. It is obvious that the relevant point of time is when she had the competence to sue; and the test should

be whether she was entitled to extension of time by reason of fraud practised on her at the relevant point of time. According to the 1st defendant, the plaintiff attained majority in 1942. In the absence of a specific plea that there was any fraudulent representation in 1942 or thereafter, no question of the extension of time under Section 18, can really arise. Neither of the contesting parties defined the position correctly and the lower Court also had not clarified it and had not formulated the question precisely. We are of opinion that in any view of the matter, the suit is barred by time.

30. In the result, the appeal fails and is dismissed with costs. The appellant will pay to the State the Court-fee due on the memorandum of appeal.

Appeal dismissed.

AIR 1970 ANDHRA PRADESH 446 (V 57 C 74)

A. KUPPUSWAMI AND
SRIRAMULU, JJ.

Gajula Abdul Jabbar, Appellant v. Rayachoty Co-operative Society, Respondent.

Second Appeal No. 227 of 1968, D/- 9-4-1970 against decree of 2nd Addl. Dist. J. Cuddapah, in Appeal Suit No. 8 of 1967.

Civil P. C. (1908), Ss. 9, 47 — Andhra Pradesh (Andhra Area) Co-operative Societies Act (6 of 1932), Sections 51 and 151 — Andhra Pradesh (Andhra Area) Co-operative Societies Rules (1932), R. 22(12) — Registered Society purchasing debtor's immovable property in enforcement of award — Debtor's failure to deliver possession — Suit for recovery of possession is maintainable — Section 47, Civil P. C. is no bar — Rule 22 (12) has no relevancy.

Where a registered Co-operative Society, in an enforcement of an award in its favour, purchased the debtor's immovable property and on debtor's failure to deliver possession filed a civil suit for recovery of possession, such a suit is maintainable. It is not barred on the ground that the enforcement of the award was a proceeding in execution of a decree to which Section 47, C.P.C. applied. There is no provision either in the Andhra Pradesh Co-operative Societies Act or the Rules framed thereunder, that Section 47, C.P.C. will apply to any proceeding to enforce award. Nor is there any provision there that the provisions of Civil P. C. will apply to such proceedings, or to say that an award under Section 151 of the Act is executable as if it was a decree of a Civil Court. The civil suit under Section 9, C.P.C. is, therefore, not

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barred expressly or by necessary implication. Rule 22(12) has no relevance to the question of maintenance of such a suit. AIR 1955 Andhra 10, Applied.

(Paras 3, 4)

Cases Referred: Chronological Paras
(1955) AIR 1955 Andhra 10 (V 42)

= 1954 Andh LT (Civil) 109,

Srinivasacharyulu v. Hanu-
mantha Rao

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E. Subramanyam, for Appellant; K. Siva Prasada Rao, for Respondent.

A. KUPPUSWAMI, J.—The appellant who is the defendant in O. S. No. 161 of 1966 District Munsif's Court, Nandalur, became indebted to the plaintiff which is a Co-operative Society. There was an award for Rs. 1256-06 by the Deputy Registrar of Co-operative Societies, Cud-dapah on 13-7-53. The Society enforced the said award by bringing the appellant's property to sale in E. P. No. 278 of 1953-54 and the property was purchased by the Society itself and a sale certificate was duly granted in favour of the plaintiff on 3-6-1956. The appellant, however, did not deliver possession and therefore the Society filed several Execution Applications for the delivery of the suit property through Court. In the first E. A. No. 346 of 1959 delivery was ordered, but the petition was dismissed on the ground that the decree-holder was away from town. E. A. No. 682 of 1961 was dismissed, as batta was not paid in time. E. A. No. 290 of 1962 was dismissed on the ground that the application was barred by limitation under Article 181 of the Limitation Act. After the dismissal of the last execution petition, the Society filed the suit, O. S. No. 161 of 1966 before the District Munsif's Court, Nandalur, for recovery of possession of the property.

2. The main contention of the defendant was that the suit was not maintainable. This contention was accepted by the learned District Munsif who dismissed the suit with costs. On appeal by the plaintiff, the lower appellate Court took a different view and held that the suit was maintainable. The decree of the trial Court was set aside and the appeal was allowed with costs throughout. The defendant has preferred the appeal to this Court.

3. The principal contention reiterated before us by Mr. Subrahmanyam on behalf of the appellant is that the suit is not maintainable in view of Section 47 of the Code of Civil Procedure. His contention is that the only remedy of the Society, which is in the position of a decree-holder purchaser, when an obstruction is caused by the judgment-debtor, is to file an execution petition and no suit lies to recover possession of the property. In order to appreciate this contention, it is necessary to refer to the relevant provisions of the Co-operative Societies Act.

As the award is of the year 1953, both the Advocates stated before us that the case is governed by the Andhra Pradesh (Andhra Area) Co-operative Societies Act of 1932 and not by the new Act, viz., the Andhra Pradesh Co-operative Societies Act, 1964. Section 51 of the old Act provides for the decision of any dispute by the Registrar. Section 57-A provides:

"The Registrar or any person subordinate to him empowered by the Registrar in this behalf may subject to such rules as may be prescribed by the State Government and without prejudice to any other mode of recovery provided by or under this Act recover—

"(a) any amount due under a decree or order of a Civil Court, a decision or an award of the Registrar or arbitrator, or an order of the Registrar, obtained by a registered society including a financial bank or liquidator;

(b)	xx	xx
(c)	xx	xx
(d)	xx	xx"

It is well settled that under Section 9 of the Code of Civil Procedure a person has a right to resort to a Civil Court by means of a suit unless such a suit is barred expressly or by necessary implication. The contention of the appellant is that the enforcement of the award is a process in execution of a decree and Section 47, C.P.C. applies and therefore the suit is barred. No section of the Act or any rule was brought to our notice which states that Section 47, C.P.C. is applicable to any proceeding to enforce an award. There is no provision in the Act or in the rules which says that generally the provisions of the Civil Procedure Code are applicable to proceedings taken under this Act, nor is there any provision which says that an award obtained under Section 151 of the Act is executable as if it were a decree of court. In these circumstances, it is not possible to accept the argument that an award is in the nature of a decree, that proceedings to enforce the award are in the nature of execution proceedings and Section 47 is applicable to such proceedings. We have, therefore, no hesitation in rejecting the contention that the suit is barred by reason of Section 47, C.P.C.

4. Reliance was placed on Rule XXII of the Rules. Rule XXII deals generally with the procedure in execution of the decree, decision, award or contribution order. It provides for the attachment and sale of moveable and immovable property and the procedure in connection with such attachment and sale. Sub-rule (12) of Rule XXII provides as follows:—

"Where any lawful purchaser of immovable property is resisted and prevented by any person other than a person (not being the defaulter) claiming in good

faith to be in possession of the property on his own account from obtaining possession of the immovable property purchased, any court of competent jurisdiction, on application, and production of the certificate of sale provided for by sub-rule (10) shall cause the proper process to be issued for the purpose of putting such purchaser in possession, in the same manner as if the immovable property purchased had been decreed to the purchaser by a decision of the court."

It was argued that this sub-rule provides for the obtaining of possession from a person other than the defaulter who resists delivery of possession, but there is no provision in the rules for recovering possession from the defaulter himself when he resists such a delivery. In our opinion this has no relevance to the question with which we are concerned viz., whether a suit lies for recovery of possession of the property which the society had purchased while enforcing an award in its favour. On the other hand, the fact that this rule does not provide for any remedy against the obstruction of a defaulter goes to a certain extent against his submission. As no remedy is provided under the rules to remove the obstruction caused by a defaulter it follows that a suit to recover the property which he purchased in execution, will lie in such a case.

5. In *Srinivasacharyulu v. Hanumantha Rao*, 1954 Andh LT (Civ) 109 = (AIR

1955 Andhra 10) it was held that the provisions of S. 66, C.P.C. are not applicable to proceedings under the Co-operative Societies Act. Though that decision does not deal directly with the question at issue, the decision is based upon the principle that the provisions of the C.P.C. are not generally made applicable to proceedings under the Co-operative Societies Act. In the same way as Section 66, C. P. C. was held not applicable, it follows that Section 47, C.P.C. also would not be applicable to proceedings under the Act, as there is no provision making that section applicable.

6. We agree with the view of the learned Additional District Judge that the suit is maintainable.

7. Another contention was raised that one of the items viz., Item No. 1 had been purchased by a third party in execution of another decree and therefore, he was a necessary party. We do not understand how the appellant can have any grievance at the third party not being made a party to these proceedings. If, according to him, the property has already been purchased by a third person he is not interested in the same. There are no merits in this objection.

8. In the result the appeal is dismissed with costs.

Appeal dismissed.

END

Section 12, which is the other material section, runs thus:

"12. Whoever shall print or publish any book or paper otherwise than in conformity with the rule contained in Section 3 of this Act shall, on conviction before a Magistrate, be punished by fine not exceeding two thousand rupees or by simple imprisonment for a term not exceeding six months or by both".

It is also interesting that although initially the sentence was Rs. 5,000/- and sentence of two years' imprisonment in default, the Legislature has thought it fit to reduce the sentence as noted above. The object of the Act is to prevent publication of anonymous literature and to take note of all the books and papers published in a legitimate way.

5. The short question that comes up before this Court for consideration is whether on the evidence adduced by the prosecution, namely, to the effect that the accused, who is admittedly the author of these writings and was in possession of the printed pamphlet with his name on the title page of the book and was found himself distributing the same in the market place at the town where the accused is said to have his address, within two months of the printing, the date whereof is 15-8-66 can be said to be publishing the pamphlet within the meaning of the word in Section 12 read with Section 3 of the Act. Section 3 requires that whenever a certain thing is printed the name of the printer and the place of printing shall be legibly mentioned. Secondly, if there is a publisher the name of the publisher and its place of publication must also be similarly legibly printed. If a printed book of the nature of these exhibits proved in this case, does not bear the printer's name and place of printing and the publisher's name and the place of publication, the book becomes an offender under Section 3. When the book becomes an offender, the next question to be considered is whether such a book when it is published by another person, that person is liable under Section 12 or not. Section 12 in terms does not refer to merely the press owner or the printer. It uses the words "whoever shall print or publish". Any person who prints or publishes a book in violation of the requirement mentioned in Section 3, is liable under Section 12.

6. Mr. Saikia, the learned counsel for the petitioner, submits that there is no evidence in this case that the accused went to a printing press, got the thing printed or that he had anything to do with the printing as such. According to him, therefore, the accused cannot be convicted under Section 12 in absence of evidence of those particulars. We have examined the question very carefully and

we are of the view that a mere distributor or a hawker of a printed literature not containing the name of the printer or the name of the publisher may not be liable under Section 12, but the author of a printed book who is a literate person and who admits that he has written the subject-matter which is dealt with in such printed pamphlet and whose name is mentioned in the title page of the book and further which he having obtained it, passed it on to others, must be held to be publishing the particular printed literature of which he is the author, within the mischief of Section 12 of the Act. In the view we have taken on the evidence against the accused, he cannot be equated with a hawker or a mere distributor. On the evidence produced he must be held to have arranged the printing of these books of which he is undoubtedly the author and having himself circulated it to the public openly must be held to have published the books within the meaning of the expression 'publish' in Section 12 of the Act.

7. Mr. Saikia has also drawn our attention to a decision of the Allahabad High Court in the case of Abdul Hakim v. State, reported in AIR 1960 All 450, where the learned Single Judge observed: "Section 12 of our Act (meaning this Act) does not punish the publication of a book not printed in conformity with the provision of Section 3".

With great respect, we cannot accept this wide proposition in absolute terms laid down in this decision. On the other hand, we are in respectful agreement with the observation of Ramaswami, J. in the case of G. Alavandar, reported in AIR 1957 Mad 427 at p. 429, paragraph (5a):

"But a man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of Section 3 and Section 12 of the Act." While dealing with the Publishers and Printers, we find in Article 267 of Halsbury's Laws of England, Second Edition, Vol. 26:

"A publisher is a person who puts forth a work to the public. In the case of literary works the publisher is an intermediary between the public and the author".

We are definitely of opinion that in this case the accused has put forth his own book to the public and this book being printed in clear violation of Section 3, he has published this offending book within the meaning of Section 12. When publishing it, it was his duty as well to see that the requirements of Section 3 had been complied with. A publisher also cannot avoid the responsibility cast under Section 3 of the Act with regard to his published book or paper. A publisher cannot escape liability under Sec-

tion 12 by merely stating that he is not a person connected with the press or having anything to do with the actual printing. We are, therefore, clearly of opinion that the accused has been rightly convicted under Section 12 of the Act for publishing the books and the above-mentioned Division Bench decision of this Court, on the basis of the finding in that case, is, with all respect, correct.

8. The revision petition is accordingly rejected.

M. C. PATHAK, J.: 9. I agree.

D. M. SEN, J.: 10. I agree.

Petition dismissed.

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(V 57 C 32)

FULL BENCH

P. K. GOSWAMI, C. J.,

M. C. PATHAK AND

D. M. SEN, JJ.

U. Shan Manik and others, Accused-Petitioners v. Ka Brie Nongrum and another, Opposite-Parties.

Criminal Revn. No. 90 of 1967, D/-11-5-1970.

United Khasi Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953, Rr. 21 and 22 — Under R. 21 the Subordinate District Council Court is not competent to try an offence under S. 147 Penal Code — Jurisdiction of Assistant to Dy. Commissioner to try such offence is saved by R. 22.

Sch. 6, Para 5, Constitution of India gives powers to Judge, District Council Court to try certain offences mentioned therein. Notification No. TAD/GA/234/66/11 D/-26-11-66 by Government of Assam does not relate to the jurisdiction to try an offence under Section 147, Penal Code. AIR 1965 Assam & Nagaland 51, Approved. (Para 4)

Cases Referred: Chronological Paras
(1965) AIR 1965 Assam & Nagaland

51 (V 52) = 1965 (2) Cri LJ 72,

U. Bithiang v. State of Assam, 1, 5 B. S. Guha, for Petitioners; Dr. J. C. Medhi, Advocate-General for Assam; N. M. Lahiri, Advocate-General for Meghalaya; D. K. Hazarika, as Public Prosecutor, for Opposite-Parties.

GOSWAMI, C. J.:— This Criminal revision is placed before this Full Bench without any referring order as required under the High Court Rules. All the same, having heard the learned Counsel on both sides, we may frame the question in the following term:

"Whether the decision in the case of U. Bithiang Malangiang v. State of Assam, reported in AIR 1965 Assam and Nagaland 51, which is a Division Bench decision of this Court, has been correctly made".

The second point which is necessary for consideration is whether a certain trial

under Section 147, Indian Penal Code, pending in the Court of the Assistant to the Deputy Commissioner Shillong, is competent under the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953. In other words, whether the Judge, District Council Court, has exclusive jurisdiction for trial of such a case under these Rules. It may be stated here that the learned Counsel for the petitioners felt that the decision above referred to needs reconsideration and that is why, we have entertained this case before the Full Bench.

2. The facts of the case are that on 7th February, 1966, a complaint was lodged by the Opposite Party No. 1 against the accused petitioners and the Police after investigation of the case submitted charge-sheet under Section 147/448/427, Indian Penal Code and the Assistant to the Deputy Commissioner took cognizance of that charge-sheet and proceeded with the trial.

3. It is admitted that both parties belong to the Scheduled Tribes (Khasi tribals) and the place of occurrence is also within the autonomous District of United Khasi-Jaintia Hills. The petitioners, therefore, moved the Additional Deputy Commissioner for transferring the case to the Judge, District Council Court and by order dated 17-5-1967 that Court rejected the application relying on the decision of the Division Bench of this Court above referred to.

4. Mr. Guha, the learned Counsel for the petitioners, relies upon a notification of the Governor dated 26-11-1966 for his submission that the Judge, District Council Court alone had exclusive jurisdiction to try the cases. The notification may be set out:

"Dated Shillong, the 26th November, 1966.

No. TAD/GA/234/66/11:— In exercise of the powers conferred by the sub-paragraph (1) of paragraph 5 of the Sixth Schedule to the Constitution of India, the Governor of Assam is pleased to confer on Shri B. R. Lazo Judge District Council Court, United Khasi-Jaintia Hills, with the powers to try offences punishable with imprisonment for a term not exceeding ten years under the Indian Penal Code or under any other law for the time being applicable to the United Khasi-Jaintia Hills Autonomous District".

We fail to understand how this notification assists the learned counsel in this case to exclude the jurisdiction of the Assistant to the Deputy Commissioner for trial of the offences of which he took cognizance. We have in Chapter II of the United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules, 1953 hereinafter called 'the Rules' the different classes of Courts, namely, (i) Village Courts (ii) Subordinate District

Council Court and Additional Subordinate District Council Court, and (iii) District Council Court. Chapter III describes the powers of the Courts. Rule 21, which is material is in the following terms:

"21. Courts not competent to try suits and cases in respect of certain offences.— (1) A Subordinate District Council Court or an Additional Subordinate District Council Court shall not be competent to try suits and cases in respect of offences—

- (i) under Sections 124-A, 147 and 153 of the Indian Penal Code,
- (ii) under Chapter X of the same Code in so far as they relate to the contempt of a lawful authority other than an authority constituted by the District Council,
- (iii) of giving or fabricating false evidence.....

* * * *

The rest is not material for our purpose in this case. Rule 22 may be set out:

"22. (1) Suits and cases referred to in Rule 21 shall continue to be tried and dealt with by the existing Courts until such time as the Governor deems fit to invest the Subordinate District Council Court and Additional Subordinate District Council Court with such powers by notification in the Gazette.

(2) For the purposes of this rule the existing Courts mean the Courts of the Deputy Commissioner and his Assistant."

[Since under Rule 21 the Subordinate District Council Court is not competent to try an offence under Section 147, Indian Penal Code, the jurisdiction of the Assistant to the Deputy Commissioner to try these offences is saved by Rule 22. That is the short answer to the submissions made by the learned Counsel. But says Mr. Guha that the Judge, District Council Court, has simple powers to try offences of this kind and the notification of the Governor set above clearly gives him jurisdiction to try the offences of this description between the members of the Scheduled tribes. As pointed out earlier, the Judge, District Council Court has been given powers under the relevant paragraph of the Sixth Schedule to try certain offences mentioned therein. That notification does not relate to the jurisdiction to try offences of the description which arises for consideration in this case. That notification cannot be called in aid for the purpose of empowering the Judge, District Council Court, to try an offence originally under Section 147, Indian Penal Code. We are, therefore, satisfied that the learned Assistant to the Deputy Commissioner is competent to proceed with the trial of the case in his Court. The decision which was arrived at by a Division Bench of this Court in AIR 1965 Assam and Nagaland 51 (supra), with all respect, is correct although we find an additional reason for

coming to the same conclusion reached in that case.

5. The petition is accordingly rejected.
D. M. SEN, J.:— 6. I agree.
PATHAK, J.:— 7. I agree.

Petition rejected.

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P. K. GOSWAMI AND
M. C. PATHAK, JJ.

Sujit Kantha Neogi and another, Petitioners v. Union of India and others, Opposite Parties.

Civil Rule No. 461 of 1968, D/- 13-8-1969.

(A) Evidence Act (1872), Section 123 — Evidence as to affairs of State — Documents marked as annexure to petition — Waiver of privilege by respondent.

Where certain documents annexed to a petition were described in the counter-affidavit of the respondent Railway authority as general secret and confidential instructions having no bearing on the case and the petitioner neither took steps to call for their originals nor explained how he came by those documents, it cannot be said that the Railway authority had waived any claim to privilege in respect of those documents under Section 123, and it is entitled to raise the objection under Section 123 at the hearing particularly when the documents are introduced by the petitioner not in accordance with law. (Para 5)

(B) Evidence Act (1872), Section 123 read with Section 162 — Evidence as to affairs of State — Documents claimed to be privileged — Duty of Court — It has to determine question without inspecting documents on basis of collateral evidence.

When a privilege is claimed with regard to certain documents the Court without inspecting the documents will determine the validity of objection under Section 123, particularly with regard to the character of the document whether it relates to the affairs of the State. The Court under Section 162 of the Evidence Act will not inspect the document, although it is brought to Court in order to determine whether it relates to the affairs of the State. It will however have power to determine the point by entertaining collateral evidence or evidence aliunde. AIR 1961 SC 493 & AIR 1934 PC 254, Rel. on. (Paras 6, 7)

(C) Evidence Act (1872), Section 123 read with Section 162 — Documents annexed to petition already in Court — Claim of privilege under Section 123 by respondent after service of Rule nisi — Court may adopt judicial blindness to these documents and proceed in accordance with law — But if petitioner does not take any step to direct respondent to

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produce originals before Court, no question of taking collateral evidence to determine validity of objection arises — Court is justified in excluding these documents from consideration in arriving at its decision in case on merits. (Paras 7, 8)

(D) Evidence Act (1872), Section 123 — 'Affairs of State' — Meaning of — State activities of a welfare State like India are fast expanding after independence — Administrative instructions and guidance notes secretly given to various departments of Government can claim status of being documents relating to affairs of State — AIR 1961 SC 493 & 1942 AC 624, Rel. on. (Para 9)

(E) Constitution of India, Article 311 — Temporary servant — Railway servant having no lien on post — Termination of service in exercise of power under R. 149 Railway Establishment Code — Nothing to show that any slur or stigma was cast on petitioner — Order is valid and not open to any objection. (Para 10)

(F) Industrial Disputes Act (1947), Section 2(o) — Retrenchment — Meaning of — Termination of service in accordance with service rule is not retrenchment for purposes of Section 25-F.

Ordinary meaning of retrenchment fulfils requirements of Section 2(o), that is to say when a portion of staff or labour force is discharged as surplus. AIR 1957 SC 121, Rel. on. (Para 11)

Hence, where the services of a railway employee is terminated in accordance with Rule 149, Railway Establishment Code, the termination is not retrenchment within Section 2(o) and therefore provisions of Section 25-F cannot be invoked: (Para 11)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1089 (V 55) = 1968 Lab IC 1286, State of Punjab v. Sukh Raj Bahadur 4

(1964) AIR 1964 SC 1658 (V 51) = 67 Pun LR 90, Amar Chand Butail v. Union of India 5

(1961) AIR 1961 SC 493 (V 48) = 1961-2 SCR 371, State of Punjab v. Sodhi Sukhdeo Singh 5, 6, 9, 10

(1960) AIR 1960 SC 610 (V 47) = 1960-2 SCR 866, State of Bombay v. Hospital Mazdoor Sabha 11

(1958) AIR 1958 SC 36 (V 45) = 1958 SCR 828, P. L. Dhingra v. Union of India 4, 10

(1957) AIR 1957 SC 121 (V 44) = 1957 SCR 121, Hari Prasad Shishankar Shukla v. A. D. Divakar 11

(1956) 1956 SC 1 (HL) = 1956 SLT 41, Glasgow Corp'n. v. Central Land Board 5

(1942) 1942 AC 624 = 22 MLR 187 (HL), Duncan v. Cammell Laird and Co. Ltd. 6, 9

(1934) AIR 1934 PC 254 (V 21) = 40 Mad LW 173, Henry Greer Robinson v. State of Australia 6

B. C. Ghose, B. K. Das, P. K. Bhattacharjee, S. K. Chattopadhyay and P. K. Singha, for Petitioner; B. C. Barua, Advocate-General and A. R. Barooah, for Opposite Parties.

GOSWAMI, J.:— This Rule was obtained against an order dated 24th October, 1968, terminating the service of the petitioner, who was at the material time a temporary Assistant Station Master in the service of the Northeast Frontier Railway. The petitioner's case is that he joined service under the Railway as a temporary Signaller at the salary of Rs 110/- per month in the scale of Rs. 110-200/-, sometime in March, 1962. In April, 1962, he was appointed to the post of Assistant Station Master (ASM). The petitioner states that he has rendered good and efficient service since his date of appointment and even after completion of about six years, he is still kept as a temporary employee. He is a member of the N. F. Railway Mazdoor Union which is a registered trade union of the non-gazetted railway servants and he is also an office-bearer of the same. The Union decided to call a token strike for one day on 19th September 1968 in accordance with the provisions of the Industrial Disputes Act with intimation to the authorities. The President of India promulgated the Essential Services Maintenance Ordinance, 1968 (hereinafter called 'the Ordinance') on 13th September, 1968 and various orders were passed declaring the strike as illegal. That a strike took place, as notified, on 19th September, 1968 for a period of 24 hours commencing at 6 A.M. of the day. The petitioner was arrested by the police on the same day at about 8-30 A.M. under Sections 4 and 5 of the Ordinance, but was released on bail that very day. It may be useful to quote paras 18 to 21 of the petition:

"18. That the Home Minister, Government of India made repeated directions for inflicting punishments on all those who were alleged to have participated in the aforesaid strike in the aforesaid manner namely by termination of service in case of temporary employees. Similar statements were made by the Home Minister and Prime Minister on the floor of the Parliament.

19. That in pursuance of the policy of the Government, the Ministry of Home Affairs, Government of India in its Office Memorandum issued under Nos. 13/9(S)/68 Est(B) dated 16-9-68 and 13/9(S)/68 Est(B) dated 24-9-68 issued orders directing and detailing the actions to be taken against the employees who participated in the strike. In that instructions, inter alia, it was ordered to terminate the services of the temporary Government servants who had taken active part in the strike by giving one month's pay in lieu of notice.

20. That prior to 19th September, 1968 and thereafter, the Railway Board also issued instructions to all Zonal Railway directing repression and persecution of the railway employees who would participate in the token strike of 19th September, 1968. In pursuance of the Government's policy of repression and persecution the Railway Board under secret letter No. E(L)68STI-56 dated 17-9-68 followed by further instructions conveyed through the Secret Wireless Message No. E(L)68STI-56 dated 20th September, 1968 and Demi-official Secret Letter No. E(L)68STI-56 dated 23rd September 1968 from Sri K. V. Kasthuri Rangam, Director (Establishment), Railway Board issued directions to the all Zonal Railway including Northeast Frontier Railway for taking action against the employees who would take part in the token strike of 19th September 1968. In that instructions, inter alia, it was ordered to terminate the services of temporary employees who would be arrested in connection with the strike by giving pay and allowances in lieu of notice.

21. That before and after the strike several other communications were also received by the General Manager, Northeast Frontier Railway (Respondent No. 2) and other officers in the Railway Head Quarters at Pandu directing disciplinary actions who according to the Administration and their officers alleged to have taken active part in the aforesaid strike and the General Manager and its staff in the Railway Head Quarters issued consequential directions to his subordinate officer in the Northeast Frontier Railway."

The petitioner states that on 23rd September, 1968, the General Manager, respondent No. 2, issued orders instructing all his subordinate Gazetted Officers to suspend and terminate the services of the temporary employees who are arrested for any offence by application of Rule 149 RI, as per Annexure II to his petition. Further the petitioner states that on 30th September, 1968, the General Manager "again issued further secret orders to all his subordinate Gazetted Officers detailing the guide-lines for taking action against the employees in connection with the strike of 19th September, 1968." The document containing these is marked as Annexure III to his petition. That on 23rd October, 1968, the General Manager "again relayed further confidential orders issued by the Railway Board, to all his subordinate Gazetted Officers detailing the action to be taken in context of the token strike of 19th September, 1968." A copy of the said order is marked as Annexure IV to his petition. The petitioner states that in pursuance of the aforesaid directions issued by the General Manager, the Area Officer, respondent

No. 4, suspended the petitioner with effect from 19th September, 1968 by his order dated 25th September, 1968 (Annexure V). That on 2nd October, 1968, the petitioner was served with a notice dated 26th September, 1968/2nd October, 1968 signed by the District Operating Superintendent, respondent No. 3, terminating forthwith his service and directing that he be paid a sum equivalent to the amount of his pay and allowance for one month in lieu of notice period under Rule 149 of the Indian Railway Establishment Code, Vol. I (Annexure VI). That on 5th October, 1968, the Deputy General Manager, by a telegram cancelled the said order of termination of service and also released the petitioner from suspension and directed the authority to issue a formal revocation order and to intimate the date on which the petitioner is to be put back to duty (Annexure VII). Even so, the respondent No. 3, under the orders and directions of the General Manager passed the impugned order dated 24th October, 1968 terminating the petitioner's service with immediate effect under Rule 149 (Annexure VIII). The petitioner states that the Assistant Station Masters working in the Railway who are junior in service to the petitioner are still continuing in service. He states that no reasonable opportunity to show cause against the termination order was afforded to him.

2. The petitioner submits that the order of termination of service is by way of punishment and as such is violative of Article 311(2) of the Constitution. He also submits that the order is mala fide and has been made in colourable exercise of powers with the object of wrongfully removing the petitioner from service. The petitioner also submits that the impugned order is void and illegal and it contravenes the provisions of Section 25-F of the Industrial Disputes Act.

3. The learned Advocate-General, who represents the respondents in this proceeding, submits on the other hand relying on the several counter-affidavits that the order is in bona fide exercise of the powers under Rule 149 and is a termination simpliciter and is not by way of punishment. With regard to the Annexures III and IV of the petition it is claimed by the respondents that they are general, secret and confidential administrative instructions and the petitioner should not be allowed to rely on them. The learned counsel also claims privilege under Section 123 of the Indian Evidence Act with regard to these documents. The respondents further submit that Section 25-F of the Industrial Disputes Act is not attracted in the instant case, as it is not a case of retrenchment.

4. Mr. Ghose, the learned counsel for the petitioner is conscious that he is

arguing the case of a temporary railway employee. He also rests his case on the second test laid down in Parshotam Lal Dhingra's case, (AIR 1958 SC 36), namely, that the order visits the petitioner with penal consequences. Indeed, he relies on the decision of the Supreme Court in the State of Punjab v. Sukh Raj Bahadur, AIR 1968 SC 1089 wherein, *inter alia*, the following propositions have been held to be established on a conspectus of the cases decided by the Supreme Court.

"1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4.
5.
The learned counsel strenuously contends that his case comes within the purview of the second and third propositions mentioned above. The learned Advocate-General, on the other hand contends emphatically that the case comes squarely within the terms of the aforementioned proposition No. 1. In order to establish the petitioner's case in this behalf, Mr. Ghose draws our attention to Annexures II, III & IV of his application. In fact, his whole contention rests on the Annexures III & IV which are claimed as privileged documents by the learned Advocate-General. The claim of privilege in this case assumes a great importance, as, if Annexures III & IV are left out, the petitioner will have no other material to make out his case.

5. The law regarding the claim of privilege is now laid down in a decision of the Supreme Court in the case of State of Punjab v. Sodhi Sukhdev Singh, AIR 1961 SC 493. The principles laid down therein have been reiterated in AIR 1964 SC 1658. The learned Advocate-General claims privilege under Section 123 of the Evidence Act read with Section 162. Section 123 runs as follows:—

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."
The law laid down in AIR 1961 SC 493 has been summarised thus:

"It is perfectly true that in holding an enquiry into the validity of the objection under Section 123 the Court cannot permit any evidence about the contents of the document. If the document cannot be inspected its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection.

... ..
Thus our conclusion is that reading Sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide, but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under Section 123 or not. In this enquiry, the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not."

It is clear that the two documents are marked as secret and confidential ones by the Railway and these are unpublished official records. The petitioner has not taken any steps to call for the originals of these documents from the respondents. The petitioner also does not state how he has come by these confidential documents. The matter has therefore come before this Court in a rather irregular manner. Mr. Ghose, however, contends that the existence of these documents of their genuineness is not questioned by the respondents and hence they have waived their claim of privilege and no objection should be entertained with regard to it. It is true that in para 14 of the counter-affidavit of respondent No. 3, these documents are described as "general, secret and confidential administrative instructions and those instructions have no bearing with the instant case". There is no reference to any claim of privilege under Section 123 of the Evidence Act. In a matter such as this, we are not prepared to accept the submission of the learned counsel that the respondents have waived their claim of privilege with regard to these documents, particularly in view of the fact that the petitioner has not introduced these documents in accordance with the procedure laid down under the law. We have therefore allowed the learned Advocate-General to

take his objection under Section 123 of the Evidence Act.

6. The law in India is now clear that when privilege is claimed with regard to a certain document, it is for the Court to determine at the first instance whether the document relates to the affairs of the State. This decision rests entirely with the Court. How that decision will be arrived at by the Court is however a ticklish matter. The Court under Section 162 of the Evidence Act will not inspect the document, although it is brought to Court in order to determine whether it relates to the affairs of the State. It will however have power to determine the point by entertaining collateral evidence or evidence aliunde. As the Supreme Court observed—

"If the document cannot be inspected, its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of objection."

Sodhi Sukhdev Singh, AIR 1961 SC 493 (supra). This view is in accord with the decision of the Privy Council in *Henry Greer Robinson v. State of South Australia*, AIR 1934 PC 254. The Court is only debarred under Section 162 from inspecting the document in order to determine whether it relates to the affairs of the State; but is not prevented from arriving at its decision by entertaining other appropriate and relevant evidence. The law in England has undergone a change after the House of Lords decision in *Duncan v. Cammell Laird and Co. Ltd.*, 1942 AC 624, wherein it has been held that once the Crown makes the claim supported by the affidavit of the appropriate Minister, it is the Judge's duty to reject the evidence even if the party who wants to prove it has it in possession. Once the Minister affirms that production of the evidence is against national interest the Judge cannot question whether the claim of privilege is justified or not. A decision of the House of Lords in *Glasgow Corpn. v. Central Land Board*, 1956 SC (HL) 1, referring to *Duncan's* case, 1942 AC 624, observed that the Scottish law has always reserved to the courts the inherent power to inspect the documents and to override the certificate of the head of the department that production would be against the public interest. It has been held that impartial administration of justice in the courts of law is also a matter of public interest, and that indeed it is of a higher order. The practice in the United States is in accord with the principles laid down in the Privy Council case AIR 1934 PC 254 (supra). Even after the passing of the Crown Proceeding Act in England in 1947, the powers in England are much narrower than those conferred under Sec-

tion 162 of the Evidence Act, *Sodhi Sukhdev*, AIR 1961 SC 493 (supra).

7. The position in law therefore is that the Court without inspecting the documents will determine the validity of objection under Section 123, particularly with regard to the character of the document whether it relates to the affairs of the State. So far as this case is concerned, the position is however rather anomalous as the documents are already produced in court and the claim of privilege has been lodged afterwards, after service of the Rule. There are therefore two courses open to the Court. Firstly the Court may adopt a judicial blindness to these documents and proceed in accordance with law. For that however, there is no application by the petitioner to the Court to direct the respondents to produce the originals of these documents. There is therefore no question of taking collateral evidence in order to determine the validity of the objection. On this short ground alone, the documents in question can be ruled out of consideration in this proceeding.

8. The statute has clearly proscribed inspection of documents relating to the affairs of the State. The rule of conduct which is prescribed by this law is that no person should pry into confidences of Governmental affairs. But the conduct of the petitioner clearly runs counter to the rule for conduct laid down by the statute. It is significant, as Cohen has neatly observed in his "Ethical Systems"— "Words are frail packages for legislative hopes. The voyage to the realm of law observance is long and dangerous." It is a question of serious import whether a person should be allowed to take advantage of his illegitimate action in securing by any means whatsoever secret and confidential documents of the Government. It is not possible to show any leniency in a matter of this description and we cannot too strongly condemn this unlawful practice and would be loath to give the erring party any advantage of his wrong action. It should be a warning to those who want to thrive from such unethical disclosures which are clearly opposed to the provisions of law. Where it is possible, as in this case, the Court will without any hesitation, help law coincide with morality. We will be, therefore, justified in not looking into these two documents in assessing the submission of the learned counsel.

9. Mr. Ghose next contends that Section 123 is not attracted in this case as the documents do not relate to any affairs of the State. This argument will be inadmissible in view of our conclusion that the petitioner has not properly applied to this Court for production of the originals by the appropriate authority. But even excusing this absence of preliminary

and having examined, out of hand, the contents of the two documents, we are satisfied that they relate to the affairs of the State. The concept of State has undergone a tremendous change. Besides, the State is a dynamic organisation. A democratic State, as is ours, being the creature of a written Constitution, holds out the picture of a welfare State. The affairs in the welfare State of today cannot be compared with those which were obtaining prior to independence, and even during that period, as days rolled on, State activities were expanding. It is no longer the regal functions alone which the State exercises. Its activities permeate through various fields and aspects of the body politic. As observed in the majority judgment in Sukhdev Singh's case, AIR 1961 SC 493 (supra):—

"The inevitable consequence of the change in the conception of the functions of the State is that the State in pursuit of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial and documents in relation to such commercial activities undertaken by the State in the pursuit of public policies of social welfare are also apt to claim the privilege of documents relating to the affairs of State."

We therefore see no force in the contention of the learned counsel that these documents do not relate to affairs of the State. They are administrative instructions and guidance notes secretly given to various authorities at different levels and the subordinate officers in the departments are entitled to such advice and instructions from time to time in dealing with matters involving law and order and discipline in the entire organisation. No objection can be taken to such instructions and guidance being given and no one can be allowed to make capital out of such confidential instructions which are not intended for outsiders or for publication. As observed by the House of Lords in Duncan's case, 1942 AC 624 (supra) —

"Practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

Hence assuming for the moment that we have collateral evidence to determine the nature of the two documents, which however in this case have already become public property, we are clearly of opinion that they are unpublished official records relating to affairs of the State and in absence of a proper application through Court, enabling the appropriate authority itself to consider the question of public injury if these are disclosed, make these documents non-existent for judicial consideration in the present proceeding. We must not however be understood to mean that the contents of these documents even

if proved and permitted to be disclosed would establish the petitioner's pleas in this case.

10. If these two documents go out of consideration, there is no case made out by the petitioner to bring his case within the second test laid down in Dhingra's case (AIR 1958 SC 36), nor in the second and third propositions of Sukhdev's case, AIR 1961 SC 493. The order is in full conformity with Rule 149 and it does not cast any slur or stigma on the petitioner. The order cannot be said to be by way of punishment, as the petitioner, being a temporary employee, had no lien to the post. The termination is thus in exercise of the power conferred under Rule 149 of the Railway Establishment Code and the order is not open to any valid objection under the law.

11. Mr. Ghose next contends that the order being in violation of Section 25-F of the Industrial Disputes Act, is void and illegal and as such should be quashed in our writ jurisdiction. In this context, he draws our attention to the amended Rule 149 by adding sub-rule (6) therein which runs as follows:—

"6. Notwithstanding anything contained in clauses (1), (2) and (4) of this Rule, if a Railway servant or apprentice is one to whom the provisions of the Industrial Disputes Act 1947 apply, he shall be entitled to notice or wages in lieu thereof in accordance with the provisions of that Act."

He therefore contends that since the termination in question is retrenchment within the meaning of Section 2(oo) of the Industrial Disputes Act, the provisions of Section 25-F thereof are clearly attracted. In this case, Mr. Ghose relied upon the State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610. He submits that the Supreme Court has approved of the decision of the Bombay High Court holding that the orders which do not comply with the mandatory provisions of Section 25-F, were invalid and inoperative and did not interfere with the writs of mandamus issued by that Court. The learned counsel has failed to take note of the concession made by the appellants that the case was one of retrenchment. The chief question that was canvassed in that decision is one centering round the meaning of industry under Section 2(j) of the Industrial Disputes Act. In the instant case, the respondents do not admit that it is a case of retrenchment within the meaning of Section 2(oo) of the Act. The Supreme Court has interpreted the definition of retrenchment in Section 2(oo) in Hari Prosad Shishankar Shukla v. A. D. Divkar, AIR 1957 SC 121 and has held that the ordinary meaning of retrenchment fulfils the requirements of Section 2(oo), that is to say when a portion of the staff or the labour

force is discharged as surplus. The present termination of the service of the petitioner is therefore not a case of retrenchment within the meaning of Section 2(o) and as such he cannot invoke the provisions of Section 25-F of the Act, which is mentioned in sub-rule (6) of Rule 149, sought to be invoked in his favour. The objection on this ground is therefore without any substance.

12. In the result, the application fails and is dismissed, but we make no order as to costs.

M. C. PATNAIK, J.: 13. I agree.

Application dismissed.

AIR 1970 ASSAM & NAGALAND 137
(V 57 C 34)

P. K. GOSWAMI, C. J. AND
D. M. SEN, J.

Priyalal Barman, Appellant v. The State, Respondent.

Death Reference No. 2 of 1970 and Criminal Appeal No. 6(J) of 1970, D/-27-5-1970, Ref. made by Dist. and S. J. Cachar, D/-20-1-1970 and judgment D/-12-1-1970.

(A) Evidence Act (1872), S. 32(1) — Dying declaration — Evidentiary value of.

The dying declaration is only a piece of untested evidence. It must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and the whole truth and that it is absolutely safe to act upon it. (Para 14)

(B) Evidence Act (1872), Section 3 — Benefit of doubt — Dying declaration not satisfactory — Police investigation inadequate and defective — Evidence not conclusive — Benefit of doubt given to accused. (Para 16)

(C) Assam Police Manual, Part V, (1968 Edition), Rule 188 — Case diary without pagination — Various stages of investigation not correctly entered — Diary held not in conformity with Rule 188 and created suspicion. (Para 18)

(D) Criminal P. C. (1898), S. 172(2) — Case diary of Police investigation — Its use and value.

Case diary is a very important document which has to be maintained in a faithfully regular manner. Although it cannot be treated as evidence in trial, the Court is entitled to peruse the same under Section 172(2). This duty to peruse is incumbent upon a Public Prosecutor and almost always so upon a Court trying serious offences. When the cases for prosecution and defence are both inadequate the case diary enables the Court to discover for itself the material facts and arrive at truth in the interest of justice. (Para 19)

D. C. Chakraborty, for Appellant; T. N. Singh, Public Prosecutor, for Respondent.

GN/GN/D160/70/HGP/B

GOSWAMI, C. J.:— This is a case of triple murder which took place on the night of 18th April, 1969. The accused, a son, is said to have murdered his father, his step-mother and his step-brother, and he has been sentenced to death under Section 302, I. P. C. The accused has appealed against his conviction and there is also the usual reference under Section 374, Cr. P. C. Both are taken up together. The accused was also convicted under Section 457, I.P.C., but no separate sentence was awarded to him.

2. There lived a man named Gopicharan Barman, aged about 55 years, at village Ratanpur under Udharbond Police Station. He seems to be a substantial man, having land and granary and several houses within his homestead and has also allowed the accused, who is his son, to build another house for him (accused) within his compound. Gopicharan's first wife is the mother of the accused who was driven away from his house while he was only three years of age. Gopicharan had a second wife Bazodi who had a son Parimal, aged about 11 years. The accused's mother since then resided at a place called Barbond about six miles from Ratanpur. The accused grew up and was serving in the Military Department and came to Ratanpur about two months prior to the occurrence and shared his stay with his father as well as his mother. The accused built the fifth house near his father's house at Ratanpur. On the previous day of the occurrence, Gopicharan went to the accused's house where heated altercation took place between the two. This quarrel was over a sum of Rs. 1400/- (evidence of P.W. 5). On the morning of the occurrence, when Ananta Kumar (P.W. 1) was going by the side of Gopicharan's house, he heard a cry of distress — "Give me water, give water" — coming from inside the house. Ananta Kumar lives only hundred yards off from Gopicharan's house and his wife was also coming out at that time. Having heard the scream, he went inside the compound and found Gopicharan lying dead at the court-yard 'smeared with blood'. The cry for water was coming from inside the house and Ananta Kumar asked his wife to give water and he went to bring people. He then returned with Pulin, Rajendra and Arun and found Gopicharan's son Parimal lying dead on the bed. There was blood on his person. Bazodi, second wife of Gopicharan was lying on the bed with bleeding injuries by the side of her dead son Parimal. It is said that Bazodi told them that at night their son Jaurang (accused) "came and cut his father, his brother and herself". While Gopicharan and Parimal were already dead, Bazodi died on Sunday, the 20th at 10 A.M., the occurrence having taken place on Friday night.

3. Before the death of Bazodi, Ananta went to the Udharpur Police Station, eight miles away, and verbally reported the occurrence and the Sub-Inspector of Police recorded the same (Ext. 1) on 19th April, 1969 at 10-45 A.M. This first information report mentions the name of the accused to be the assailant of all the three persons mentioned above. It also appears that Santa Barman, Member of the Gaon Panchayat and another person were present when Bazodi mentioned the name of the accused to Ananta Kumar for the first time when the latter came with these persons to find out what had happened inside the house.

4. The police officer registered the case and took up investigation and after leaving the police station at 11 A.M., arrived at the place of occurrence at half past twelve. He found the dead body of Gopicharan lying in the courtyard of the dwelling house near the verandah. His son Parimal Barman was found lying dead on the bed inside the house. He also found Bazodi lying injured by the side of her dead son. According to the Sub-Inspector of Police (P.W. 10) "Bazodi Barman stated that on the night of previous day, Jaurang forcibly entered the house and cut her, her husband and her son with a Bhujali". He sent for the doctor who came and recorded a statement of Bazodi at his request. He held inquest over the dead bodies of Gopicharan and Parimal (Exts. 4 and 5) and he drew up also a sketch map with Index (Exts. 6 and 6(1)). He also stated that "the statements of Bazodi taken by Arun Master and the doctor were handed over to me". He came to know of the death of Bazodi on 20th and held inquest over her dead body (Ext. 7). He had on the previous day sent the dead bodies of Gopicharan and Parimal for post-mortem examination and sent the dead body of Bazodi for the same purpose on 20th. He seized an umbrella (Ext. I) and a naked lamp (Ext. II), a bamboo door and a little blood soaked soil (Ext. III) at the house of Gopicharan. After completion of the investigation, he submitted a charge-sheet. The cross-examination of this witness was only two sentences, namely "Bazodi Barman made all the statements in Bengali. I recorded her statement in English."

5 to 7. [After narrating the evidence given by P.Ws. 2, 3 and 4, his Lordship proceeded:] P.W. 6 is Dr. S. K. Choudhury who held the post-mortem examination on the dead body of all the three deceased persons. He found the following injuries on the dead body of Parimal:

"One transverse incised wound 6" x 2" x brain cavity deep on the back of head.

One incised wound 4" x 2" x 1" on the back of lower part of left forearm.

Fracture of occipital bone and both parietal bones on the back of head measuring 5 1/2" x 1" x thickness of the bone.

Membrane incised in the back of head measuring 5" x 1" x thickness of membrane. Haemorrhage seen in the brain on back." He also found on the dead body of Gopicharan the following injuries:

"One incised wound 6" x 2" x brain cavity deep on the left side of head 2" above the ear, placed longitudinally.

One incised wound 6" x 5" x 1" on the back of right shoulder.

Fracture of the left temporal bone and left parietal bone measuring 5 1/2" x 1 1/2" x thickness of bone.

Membrane incised on the left side measuring 5" x 1" x thickness of membrane. Haemorrhage seen on the left side of brain."

He noticed on the dead body of Bazodi, aged about 45 years, the following injuries:—

"One incised wound 7" x 2" x 4" on the outer front and inner side of upper third of left arm.

One incised wound 6 1/2" x 3" x 1/2" on the upper part of left side of back.

Muscles, nerves and arteries of upper third of left arm is cut. There is fracture of left humerus on the upper third." Death of all the above three persons, according to the opinion of the doctor, is due to shock and haemorrhage caused by the injuries described. He also states that all the injuries on the three persons can be caused by a sharp cutting weapon like Bhujali.

8. P.W. 7 is Dr. Pabitra Kumar Singh Chaudhuri, who had examined Bazodi earlier at 7-30 P.M. on 19th April, 1969 on being requisitioned by the Police Officer (P.W. 10), while she was yet alive and found two incised wounds noticed by the doctor P.W. 6 later. He found her pulse weak, almost imperceptible, due to severe bleeding and that she was in a state of shock. He recorded her dying declaration marked Ext. 3 on the requisition of P.W. 10. According to him, she could very clearly understand what he wanted about the circumstances leading to the injuries. He could also follow her distinctly. He "recorded just what she stated". He read over the statement to her after recording the same and she admitted it to be correct and put her thumb impression. He recorded the statement after examination of the injuries. P.Ws. 8 and 9 are the constables who escorted the dead bodies.

9. The above is all the evidence and it appears therefrom that Bazodi was the only person who could speak about the identity of the assailant and we find that there are two of her recorded statements Exts. 2 and 3. We have also the evidence of P.Ws. 1, 2, 3 and 4, besides P.Ws. 7 and 10 who deposed before the Court

about the statement made by Bazodi implicating the accused. The learned Sessions Judge has relied upon the two dying declarations and also was satisfied that there was no possibility of Bazodi making any mistake about the identity of the culprit. Relying on the evidence of P.W. 5, he also held that it might be on account of the quarrel over Rs. 1400/- that the accused came at night and "committed this dastardly crime".

10. The most important point for consideration is whether we shall be justified in relying upon the dying declarations as well as the statements which had been alleged to be made to the witnesses mentioned above. It is no doubt true that at 10-45 A.M. on 19th April, 1969, the name of the accused appears in the first information report lodged by P.W. 1 who went to the Thana accompanied by P.W. 3. This fact is also corroborated by P.W. 1 in his evidence. One thing is however noticeable that P.W. 1 did not immediately go inside the house to ask the screaming wife as to what has happened and how it happened. He left his wife there and came sometime afterwards with Arun, Pulin and Rajendra, the last two being not examined in the case. P.W. 1 states that when this time he went inside Bazodi made the statement implicating the accused and while he was there Santa Barman and Satyendra came and they heard what Bazodi said. (The translation in the paper book of the evidence of P.W. 1 is wrong at places and I had to go through the Assamese deposition in original). P.W. 4 Atashi, who was perhaps the first person to meet Bazodi and who gave her water in the morning, stated as follows:

"Bazodi said that at night Jaurang had come and had cut herself, her husband and her son with a Bhujali".

This witness was not examined in the committing court and for the first time examined before the Sessions Court on 9-1-1970 and it is not even clear when Bazodi made that statement to her. On the other hand, the evidence of P.W. 2 is that Ananta came and called him and he was at that time with Sudhir, Pulin and others. He went to inform P.W. 3, the Member, and others. Up to this time he does not speak about any statement made by Bazodi. He came later at 12 noon and found Santa Member (P.W. 3), Ananta (P. W. 1), Satyendra and others present at that place. He then stated that Bazodi was then speaking. Santa Barman asked him to record the statement. Then he recorded Ext. 2.

11. From the above it appears that Ext. 2 which was recorded after 12 noon on the second visit of P.W. 2 contained the first written record of the statement of Bazodi taken down after 12 noon in the presence of Santa and Ananta. In-

deed Ext. 2 contains the signature of several persons including Santa Barman and Ananta. If, therefore, Ext. 2 was recorded by Arun as stated by him after 12 noon, there was no necessity for this recording, as according to the Police Officer (P.W. 10), he arrived at the place of occurrence at half-past twelve on being informed of the occurrence by P.W. 1, who was even accompanied by Santa. Naturally, therefore, Santa and Ananta would have in all probability either accompanied this officer from the Thana or, at any rate, would have arrived back about the same time. Looking at Ext. 2 now, it is written in Bengalee and the writer's signature appears as Arun Kumar Deb. There is also not too distinct thumb impression said to be of Bazodi taken by Arun Kumar. The dying declaration is (in) the following terms:

"The statement of the injured: My name is Bazodi Bala Barman. My husband is Gopicharan Barman. On last Friday night after we slept, Jaurang son of Gopicharan Barman came about 12 or 1 O'Clock while we were asleep. The said Jaurang Barman was forcibly pulling the door. By (at?) this time, I lighted the lamp. Then Jaurang having entered the house put out the lamp and first cut my husband and thereafter me with a dao and thereafter my son and went away. I could recognise him. Finish — 19th April 1969 (Eng.)."

This very witness, who recorded the statement, stated in his evidence as follows:—

"Bazodi said that at 12 P.M. or 1 A.M. at night, she had heard a sound coming from the door and had asked her husband to light a lamp. It was said that as soon as the lamp was lighted, Jaurang felled the door and entered the house. Bazodi further stated that Jaurang, having entered the house, had put out the lamp. She stated further more that Jaurang, having put out the lamp, flashed with a torch and cut his father. She stated further more that after that he had cut Parimal with a Bhujali. She stated further more that thereafter Jaurang had cut herself (Bazodi)."

P.W. 1 Ananta, who is said to be present at the time of recording of Ext. 2 does not mention about Ext. 2 and only stated in his evidence that "Bazodi said to us that at night their son Jaurang came and cut his father, his brother and herself". P.W. 3 who was also present at the time of recording of Ext. 2, stated that "Bazodi said that she had heard a sound at the door and her husband had lighted a lamp. After a little while, accused Jaurang having broken and felled the door on the courtyard, entered the house and began to cut all. Bazodi stated that Jaurang had cut his father, his brother and herself". P.W. 10 also stated:

"Bazodi Barman stated that on the night of previous day, Jaurang forcibly entered the house and cut her, her husband and her son with a Bhujali. I sent for the doctor at Udhband. Having come, the doctor examined Bazodi and recorded a statement of Bazodi at my request."

He also stated that "the statements of Bazodi taken by Arun Master and the doctor were handed over to me. All these have been filed in this case."

12. Although it appears from the records and case diary, the relevant seizure lists for seizing the documents Exts. 2 and 3 have not been exhibited in the case. Yet the two relevant seizure lists are dated 19-4-69 and 26-4-69, that is to say, the police officer took possession of Ext. 2 on 19th April 1969 according to this unexhibited seizure list and his statement in Court, but he seized Ext. 3 on being produced by the doctor on 26th April, 1969, a week after the recording. It is therefore intriguing how he could state in his evidence that these two statements Exts. 2 and 3 were handed over to him together on that day, which is the impression sought to be given in the evidence. Again, if the statement was recorded by the doctor, whom he had requisitioned for the purpose, it is rather surprising that he would not take possession of Ext. 3 on the same day and left it to be seized after a week. This might not throw doubt about the recording of the statement Ext. 3 on the 19th April, 1969, but only shows that Ext. 2 may not have been recorded as stated by P.W. 2 Arun Kumar in his evidence. One cannot help doubting the dying declaration Ext. 2 for another reason. This statement does not appear to be *ipsissima verba* that is to say, in the words of the declarant. She would never describe herself in the way recorded in the statement unless asked to do so. Further, she would not say in the *very next morning* of the occurrence "on last Friday night" when it happened only a few hours earlier. Besides, the signature of Arun Kumar (P.W. 2) and the endorsement of the thumb impression of Bazodi appear to be not in one sitting, although Arun has stated in his evidence that the statement was read over to her and she admitted it to be correct and put her thumb impression then and there. While the entire statement in Ext. 2 written by Arun gives the picture of a bold writing, his signature and his endorsement on this document written in different ink seem to be hesitant and feeble. It does not appear that this document was carefully noticed by either the defence counsel or by the learned trial Judge. Otherwise we would have found certain questions put to Arun Kumar in cross-examination or at least from the Court.

13. Let us now look at Ext. 3, the second dying declaration which is said to be written by the doctor on the request of the Police Officer, who must have been present at the time of recording. The statement herein runs as follows:—

"Last night at about two, my son Jaurang forcibly entered the house and firstly cut my husband dead, then cut me and then cut my son Parimal dead. He cut all by Bhojali."

The doctor, P.W. 7, has proved this Ext. 3 which he recorded at 7-30 P.M. on 19th April, 1969 when he came there on receipt of information from the Police Officer (P.W. 10). Although we do not distrust the doctor, who had written this document, we cannot help thinking that the last sentence in Ext. 3 "He cut all by Bhojali" was written not in the same sitting. Even the thumb impressions in the document appear to have been taken on different occasions. Although the document is dated 19-4-1969 and is said to have been handed over to the Police Officer the same day as noticed earlier, the document was seized on production by the doctor only on the 26th April, 1969. It is not known whether this discrepancy about the time when the document came to the possession of the Police may have something to do with the insertion of the last sentence in Ext. 3. At any rate, if the earlier statement recorded in Ext. 2 is absolutely true and safe, as deposed to by Ananta and corroborated by different witnesses who also gave oral evidence to the same effect, the second document Ext. 3 would lose much of the importance. We, therefore find that the whole case turns on the alleged statement of Bazodi implicating the accused as the assailant of herself as well as the other two deceased.

14. The questions will require consideration before we are in a position to act on that statement. Firstly, assuming that she had stated as recorded in the dying declarations and as deposed to by the witnesses, was it possible for her to recognise the assailant that night? For this purpose, it is necessary to compare the evidence of all the witnesses describing the statements of Bazodi as also those recorded in Exts. 2 and 3. The night was said to be a stormy night and there was heavy downpour. The accused was not in the house of the deceased on that day but must have come from his mother's house which is six miles away. The room inside, at the moment there was knock at the door, was dark and unless a lamp was lighted it was not possible for Bazodi to have recognised the assailant. She is not said to have stated that she recognised him by any other means, say by voice. The question of lighting the lamp, therefore, is of some importance. Arun Kumar, who has himself recorded the dying declaration Ext. 2 stated that

Bazodi has asked her husband to light the lamp. Even P.W. 3 Santa Barman stated that Bazodi stated that her husband lighted the lamp. On the other hand, the statement in Ext. 2 is that she lighted the lamp. It is, therefore, doubtful whether the lamp was lighted at all to enable Bazodi to recognise the assailant. This aspect did not receive due consideration from the learned Sessions Judge. It may not be overlooked that she is the step-mother of the accused. Although the father, advancing in age, seems to have reconciled to allowing the son to come and reside near his house perhaps with his mother in the same compound, Bazodi may not have taken all these developments kindly. Besides, if, as stated by P.W. 5, a sum of Rs. 1400/- had been stolen and the father had altercation with him over it on the previous day, this fact also would be in the know of Bazodi. For these two reasons, if not for more which are undisclosed, Bazodi may have grudge and even strong suspicion against the accused whom she may even honestly think or imagine to be the dangerous miscreant of that night. It may not also be ruled out that when neighbours and other villagers, who naturally came in the morning on hearing of this horrible calamity, would start discussing to the hearing of Bazodi to locate the assailant and with the informations available then and the play of feelings and reactions on the mind of Bazodi at that grievously distressing state of her mind, it is no wonder that the accused might be thought of as the possible culprit and that is how the name of the accused might have been broadcast leading ultimately to the lodging of the first information report at the Thana against him. We are, therefore, unable to place on the statement and declaration of Bazodi such reliance as would be necessary to enable us to convict the accused in a serious charge of this nature. The dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and the whole truth and that it is absolutely safe to act upon it.

15. On the top of that, the police investigation is so inadequate and purposeless that no attempt was made to produce any corroborating circumstances from any other source to establish the charge against the accused. There was no attempt to find out any foot-prints or finger-prints of the accused about which there was certainly some possibility. Secondly, there is no evidence about the conduct of the accused after the occurrence if he was the murderer of his father and his step-brother at that stage. Neither the prosecution attempted to ask the police officer any questions with that regard, nor did the police officer even

bother to state when, where and in what state the accused was found and arrested. The evidence of the mother of the accused who lives at Barbond would have also thrown some light about the accused whether he was absent from his house on that night. After all her husband had been murdered by somebody. Even it cannot be said that she would be hostile witness until her statement has been recorded at least by the Police Officer. Her utility as a witness cannot be brushed aside by saying that she was at one stage driven out by her deceased husband. Certain things would have come to light from which the Court would have been in a position to judge the truth of the charge against the accused. Since the prosecution has not chosen to adduce any evidence regarding the conduct of the accused, it may be presumed that there was nothing unusual in his conduct.

16. We are, therefore, clearly of opinion that the evidence produced in the case does not establish the charges framed against the accused. He is entitled to benefit of reasonable doubt and is acquitted of the charges under Sections 302 and 457, Indian Penal Code.

17. It is necessary to observe that the dying declaration appears to be the be-all and end-all of the investigation in this case and the police officers thought that they had no other duty in the matter. While the same together with an answer was supplied by the informant, the police did not make any effort on their part to confirm and arrive at the answer by means of a conscientious process of their own bringing credit to the force.

18. Further, it does not give us the impression that the learned Sessions Judge perused the case diary of the police which he was entitled to do under the law. We have thought it our duty to go through the same and found to our surprise that Rule 188 of the Assam Police Manual, Part V (1968 Edition) does not seem to be complied with. That Rule requires as follows:—

"..... The forms of case diary are issued in bound books of 100 forms each. Carbon paper is separately supplied and a tin slab to write on.

Each form has a separate printed number running consecutively through the book so that no two forms will bear a same number. Investigating officers will write their case diaries on these forms, placing one or two sheets of carbon paper underneath the original according to the number of copies required. On the conclusion of an investigation the sheets of the original diary will be removed from the book and filed together The present case diary of such a serious case has no pagination and is not at all maintained in conformity with Rule 188. While going through the same, we find

the seizure of the seizure list Ext. 2 being noted as Item VI at 3 P.M. on 19-4-69, on the reverse of a certain page in carbon, although the reverse of the succeeding page contains endorsement No. V at 5 P.M. the same day. It is further intriguing that after five pages there is another endorsement VI at 7 P.M. of the identical day. These various stages of the investigation, which have to be recorded faithfully, do not give the impression of being correctly entered and one may naturally feel suspicious particularly because the seizure list Ext. 2 which has not been even exhibited in this case has been entered in the case diary in such dubious manner.

19. The case diary is a very important document which has to be maintained in a faithfully regular manner. The contents of the diary cannot be treated as evidence in a trial but the Court is entitled to peruse the same under Section 172(2) of the Criminal Procedure Code to aid it in the trial. This duty is incumbent upon a Public Prosecutor and almost always so upon a Court trying a serious offence of this nature. Where prosecution and defence are both inadequate, it will enable the Court to rise up to the occasion and discover for itself the material facts and circumstances from the case diary, which can be brought to light through the witnesses examined in the case to arrive at the truth in the interest of justice.

20. We feel distressed to see these defects in the investigation and hope the authorities will look into the matter and take appropriate steps to remedy them.

21. In the result, the Reference of the learned Sessions Judge is rejected and the appeal is allowed. The conviction under Sections 302 and 457, Indian Penal Code, and the sentence of death are set aside. The accused shall be set at liberty forthwith.

D. M. SEN, J.: 22. I agree.

Appeal allowed and reference rejected.

AIR 1970 ASSAM & NAGALAND 142
(V 57 C 35)

P. K. GOSWAMI, C. J. AND D. M. SEN, J.

Mano Ranjan Paul, Petitioner v. State of Assam and others, Respondents.

Civil Rule No. 14 of 1970, D/- 7-5-1970.

Assam Settlement of Forest Coupes and Mahals by Tender System Rules (1967). Rules 6 and 10 — Settling authority settling mahal in favour of A, not on his tender, but on price mentioned in B's tender — Acceptance of A's tender (after allowing him to raise his price stated in B's tender) is not in conformity with the Rules — Order of settlement set aside

GN/HN/D336/70/VBB/M

in writ petition — (Constitution of India, Art. 226). AIR 1954 SC 592, Ref.

(Para 7)
Cases Referred: Chronological Paras
(1954) AIR 1954 SC 592 (V 41) —
1955 SCR 303, K. N. Guruswamy

v. State of Mysore

J. P. Bhattacharjee and P. C. Katakya,
for Petitioner; D. Pathak and G. R. Kalita,
for Respondents.

GOSWAMI, C. J.: The dispute in this writ application centres round the settlement of Khoraghat Sand cum Gravel Mahal No. 1 of Dhubri division for the years 1969-71. A sale notice dated 27th August, 1969 issued by the Divisional Forest Officer, Goalpara West Division under the provisions of the Assam Settlement of Forest Coupes and Mahals by Tender System Rules, 1967, inviting sealed tenders for settlement of the said Mahal was published in the Assam Gazette on 17th September, 1969. The petitioner along with two others submitted their tenders. The petitioner was the highest bidder offering outright price of Rs. 87,227/- for the Mahal and Respondent No. 5 offered a sum of Rs. 71,750/-. As the Mahal was for more than Rs. 50,000/-, the Governor was the final settling authority and by order dated 13th November, 1969, the said Mahal was settled with the respondent No. 5 at the highest bid offered by the petitioner, namely, Rs. 87,227/- for the entire period. The petitioner made a review application to the Governor against the settlement order and the same was rejected on 5th January, 1970. Hence this writ application under Article 226 of the Constitution, challenging the settlement order in favour of the respondent No. 5.

2. Settlement of forest coupes and mahals by tender system is now governed by Rules framed under Sections 33, 34 and 72(e) of the Assam Forest Regulation, VII of 1891, on 25th September, 1967 and published in the Assam Gazette on 8th November, 1967. These Rules are called "the Assam Settlement of Forest Coupes and Mahals by Tender System Rules, 1967", hereinafter referred to as "the Rules". We should now notice some material provisions of these Rules. Rule 3 provides for a notice calling for tender for settlement of mahal and it shall be published in the official gazette not less than 15 days before the last date fixed for submission of tender. Rule 4 provides for particulars to be included in the said notice. Rule 5 relates to earnest money. Rule 6, which is important, may be set out:

"6. Tender and its enclosures:—

(1) There shall be a separate tender for each coupe or mahal with the requisite court-fee affixed to it.

(2) Each tender shall be in the tender form prescribed in Schedule A below and

the tenderer shall state in the tender his full name and address and his father's name (or husband's name if the tenderer is a woman) and full address, with post office and telegraph office.

(3) The tenderer shall also state in the tender the maximum outright price or the monopoly fee per rupee of royalty, as the case may be, which is (sic) prepared to pay for each coupe, or mahal, and shall also make a declaration as follows:—

"I agree that I will not withdraw the tender offered by me during the time that will be required for intimation of acceptance of the tender for coupe/mahal being given to me; nor will I withdraw it afterwards, should my tender be accepted. If I withdraw the tender, then I am liable to pay the whole sum of the tender or such amount on account of deficiency as in the opinion of the Conservator of Forests, Assam may be considered necessary to make good the whole of the loss and damages that may be suffered by Government in consequence thereof, and I shall pay the same, and if I fail to pay it, then it will be recovered from me as arrear of land revenue."

(4) The tender shall be accompanied with the following documents, namely—

(i) A copy of the treasury challan or a bank draft evidencing deposit of the prescribed earnest money.

(ii) An up-to-date income tax clearance certificate.

(iii) & (iv) are not material for our purpose.

(v) Documents evidencing financial soundness of the tenderer;

Provided that such documentary evidence shall not be necessary in case of a tenderer who has been registered under any rule prescribed by the State Government for registration of forest contractors, but in such case he shall furnish the particulars of his registration."

Rule 7: "Any other conditions not inconsistent with the rules:— The Authority calling for tender may call for any other particulars from the intending tenderer with a view to identifying the tenderer or to eliciting information about his financial soundness."

Rule 8: "Procedure for dealing with the tenders:— (1) After the scrutiny of the tenders, the orders for acceptance of any tender shall be passed by the respective competent authorities whose competency shall be according to the delegation of financial powers under the Assam Delegation of Financial Powers Rules, 1960.

(2) Where, according to the limit of financial power under the Delegation of Financial Powers Rules, 1960, the officer receiving the tenders is not competent to pass order of acceptance of tender, he shall forward the tender papers with his

comments to his next higher authority for necessary action."

Rule 9: "Appeal and review:— (1) An appeal shall lie, within 15 days from the date of issue of the order or acceptance of tender as follows:—

(a) against the order passed by the Divisional Forest Officer,— to the Conservator whose order in appeal shall be final.

(b) against the order passed by the Conservator,— to the Governor of Assam, whose order in appeal shall be final.

(2) A petition shall lie to the Governor for review of his original order within 15 days from the date of issue of such order but no petition for review of appellate order of Governor shall lie.

(3) x x x x".

Rule 10: "No obligation to accept highest or any tender:— There shall be no obligation on the part of the competent authority to accept the highest or any tender or to assign any reason for rejecting any tender."

The above are the material provisions which need consideration in deciding the present controversy between the parties.

3. It is clear that settlement is to be regulated by the above Rules which it is not disputed are statutory. Under Rule 6(4), it is necessary that the tender shall be accompanied with certain documents mentioned therein. Neither the petitioner nor the respondent No. 5 submitted any documents evidencing their financial soundness as required under Rule 6(4) (v). The petitioner, on the other hand, submitted an affidavit testifying to his financial condition before the Minister, Revenue and Forest, on 13th November 1969, on which date the impugned order of settlement was made in favour of the respondent No. 5. It appears that neither in the order granting the settlement nor in the order rejecting the review application any question was raised about the defects in the tender on account of non-compliance with Rule 6(4) (v). At any rate, both the petitioner and the respondent No. 5 are on the same boat on this score. It is, no doubt, true that the respondent No. 5 was the sitting lessee, but he has not submitted any certificate of registration as forest contractor as required under the proviso to Rule 6(4) (v).

4. The main question, which is canvassed before us, is whether the Governor is entitled to settle the mahal in favour of respondent No. 5, not on his tender, but accepting the price mentioned in the tender of the petitioner which is the highest price offered for the mahal.

5. When Rules are framed for settlement of these mahals, it is necessary that the settling authority acts in conformity with those Rules and the procedure laid down therein. The scheme and the in-

tention disclosed in the elaborate rules noticed above provide for a wide publicity in the official gazette giving sufficient time for submission of tenders which should be in the prescribed form. The tenders again cannot be entertained beyond the hour fixed for the purpose, have to be opened then and there in the presence of the public unless for special reasons the officer notifies otherwise in the office notice board. There is a gradation of officers for various tenders according to the price tendered. The settling authorities are not bound to accept the highest tender, nor any tender; nor to assign any reason for rejecting any tender. There is a right of one appeal only against the order passed by the Divisional Forest Officer to the Conservator and against that passed by the Conservator to the Governor. A petition for review of the Governor's original order is also provided for, but no petition for review of the appellate order of the Governor shall lie. The tenders as well as the appeal and review application have got to be affixed with requisite court-fee. The tenders, therefore, under the Rules, have got to contain the necessary material informations accompanied with documents which the settling authority is required to scrutinise to find out the most suitable tenderer. It is clear that whichever is the settling authority, it is required to act in accordance with the procedure laid down under these Rules. What will be the legal effect in case any defect is noticed, while acting within these Rules, need not be considered in this case. Whatever that may be, one thing is absolutely clear that the settling authority has to find out the most suitable tenderer from all points of view in accordance with its honest and best judgment. It is in a sense unfettered in this domain and in absence of mala fides, this Court will not interfere with its discretion. That, however, should make the position of the settling authority more responsible and difficult as it must not do anything which is not contemplated under these Rules.

6. The settling authority under Rule 10, no doubt, (a) is not bound to accept the highest tender; (b) may or may not accept any tender. There is, however, no tertium quid a third course open to it. To borrow an ancient adage, the settling authority wants to draw from A's well with B's rope. The settling authority cannot substitute a new tender for the tender which is before it. In other words, the Rules do not countenance direct or indirect negotiation or dialogue between the settling authority and any of the tenderers on any account after the submission of the tender. The tender has to be accepted as it is. The tender

must contain a definite price which has to be either accepted or rejected—about which he has to give a declaration under Rule 6(3). Otherwise, it would defeat the very object and purpose underlying these Rules and a settlement in disregard of this salutary principle envisaged in the Rules is invalid in the eye of law.

7. It is manifest in this case that the settling authority, while granting the mahal to the respondent No. 5, acted on a non-existent tender which is accepted beyond the prescribed time. This is not permissible under the Rules. The object of inviting sealed tenders is to keep the price offered by various tenders secret and the method adopted by the settling authority in allowing one of the tenderers to raise the price in the manner done would run counter to the procedure laid down in these Rules besides giving rise to various speculations, rightly or wrongly, about the motive of the settling authority. The scheme of these Rules providing for secrecy, as noticed above, and other requirements to be complied with, both by the tenderers as well as by the settling authorities, clearly go to show that acceptance of a tender after allowing the tenderer, to raise his price is not contemplated under these Rules. In this connection, we feel tempted to quote the following passage from a decision of the Supreme Court in AIR 1954 SC 592, *Guruswamy v. State of Mysore* wherein the unanimous Court, dealing with sale of liquor licences, observed as follows:

"The procedure of tender was not open here because there was no notification and the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to compete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State But deeper considerations are also at stake, namely, the elimination of favouritism and nepotism and corruption; not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavoured to avoid." While quoting the above, we must not be understood to mean that we have any suspicion in this case in our mind of any malpractice on the part of the settling authority.

8. In the result, the petition is allowed. The order of settlement in favour of the respondent No. 5 is set aside. Rule Nisi is made absolute. We make no order as to costs.

D. M. SEN. J.: 9. I agree.

Petition allowed.

called the employee's contribution. The liability to pay both the contributions in respect of every employee, whether employed by him directly or through an immediate employer, is, however, cast on the principal employer by Section 40 and the principal employer is given the right to recover from the concerned employee the employee's contribution, by deduction from his wages. Sections 46 to 73 deal with the various benefits available under the Act to insured persons and with other connected matters.

18. The provisions relating to E. I. Court are contained in Chapter VI which deals with "Adjudication of Disputes and Claims" and comprises Sections 74 to 83. Section 74 enjoins the State Government to constitute an E. I. Court for each local area and to appoint to it as judges, such number of persons (possessing the prescribed qualifications) as it may think fit. Sub-sections (1) and (2) of Section 75 enumerate the various matters to be decided by the E. I. Court. They consist of claims and questions under the Act regarding which disputes may arise between employers, employees and the Corporation and are to be decided in accordance with the provisions of the Act. Section 75(3) bars the jurisdiction of Civil Courts to decide or deal with any question or dispute covered by S. 75(1) and 75(2) or to adjudicate on any liability which by or under the Act is to be decided by the E. I. Court. Section 76 deals with the territorial jurisdiction of an E. I. Court and the transfer of proceedings from one E. I. Court to another. Section 77 provides that proceedings before an E. I. Court shall be commenced by application and every such application shall be in such form, shall contain such particulars and shall be accompanied by such fee, if any, as may be prescribed by rules made by the State Government in consultation with the Corporation.

19. Section 78 which deals with the powers of the E. I. Court reads:

"ui. (1) The Employees' Insurance Court shall have all the powers of a Civil Court for the purposes of summoning and enforcing the attendance of witnesses compelling the discovery and production of documents and material objects, administering oath and recording evidence and such Court shall be deemed to be a Civil Court within the meaning of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898.

(2) The Employees' Insurance Court shall follow such procedure as may be prescribed by rules made by the State Government.

(3) All costs incidental to any proceeding before an Employees' Insurance Court shall, subject to such rules as may be made in this behalf by the State Government, be in the discretion of the Court.

(4) An order of the Employees' Insurance Court shall be enforceable as if it were a decree passed in a suit by a Civil Court."

20. Section 79 permits any application, appearance or act required to be made or done by any person (other than a witness) to be made or done by a legal practitioner or by an officer of a registered trade union authorised in writing by such person or with the permission of the E. I. Court, by any other person so authorised.

21. Section 80 provides that the E. I. Court shall not direct the payment of any benefit to a person unless he has made a claim (to the Corporation) for such benefit within twelve months after the claim became due and in accordance with the regulations made (by the Corporation) in that behalf. The proviso to the section empowers the Court to relax this condition in appropriate cases.

22. Section 81 provides that an E. I. Court may submit any question of law for the decision of the High Court and if it does so, it shall decide the question pending before it in accordance with such decision.

23. Section 82 lays down that an appeal shall lie to the High Court from an order of the E. I. Court only if it involves a substantial question of law and not otherwise; the period of limitation for such an appeal is sixty days and the provisions of Sections 5 and 12 of the Indian Limitation Act, 1908, apply to such appeals.

24. Section 83 empowers the E. I. Court to withhold payment of any sum directed to be paid by it where the Corporation has presented an appeal to the High Court against its order.

25. It will be seen from these provisions that the E. I. Court is a creature of the Act, brought into existence for a specific purpose and has to discharge only such functions as are assigned to it under the Act. In deciding matters which come before it for decision, it has to apply the provisions of the Act and has no power nor can have any occasion, to administer the ordinary substantive law of the land. In conducting the proceedings before it, it has to follow such procedure as may be prescribed by rules framed by the State Government and not the procedure followed by the ordinary Civil Courts. If the rules happen to prescribe the same or similar procedure as that of the ordinary Civil Courts, that would not change the legal position. The E. I. Court will then be following that procedure because of the rules and not because it is a 'Court' properly so called. The procedure may be altered by the State Government at any time by altering or amending the rules or by replacing

them by fresh rules. The E. I. Court exercises the powers of a Civil Court for the purposes of summoning and enforcing attendance of witnesses etc. because those limited powers are specially conferred upon it by Section 78 of the Act and it is to be 'deemed to be' a Civil Court for certain specified purposes because the Act so provides. It has no power to execute its own orders. An order passed by it is enforceable 'as if it were' a decree passed in a suit by a Civil Court. It is thus clear that the E. I. Court does not satisfy the tests laid down by the Supreme Court in Brijnandan Sinha's case, AIR 1956 SC 66. It is not, therefore, a 'Court' in the strict sense or in the accepted connotation of that term in legal parlance. It follows that it is not a 'Court' for the purposes of the Limitation Act of 1963, and applications made to it are not covered by Article 137 of that Act.

26. Admittedly, there was no other provision of law prescribing any period of limitation for applications to the E. I. Court at the time when the applications with which we are concerned in the present case were filed and no question of condonation of delay can therefore, arise.

27. Mr. Govilkar for the appellants, submits that at any rate there were latches on the part of the respondent Corporation and that should be sufficient to refuse relief to it. The argument would have had some force if the relief sought by the respondent Corporation had been a discretionary relief; but that is not so. There is no dispute that if a proper application is filed before it and the claim is legally established, the Employees' Insurance Court has no discretion to refuse relief on the ground of latches.

28. In the result, both the appeals fail and are dismissed with costs.

Appeals dismissed.

AIR 1970 BOMBAY 418 (V 57 C 72)

CHANDRACHUD AND APTE, JJ.

Sayaji Mills Ltd., Appellants v. P. A. Bhaskar, Respondent.

A.F.O.D. No. 406 of 1964, D/- 25-8-1969, against decision of Judge, City Civil Court, Bombay in Short Cause Suit No. 2083 of 1958.

Employees' Provident Funds Act (1952), Section 16(1) — Suit claiming exemption under — Burden of proof — Factory whether entitled to exemption depends on facts of each case — Setting up of new factory — What constitutes — Allegations of material facts in plaint without proof not sufficient to claim exemption —

GN/GN/D271/70/KSB/T

(Evidence Act (1872), Ss. 101 to 104) — (Civil P. C. (1908), O. 6, R. 2).

Section 16(1) creates an exemption in favour of infant factories and not in favour of persons who run those factories. Whether a particular establishment is an infant factory for the purpose of claiming exemption under S. 16 (1) of the Act, must primarily depend upon the facts and circumstances of each case. The mere circumstance that the ownership has changed hands, cannot justify the conclusion that the Act will cease to apply to the particular establishment if prior to the change of hands, the Act was applicable to it. (Paras 15, 16)

H, a Cotton Mill, manufacturing textile goods since 1931 was ordered to be wound up on 17-12-1954 on creditor's petition. Prior to this the mill had discharged all its workers and the manufacturing operations had come to an end. The plaintiff, a limited company purchased on 22-7-55 from the official liquidator the mill with all the lands, buildings and stock in trade but without the goodwill of the business or the assets of the mill as a going concern. The plaintiff Company commenced the manufacturing operations on 12-11-1955. The plaintiff filed a suit for declaration against the Provident Fund Commissioner claiming exemption under Section 16(1) of the Act on the ground that the mill was renovated and set up on 12-11-1955 and the Act would not apply to its establishment from that date for a period of three years.

Held that the provisions of the Act and the Scheme were applicable to the mill since the plaintiff had not established by evidence that a new factory was established on 12-11-1955. The burden of establishing that the exemption contained in Section 16(1) applied to the particular establishment was on the plaintiffs. It was not enough for them to say in the plaint, that they had brought in fresh capital or had renovated the old machinery or had purchased new machinery. Pleadings are not evidence, and therefore, the Court cannot assume the existence of the multifarious facts pleaded in the plaint. Misc. Appln. No. 329 of 1956, D/- 5-11-1956 (Bom), Foll; AIR 1965 Mad 598, Dissented from; AIR 1966 Mad 416 (Overruling AIR 1965 Mad 508), Relied on. Case law reviewed. (Paras 14, 28)

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D/- 5-11-1956 (Bom), Chhaganlal
Textile Mills Pvt. Ltd. v. Re-
gional Provident Fund Commr. 19
R. Jethmalani, for Appellants; R. J.
Joshi i/b Little and Co., Attorneys, for
Respondent.

CHANDRACHUD, J.:— This appeal arises out of a suit for a declaration that the provisions of the Employees' Provident Funds Act, 1952 (Act XIX of 1952), hereinafter called "the Act", cannot be enforced against the plaintiffs in regard to the factory established by them in the name of "Sayaji Mills No. 2", at Ferguson Road, Bombay, until the expiry of three years from the 12th November, 1955. The plaintiffs also asked for a declaration that they are not bound to make any contribution to the Employees' Provident Fund either under the Act or under the Employees' Provident Fund Scheme, 1952. The facts giving rise to the suit are these:

2. Since about 1931, a Cotton Mill in Bombay run by Hirji Mills Ltd. used to manufacture textile goods. On a petition filed by their creditors, Hirji Mills Ltd. were ordered to be wound up under an order of this Court, dated 17th December, 1954. On 22nd July, 1955, the plaintiffs, Shri Sayaji Mills Ltd., a public limited company registered under the Indian Companies Act, purchased the assets of the Hirji Mills Ltd. for Rs. 42,80,000/-,

from the Official Liquidator. The conveyance in favour of the plaintiffs was executed on the 5th of December, 1955. The break-up of the consideration shows that, Rs. 5,00,000/- was the price of the land, Rs. 10,62,000/-, the price of the structures and the balance viz., Rs. 27,18,000/-, the price of the plant, machinery and stock-in-trade.

3. The plaintiffs neither acquired the goodwill of the business nor did they purchase the assets of the Hirji Mills Ltd., as a going concern. The manufacturing operations carried on by the Hirji Mills Ltd., had come to an end some time prior to 17th December, 1954 when the winding up order was passed. The Mills had discharged their workers prior to the winding up order.

4. After their purchase, the plaintiffs commenced the manufacturing operations on the 12th November, 1955. On the 28th February, 1956 the Regional Provident Fund Commissioner for this State, who is the defendant to the suit, made certain enquiries of the plaintiffs and called for the relevant information under the Act. The defendant then asked the plaintiffs to make the employers' contribution to the Provident Fund under the Act, but the plaintiffs contended that they were an infant factory within the meaning of Section 16 of the Act and were, therefore, not liable to make contributions to the Provident Fund for a period of three years from the 12th November, 1955 when they commenced manufacturing operations. This contention was rejected by the defendant, who by a letter of 12th December, 1956 called upon the plaintiffs to remit to him contributions payable by them under the Scheme framed under the Act.

5. The plaintiffs thereafter filed a Writ Petition in this Court under Article 226 of the Constitution challenging the right of the defendant to enforce the provisions of the Act against them for a period of three years from the 12th November 1955. That petition was withdrawn and thereafter the plaintiffs brought the present suit.

6. The learned Principal Judge of the City Civil Court, Bombay, who tried the suit, held by his judgment dated 12th December 1963 that the plaintiffs had not established a new factory on the 12th November 1955 as alleged by them and that the provisions of the Act and the Scheme applied to them from the very date that they commenced manufacturing operations, viz., the 12th November, 1955. The correctness of this judgment is challenged by the plaintiffs in this appeal.

7. For a proper appreciation of the question which arises for our decision, it would be necessary to notice some of the provisions of the Act. Section 1(3) of the Act, as it stood at the material time, pro-

vided that subject to the provisions contained in Section 16, the Act would apply (a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which fifty or more persons are employed, and (b) to any other establishment employing fifty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf. Section 2(g) defines a "factory" to mean any premises including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power. Section 2(h) defines "Fund" to mean Provident Fund established under a Scheme. Section 2(i) defines "Scheme" to mean a "Scheme" framed under the Act. Section 5 empowers the Central Government to frame a Scheme to be called "the Employees' Provident Fund Scheme" for the establishment of provident funds under the Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply. This section further provides that there shall be established as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of the Act and the Scheme. Under Section 6, the employer's contribution to the Fund has to be six and a quarter per cent of the basic wages and the dearness allowance for the time being payable to each of the employees. It is in regard to this contribution that the present dispute has arisen.

8. Section 16 of the Act as it stood at the material time read as follows together with the marginal note:

"Act not to apply to factories belonging to Government or local authority and also to infant factories.

"16 (1) The Act shall not apply to

(a) any factory belonging to the Government or a local authority,

(b) any other factory, established whether before or after the commencement of this Act, unless three years have elapsed from its establishment."

9. Sub-section (1) was substituted by Section 3 of the Employees' Provident Funds (Amendment) Act, 1958 (Act XXII of 1958) and thereafter it reads thus:

"This Act shall not apply to any establishment until the expiry of three years from the date on which the establishment is, or has been set up.

Explanation. For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location".

10. Section 16(1) was further amended, by Section 5 of the Employees' Provident Funds (Amendment) Act, 1960 (Act 46

of 1960). Under Clause (a) of the amended sub-section, the Act does not apply to an establishment registered under the Co-operative Societies Act. The Act does not apply to any registered Co-operative Societies employing less than fifty persons and working without the aid of power. Under clause (b) of the amended sub-section the Act does not apply to any other establishment employing 50 or more persons or twenty or more but less than fifty until the expiry of three years in the case of the former and five years in the case of the latter from the date on which the establishment is or has been set up. The explanation to the sub-section is retained.

11. It shall have been noticed that though Section 16(1) has undergone these amendments, the basis of exemption has remained substantially unaltered in so far as the factories like the one before us are concerned.

12. The question which we have to consider is whether by reason of the plaintiffs having purchased the assets of the Hirji Mills on 22nd July 1955 and by reason of their having commenced manufacturing operations under their own auspices on the 12th of November 1955, the Act will not apply to them until the expiry of 3 years from the date on which the factory was established, i.e., from the 12th of November 1955. It is common ground that the relevant date for the purposes of Section 16(1) is not the date on which the plaintiffs purchased the factory, nor the date on which the conveyance was executed in their favour, but the date on which they commenced manufacturing operations.

13. It is urged by Mr. Jethmalani, who appears on behalf of the plaintiffs, that between the 17th of December 1954, when the High Court passed the winding up order against the Hirji Mills Ltd., and the 12th of November, 1955 when the plaintiffs commenced manufacturing operations, a factory, as defined by Sec. 2(g) was not in existence, and therefore, a new factory must be held to have been established on 12th November 1955. According to the learned counsel, Hirji Mills Ltd., which had to suffer an order of liquidation, had stopped manufacturing operations for an indefinite period and the possibility of resumption of those operations within a foreseeable period could not have been envisaged with reasonable certainty. The Mills had discharged all of their workers, and therefore, not only was no manufacturing process carried on, but the workers with whose co-operation alone such a process could have been resumed, were also discharged, and therefore, the identity of the establishment was completely destroyed even prior to the order of winding

up. It is finally said that the plaintiffs renovated the mills, brought in new capital, re-employed only 65 to 70 per cent of the old workers and that too on fresh terms and conditions of service, and therefore, the factory established by the plaintiffs on the 12th November, 1955 is an infant factory which would attract the application of Section 16(1).

14. We are unable to accept this argument. In the first place, it is necessary to clarify that no evidence was led by the plaintiffs to show that they had in fact renovated the old Mills or that they had brought in new capital. Mr. Jethmalani says that the averments made by the plaintiffs in paragraph 3 of the plaint, that they had put in their own capital, that they had brought new machinery, that they had renovated the old machinery, that they had employed new staff and workmen, entered into fresh commitments for supply of raw materials, made new arrangements for the sale of finished goods and commenced production of goods of an entirely different type, were not traversed by the defendant in his written statement. Now, by paragraph 7 of his written statement the defendant denied that the factory set up by the plaintiffs on 12th November, 1955 was a new factory within the meaning of the Act. The defendant also denied that on the closure of the Hirji Mills Ltd., the provisions of the Act had ceased to apply to the factory run by them, because according to the defendant, the Act would apply to the factory irrespective of the closure of the Mills. The burden of establishing that the exemption contained in Section 16(1) applied to the particular establishment was on the plaintiffs. It was not enough for them to say in the plaint that they had brought in fresh capital or had renovated the old machinery or had purchased new machinery. Pleadings are not evidence, and therefore, we cannot assume the existence of the multifarious facts on which the plaintiffs' counsel relies.

15. The importance of considerations such as those referred to by the plaintiffs in paragraph 3 of the plaint is that whether the exemption under Section 16(1) of the Act can apply, i.e., whether a particular establishment is an infant factory, must primarily depend upon the facts and circumstances of each case. The mere circumstance that the ownership has changed hands, cannot justify the conclusion that the Act will cease to apply to the particular establishment if prior to the change of hands, the Act was applicable to it.

16. Section 1(3) (a) makes it clear that subject to the provisions contained in Section 16, the Act applies to every establishment which is a factory engaged in any industry specified in Schedule I and in

which fifty or more persons are employed. It was conceded by Mr. Jethmalani before us that the requirements of Section 1(3) (a) are satisfied in this case, that is, that the establishment run by the plaintiffs is a factory, that the factory is engaged in an industry specified in Schedule I and that fifty or more persons are employed in the factory. Section 16(1) creates an exemption in favour of infant factories, not in favour of new or infant owners. In terms, the exemption is created by the statute in favour of factories and not in favour of persons who run those factories. The circumstance, therefore, that the Hirji Mills Ltd., changed hands cannot give to the plaintiffs the benefit of the exemption contained in Section 16(1).

17. The fact that Hirji Mills went into liquidation does not mean that the factory had ceased to function for all time or that by reason of the winding up order the prospect of the resumption of the manufacturing process by the factory could not be envisaged. It is well known that despite a winding up order the Liquidator can be empowered to run the business and even after the winding up order is passed, instances are not lacking, particularly in regard to textile Mills, where the manufacturing process is permitted to be resumed in pursuance of a Scheme framed by the Court in consultation with the creditors of the Company. In the first place, therefore, the plaintiffs have failed to establish that they either brought fresh capital or new machinery or that they renovated the machinery so as to justify the conclusion that the identity of the old establishment was destroyed. Secondly, the old establishment cannot be deemed to have been closed for an indefinite period.

18. There are a series of decisions of various High Courts on the point which arises before us. The decisions are so uniform that one can risk the proposition that it is settled law that the exemption under Section 16(1) cannot apply merely be reason of a change in the ownership of a factory.

19. The starting point of almost all of these decisions is an unreported decision of Justice Tendolkar of this Court, in Misc. Appln. No. 389 of 1956, D/-5-11-1956 (Bom). There, a Company called the Chalisgaon Shri Laxminarayan Mills Co. Ltd. carried on business of manufacturing textiles in their mills known as the Chalisgaon Shri Laxminarayan Mills. The Company was ordered to be wound up at the instance of the creditors in August 1951. In March, 1952 the Liquidator gave a lease of the Mills to Messrs. Kotak and Co. for a period of three years from 1952 till 1955. On the termination of the lease, the lessee discharged all the employees and paid them

their dues fully, including the provident fund standing to their credit. On the 28th February, 1955 the Liquidator granted a lease to Babulal Shrivallabh for a period of one year from the 1st of March, 1955 to 29th February, 1956. The lease, inter alia, provided that the lessee shall not be liable in respect of any liabilities of the Mills incurred prior to the 1st of March, 1955 and that they shall work the Mills as a new concern and not as successors of either the lessors or of Messrs Kotak and Co. The new lessees, viz Messrs Babulal Shrivallabh, entered into possession on 13th of March, 1955 and announced by a notice that workers would be recruited on a new and purely temporary basis and that no worker will be entitled to any benefit that may have accrued to him for his previous service in the Mills. The lessees applied for and obtained a licence under the *Factories Act for working the Mills*. Pending their contention before the Regional Provident Fund Commissioner that the Act will not apply to them for a period of three years after the date on which they started the manufacturing process, the Liquidator sold the Mills to them on the 4th of September, 1956. Thereafter they floated a private Limited Company and transferred the Mills to that Company. The correspondence with the Regional Provident Fund Commissioner was continued by the Company and when the Regional Provident Fund Commissioner finally intimated to it that it would not be entitled to the exemption under Section 16(1), it filed a Writ Petition which was heard by Tendolkar, J.

20. The learned Judge rejected the contention of the Company that the Mills ceased to be established when the liquidation order was passed, that they ceased to be established for a second time when the lease of Kotak and Co. expired or that the new establishment was set up when Messrs. Babulal Shrivallabh obtained a fresh lease. After referring to the provision contained in Section 1(3) of the Act, the learned Judge says:

"The important point to notice about this provision is that the Act is made applicable to factories and not to the owners thereof; or, in other words, it applies to factories irrespective of who the owners from time to time may be".
The learned Judge proceeds:

"The question is whether the order of liquidation and the consequent temporary discontinuance of business until a lease was granted to Kotak and Company has the consequence of making the factory which was established cease to be established. In my opinion the answer to this question must be in the negative. A temporary cessation of the activities of an established factory cannot lead to the result that the factory ceases to be established

for the purposes of the Employees' Provident Funds Act, for if it did, the class of employers who spare no ingenuity in seeking to deprive the employees of all the benefits conferred upon them by statute would have convenient handle whereby the activities of an established factory have to be discontinued for a few months in order to deprive the employees of the benefits under the Employees' Provident Funds Act. I take it that the establishment of a factory involves that the factory has gone into production and no more but once it goes into production, a temporary cessation of its activities, for whatever reasons that cessation takes place, cannot, in my opinion, take the factory out of the category of an established factory for the purposes of the Employees' Provident Funds Act." Towards the conclusion of his judgment, the learned Judge says that:

"..... even a complete change in the whole body of employees cannot make a factory which is established, cease to be established. In any event, the Employees' Provident Funds Act is a beneficial legislation for the benefit of the employees and every construction of its provisions which would defeat the object of the legislation and lead to an evasion, must be rejected, unless the clear language of the Act leave no option to the Court but to accept such an interpretation."

We are in respectful agreement with this view.

21. This decision has been uniformly followed by various High Courts and we must briefly notice those decisions. In *M/s. Bharat Board Mills Ltd. v. Regional Provident Fund Commr.*, AIR 1957 Cal 702 the learned Single Judge observed:

"The date of establishment of a factory is the date when the factory starts its manufacturing process. The fact that a new company or concern subsequently takes over or acquires the factory does not shift the date of the establishment of the factory to the date of its taking over or acquisition; nor does the fact that the factory had ceased to produce goods for a certain time and resumed production after certain brief intervals result in extinction of the old factory and establishment of a new factory".

In this case Messrs. Bharat Board Mills Ltd., had purchased machinery from another Company, viz. India Paper and Board Mills Company under an agreement dated 12th October 1950. Under a sale dated the 13th October, 1950 Messrs. Bharat Board Mills Ltd. also purchased a structure along with some lands. They obtained a certificate of incorporation and commenced business on 31st July, 1950. They had not purchased the goodwill of the India Paper and Board Mills Company. They did not take over the liabilities of that Company and what was more, the

awards of the Industrial Tribunal which decided certain disputes between the factory and its employees and between the previous and present owners thereof, treated the purchasers as a new concern. In spite of these facts, the contention that the purchasers were entitled to the benefit of exemption contained in Section 16(1) of the Act was rejected by the learned Judge.

22. The same view has been taken in *Vegetable Products Ltd. v. Regional Provident Fund Commr.* W. B., AIR 1959 Cal 783, which also relies on the judgment of Tendolkar, J. and in *Jamnadas Agarwalla v. Regional Provident Fund Commr.* W. B., AIR 1963 Cal 513, which follows the earlier decision in the *Bharat Board Mills'* case. In the *Vegetable Products'* case, the business of manufacturing vegetable oils was carried on by a company prior to December, 1951. In February, 1952 the Company was ordered to be wound up. In December, 1953, the *Official Liquidator* sold the factory. The contention of the purchasers that they had established a new factory after their purchase when they started manufacturing operations was rejected by the learned Judge even though there was a time-lag of nearly two years between the cessation of its business by the old company and the commencement of their business by the purchasers.

23. Justice Tendolkar's Judgment has been followed consistently by the High Court of Punjab also. In *Robindra Textile Mills. v. Secy. Ministry of Labour, Govt. of India*, New Delhi, AIR 1958 Punj 55 Bishan Narain J. says:

"Neither the Act nor the scheme provides tests for determining when a factory can be said to have been established and it is therefore, necessary to examine the provisions of the Act and the Scheme to find out the intention of the legislation". The learned Judge refers to the definition of the "factory" in Section 2(g) and concludes that the change of ownership cannot start a fresh date of the establishment of a factory, nor even the fact that subsequently, the original machinery was re-conditioned. According to the learned Judge, the emphasis in the Scheme is on the factory which carries on manufacturing process and on the employees who are the beneficiaries under the Act, and the exemption cannot apply merely because the factory has changed hands. The same view has been taken by Mr. Justice Grover, as His Lordship then was, in *Hindustan Electric Co. Ltd. v. Regional Provident Fund Commr.*, AIR 1959 Punj 27. In that case the Government of India sold a factory belonging to it on the 17th February, 1955. The Regional Provident Fund Commissioner called upon the purchasers to contribute to the Provident Fund but they contended that they established the factory after their purchase in

October, 1955 and, therefore, they would be entitled to the protection available to the 'infant factories' under Section 16(1) of the Act. This contention was rejected on the ground that the date of the establishment of a factory is the date when the factory starts its manufacturing process and the fact that a new company or concern subsequently takes over acquires the factory, does not shift the date of the establishment of the factory to the date of its being taken over. The period of three years under Section 16(1) was held to begin from the date of the original establishment of the factory and not from the date when the purchasers started manufacturing operations.

24. This judgment went in appeal in *Regional Provident Fund Commissioner, Punjab v. Lakshmi Ratten Engineering Works Ltd.*, AIR 1962 Punj 507 where a Division Bench, consisting of Dulat J. and Dua, J. (as His Lordship then was) affirmed the view of Grover, J. in regard to the interpretation of Section 16(1) of the Act. The learned Judges held that what was exempted by Section 16 was only the factory which was not established for more than three years. If the factory was being used for manufacturing purposes long before the new purchasers acquired it, it could not be said that the factory was not established for more than three years.

25. The only decision which has struck a discordant note is that of Anantnarayanan, J. in *Vittaldas Jagannathdas v. Regional Provident Fund Commr.*, AIR 1965 Mad 508 in which it was held:—

"that an establishment means an 'Organised body of men maintained for a purpose' Where, therefore, on the entire complex of facts of a given case, it can be concluded that the legal entity 'the establishment' had come totally to an end, and was succeeded by a fresh legal entity, then that fresh entity is the entity to which the Act applies as a first impact and, if that entity is entitled to infancy protection, that protection will have to be granted as a matter of course, even if it happens by coincidence to have employed a large part of the personnel of the previous establishment".

That was a case of a lease of a cinema house and the learned Judge held that on the termination of the old lease of the talkies a new establishment must be deemed to have come into existence so as to attract the exemption of Section 16(1). With respect we are unable to agree with this decision. In the case of a lease of a cinema house, it would, in our opinion, be difficult to hold that the new lessee who conducts the same business has set up a new establishment so as to be able to claim the exemption under Section 16(1). If a new lessee or a new purchaser comes on the scene one may say that a new con-

cern has come into existence. What is, however, relevant for the purposes of Section 16 is not whether it is an old or a new concern, but whether it is a new establishment.

26. The decision of Anantanarayan, J. was overruled by a Division Bench in *M/s. R. L. Sahni and Co. v. Union of India*, AIR 1966 Mad 416, while hearing an appeal in another matter. The learned Chief Justice who delivered the Judgment of the Bench says that the exemption under Section 16(1) is available to the establishment as such and not to the owner or the lessee or the manager thereof. It cannot be postulated that each time there is a change of hands, a new establishment comes into existence. In taking this view, the Division Bench has followed the decision of the High Courts of Calcutta and Punjab, to which we have referred earlier.

27. A Division Bench of the High Court of Kerala in *Kunnath Textiles v. Regional Provident Fund Commr.*, AIR 1959 Ker 3, a Division Bench of the High Court of Andhra Pradesh in *Nazeena Traders (P) Ltd. v. Regional Provident Fund Commr.* Hyderabad, AIR 1965 Andh Pra 209 and a single Judge of the High Court of Gujarat in *New Ahmedabad Bansidar Mills Pvt Ltd. v. Union of India*, AIR 1968 Guj 71, have taken the same view. The decision of the Kerala High Court is not apposite to the point before us because there the existing owners had resorted to a subterfuge for evading their liability under the Act. The Judgment of the Andhra Pradesh High Court does not refer to previous authorities, but the learned Judge of the Gujarat High Court has relied on the judgment of Tendolkar, J. and on AIR 1958 Punj 55 & AIR 1959 Cal 783, to which we have already referred.

28. In the result, we hold that the provisions of the Act and the Scheme are applicable to the plaintiffs. They are, therefore, liable to make their contribution to the Employers' Provident Fund. The decree passed by the learned Judge is accordingly confirmed and the appeal is dismissed with costs.

Appeal dismissed.

AIR 1970 BOMBAY 424 (V 57 C 73)
PALEKAR AND TULZAPURKAR, JJ.

Rustom K. Karanjia and another, Plaintiffs v. Krishnaraj M. D. Thackersey and others, Defendants.

Appeal No. 24 of 1965 and Suit No. 319 of 1964, D/- 22-7-1969.

(A) Torts — Libel — Qualified privilege — Privileged occasion — Fact that subject-matter is of general public importance not sufficient — Party must have duty to communicate to the public.

HN/IM/D864/DHZ/IM

It is not sufficient to attract the protection of qualified privilege that the subject-matter is one of general public interest. The person or the newspaper who wants to communicate to the general public must also have a duty to communicate, and the person to whom the communication is made must have a corresponding duty or interest to receive it. The principle on which the privilege is based is that such communications are protected for the common convenience and welfare of Society.

(Paras 21, 22)

The journalist like any other citizen has the right to comment fairly and, if necessary, severely on a matter of public interest, provided the allegations of facts he has made are accurate and truthful, however defamatory they may be otherwise. Since his right to comment on matters of public interest is recognized by law, the journalist obviously owes an obligation to the public to have his facts right. Where the journalist himself makes an investigation, he must make sure that all his facts are accurate and true, so that if challenged, he would be able to prove the same. Public interests are better served that way. Case law discussed.

(Para 25)

(B) Torts — Libel — Qualified privilege — Malice — Burden of proof — Burden is on plaintiff

Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion. In such a case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff. Malice in that sense means making use of a privileged occasion for an indirect or improper motive. Such malice can be proved in a variety of ways, inter alia (i) by showing that the writer did not honestly believe in the truth of the allegations, or that he believed the same to be false (ii) or that the writer is moved by hatred or dislike, or a desire to injure the subject of the libel and is merely using the privileged occasion to defame and (iii) by showing that out of anger, prejudice or wrong motive, the writer casts aspersions on other people, reckless whether they are true or false. (1930) 1 KB 130 & (1892) 1 QB 431, Relied on.

(Para 26)

(C) Torts — Defamation — Damages — Damages are compensatory and not punitive.

Damages for defamation are purely compensatory. There is no room for importing the concept of exemplary or punitive damages except in two well-defined categories of cases. The first category is of those cases where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servants of the Government. The

second category is comprised of those cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Where a newspaper is the defendant, it cannot be said without more that the publication has been made with a view to make profits. Aggravated damages may be awarded within the compensatory principle if there has been any kind of high-handed, oppressive, insulting or contumacious behaviour by the defendant which increases the mental pain and suffering which is caused by the defamation and which may constitute injury to the plaintiff's pride and self-confidence. But these elements cannot be taken into consideration to award what are in law punitive or exemplary damages. (1964) 1 All ER 367 & (1964) 3 All ER 947, Relied on. (Paras 38, 41)

(D) Torts — Defamation — Damages — Damage to reputation — Diminution in esteem and extent of mental distress to be considered.

In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself. It is damages under this second head which may be aggravated by the manner in which, or the motives with which, the statement was made or persisted in. The presence of the plaintiff in the witness-box gives the jury or the judge an opportunity, which the Appellate Court does not have, to form their view of his personality whether he is a particularly sensitive man, and to assess the grief and annoyance which it would cause him as a sort of person they thought him to be. (1964) 3 All ER 947, Relied on.

(Para 42)

(E) Torts — Defamation — Damages — Exemplary damages awarded by trial Court when not due — High Court in appeal has power and duty to interfere with the decree for damages — (Letters Patent (Bom.), Cl. 15). (Para 43)

(F) Torts — Defamation — Damages — Power of appellate Court to interfere.

Appellate Courts are, and should be, most reluctant to interfere with the assessment of damages for defamation by the trial Judge but, that is so, because the latter has a unique opportunity of seeing the parties before him when equating the two incommensurables, viz., the diminution in esteem and the mental distress of the plaintiff. Where the plaintiff has not entered the witness-box or exa-

mined anybody for proving the same, the Appellate Court is in no worse position than the trial Judge in making the proper assessment. Even otherwise, what are proper damages is always a matter of impression. (Para 45)

(G) Torts — Defamation — Damages — Costs of the litigation cannot be included in damages — (Civil P. C. (1908), S. 35).

The costs between an attorney and client are very much more than the costs between party and party, and costs actually incurred are much more than the costs awarded by the decree. But this consideration is extraneous to the question as to what damages are to be awarded for the injury caused. A party complaining about a tort like libel can only ask compensation for the injury sustained. It cannot include any part of the costs. Costs have to be decreed only in accordance with the rules of the court.

(Para 46)

(H) Torts — Defamation — Damages — Plea of justification entirely given up — Evidence relating to justification cannot be reconsidered for purposes of mitigation of damages. (Para 47)

(I) Civil P. C. (1908), O. 41, Rr. 4 and 33 — Defamation — Damages — One decree against all defendants — Variation in appeal must be even against defendant not appealing.

There must be one verdict and one judgment against all for the total damages awarded. What the plaintiff is entitled to receive is a sum representing the damages that he has suffered from a single wrong inflicted by all. There cannot be two decrees for different amounts in respect of the same libel. The fact that one of the defendants has not appealed is not of much consequence in view of the principles underlying Rules 4 and 35 of Order 41.

(Para 49)

(J) Civil P. C. (1908), S. 35 — Costs — Appeal on two grounds — On one ground arguments going on for 22 days and appellant failing — Appellant succeeding partially on the other ground — Held if appellant had confined his arguments only to second ground appeal would have been disposed of in not more than five or six days — Hence appellant should pay four-fifth of the costs of appeal to respondent and bear his own costs. (Para 50)

Cases Referred: Chronological Paras (1967) 1967-3 All ER 523 (PC).

Australian Consolidated Press v. Uren 39

(1975) 1965-2 All ER 523 = 1975-1 WL R 805, Broadway Approvals Ltd. v. Dhams Press Ltd. 38

(1964) 1964-1 All ER 367 = 1964 AC 1129, Rookes v. Barnard 38, 39, 40

(1964) 1964-3 All ER 947 = 1964-2 WL R 45, McCarey v. Associated Newspapers Ltd. 38, 40, 42

- (1963) 1963-2 All ER 151 = 79
LCR 489, Lewis v. Daily Telegraph Ltd.
- (1961) 19-1 AC 1690 = 1961-1 All ER 877, Plato Films Ltd. v. Spicidel
- (1960) 1960-3 WLR 352 = 1960-2 QB 535, Webb v. Times Publishing Co. Ltd.
- (1964) 50 TLR 581 = 78 SJ 617, Youssouppoff v. Metro-Goldwyn Mayer Pictures Ltd.
- (1930) 1930-1 KB 13 = 45 TLR 619, Watt v. Longsdon
- (1917) 1917 AC 509 = 86 JKB 849 (HL), Adam v. Ward
- (1916) 1916-2 AC 15 = 85 LJKB 698, London Association for Protection of Trade v. Greenlands Ltd
- (1915) 31 TLR 299 (CA), Adam v. Ward
- (1914) AIR 1914 PC 116 (V 1) = 30 TLR 462 = 41 Ind App 149, Channing Arnold v. King Emperor
- (1909) 25 TLR 534 = 1909-2 KB 958, Mangena v Wright
- (1893) 59 Fed 530, Post Pub. Co. v. Hallam
- (1892) 1 QB 431 = 61 LJ QB 409, Royal Aquarium and Summer and Winter Garden Society v. Parkinson
- (1891) 7 TLR 502 = 1891-2 QB 341, Stuart v Bell
- (1889) 23 QBD 400 = 5 TLR 651, Allbutt v General Council of Medical Education and Registration
- (1877) 2 CPD 215 = 46 LJQB 308, Purcell v. Sowler
- (1863) 122 ER 288 = 3 F & F 421, Campbell v. Spottiswoode
- (1862) 4 F & F 15 = 176 ER 445, Cox v. Feeney
- (1834) 149 ER 1041 = 1 CM & R 181, Toogood v. Spyring
- 28 DLR 343 (Canada), Banks v. Globe & Mail Ltd.
- 22 DLR (2d) 277 (SC Canada), The Globe and Mail Ltd. v. Boland
- A. S. Chari with L. M. Zaveri and L. R. Chari I/b Kantilal Parekh and Co. Solicitors, for Plaintiffs; M. J. Mistree with P. P. Khambata and S. P. Dharucha I/b Mulla and Mulla and Cragie, Blunt and Caroe, Solicitors, for Defendants.

PALEKAR, J.— This appeal by defendants 1 and 2 arises out of a libel suit filed by the plaintiff-respondent No. 1, on the original side of this Court in respect of an Article published in the English Weekly "Blitz" in its issue of 24th September 1960. The plaintiff sought to recover Rs. 3,00,000/- as general damages and prayed for an injunction. A decree has been passed for the full claim with costs and future interest against defendants 1, 2

and defendant No. 4 who is respondent No. 2(a) in the appeal.

2. The plaintiff is a prominent businessman and industrialist of Bombay. At the time of the suit he was a partner in a firm which had been carrying on the business of Managing Agents of four textile mills. He was a Director of the Bank of India and of several other well-known companies. He was also the Chairman of the Textile Control Board which had been set up by the Government during the last World War. He was also the Chairman of the Indian Cotton Mills Federation.

3. Defendant No. 1 is the Editor of the "Blitz" and has accepted responsibility for the Article referred to above. Defendant No. 2 is a Private Limited Company which owns the newspaper. Original defendant No. 3, with whom we are no longer concerned, was the printer of the issue of the "Blitz", but since at an early stage of the suit he tendered an apology, the plaintiff withdrew his suit against him. Defendant No. 4 was joined subsequently in the suit as a joint tort-feasor since it was, principally, upon material furnished by him and with his agreement that the article was published in "Blitz".

4. The plaintiff claimed that the Article aforesaid, which is separately exhibited as Exhibit 6, was grossly defamatory of him. The whole of the Article was reproduced in the plaint. He alleged that the allegations and imputations made in that Article along with the several innuendoes set out in detail in the plaint were false and malicious, and as a result of the same, the plaintiff was injured in his character, credit and reputation and in the way of his business and had been brought into the public hatred, contempt and ridicule. Therefore, he alleged, he had suffered damages which he assessed at Rs. 3,00,000/-. As the Article itself showed that the defendants contemplated publishing a series of similar articles, the plaintiff further asked for a permanent injunction.

5. The suit was, principally, contested by defendants 1 and 2. That the Article was defamatory was not seriously disputed. The principal defences offered were, (i) justification (ii) fair comment on a matter of public interest; and (iii) qualified privilege. It was also contended that the damages claimed were excessive and disproportionate.

6. After a trial, which, we are told, went on for 101 days, in which most of the evidence was produced by the defendants and very little on behalf of the plaintiff, the learned Judge negatived the three defences referred to above, and holding that the plaintiff had been grossly defamed by that article and punitive damages were awardable in this case.

decreed the full claim of damages of Rs. 3,00,000/- with costs. He also gave the injunction asked for.

7. It is from this decree that the present appeal has been filed by defendants 1 and 2. Learned counsel for the appellants did not press their appeal against the finding of the learned Judge on the pleas of justification and fair comment, but confined their arguments to the plea of "qualified privilege". They also pressed the plea that the damages awarded to the plaintiff were excessive, disproportionate and unreasonable.

8. The defence of "qualified privilege" is set out in the written statement at para 11A and is as follows:

"11A. Without prejudice to the aforesaid contentions of the defendants and in the alternative, these defendants say that the said Article appearing in the issue of Blitz dated 24th September 1960 is protected as being on an occasion of qualified privilege in that the defendants honestly and without any indirect or improper motive and for general welfare of society published the said Article as it was the duty as Journalists to do and believing the allegations contained in the said article to be true."

Mr. Chari in his address assured us that he would stick to this defence as set out in the written statement. The law with regard to "qualified privilege", which holds good to this day, has been stated by Parke, B. in *Toogood v. Spyring*. (1834) 149 ER 1044 at p. 1049, as follows:

"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits"

9. Before we proceed to determine whether the Article containing defamatory allegations was published on a privileged occasion, we have to see what precisely the Article would convey to its reader. See the speech of Lord Reid at page 153 in *Lewis v. Daily Telegraph, Ltd.*, (1963) 2 All ER 151.

10. The first thing to be noted while reading the Article is that the Article is

not an attack on the personal or private character of the plaintiff. The attack is directed against the business organisation going by the name of "House of Thackersey" of which, it is alleged, the plaintiff is the head. According to Mr. Chari, the Article is not an aimless literary composition. The writer under the pen-name of "Blitz's Racket-Buster" wanted to expose in a series of articles, first how this "House of Thackersey", that is, the business organisation, consisting, principally, of the plaintiff, his brothers, their wives and close relations and friends, built up, thanks to the official position held by the plaintiff as the chairman of the Textile Control Board — a vast Empire of wealth by — having recourse to unlawful and questionable means, involving tax-evasion on a colossal scale, financial jugglery, import-export-rackets, and customs and foreign-exchange violations. Secondly, he wanted to suggest that owing to conditions prevailing at the time and owing to the enormous power and prestige wielded by the plaintiff, investigations into the operations of the "House" got bogged down for years leaving the "House of Thackersey" free to acquire great wealth.

11. According to Mr. Chari, the several individual allegations made in the article are merely incidental or subsidiary and fall squarely in the general pattern of the two purposes mentioned above. The main part of the Article begins with a historical narration giving some details about the "House of Thackersey." It is mentioned there that the business carried on by this "House" was on the brink of disaster in 1953 but it got a boost like any other business in the early War years. The plaintiff's position in the textile trade was recognised by the Government who appointed him as the Chairman of the Textile Control Board. This gave the plaintiff a chance not only to further the interest of his satellite concerns but also to exert pressure to smother investigations made with regard to the operations of the "Thackersey House" and the plaintiff's personal involvement as a Director in the affairs of the Sholapur Mills Owing to the inaction of Government, and being emboldened by such inaction, the "House of Thackersey" was left free to build its vast cartel and mint untold wealth. That was the position of the "House of Thackersey" before it embarked, according to the Article, on a career of building a financial empire

12. This empire was built by the "House" by embarking on a new line of business in the import-export field. Bogus factories and firms were brought into existence with a view to wangle fabulous licences for unlawfully importing artificial yarn. This yarn was sold through the media of these bogus factories. Enormous profits were made in these transac-

tions which were concealed by financial jugglery which enabled the "House of Thackersey" to evade income-tax, which, with penalty, was computed at Rs 4.66 crores. In order to manage these operations on a large scale, bank credits were obtained from obliging banks by the two firms of China Cotton Exporters and Laxmi Cotton Traders which had been recently started. Laxmi Cotton Traders was supposed to be practically owned and managed by the ladies of the house-hold who knew little business. The Article suggested that these concerns were really the Concerns of the plaintiff, and enormous credits had been obtained from the banks not on the standing of the Concerns themselves but on the standing of the plaintiff who had become, in the meantime, a Director in a couple of Insurance Firms, two Banks, and several other Concerns for this purpose.

13. That was one way how the "House of Thackersey" accumulated vast wealth in India. Another way to which they had recourse was to accumulate large funds of foreign currency in foreign countries which the "House of Thackersey" surreptitiously brought into India in violation of Customs and Foreign Exchange Regulations. This part of the case, however, was reserved for the Article to be published in the next week. "Blitz" promised that in the next Article, it would narrate (i) how these funds were brought to India from China and even Pakistan; (ii) how the Reserve Bank, the Finance Ministry and the Special Police Establishment got the scent and started investigations way back in 1953-54 (iii) how investigations had still remained incomplete, (iv) how investigating officers were frequently transferred; and (v) how one officer, just on the eve of leading a mass police raid on the "Thackersey Empire" unfortunately met with a fatal car-accident.

14. Special reference was also made to the inaction of Government with regard to tax evasion by pointing out in the first two paragraphs of the Article that though income-tax evaded together with penalty was computed at about Rs. 4.66 crores and the case had passed through the Finance Ministry during the regimes of three successive Finance Ministers, Government had not succeeded in collecting the amount. On the other hand, it is suggested in paragraph 3 that the vast Industrial Empire of the Thackerseys continued to flourish and prosper, while its supreme boss, the plaintiff, as the Chairman of the Indian Cotton Mills Federation lorded over the entire textile-trade and openly defied the Government's plans to reduce cloth prices.

15. Thus, on a reading of the Article, Mr. Chari submits, the several allegations

and imputations in the Article complained of as defamatory were made in the context of dealing with two principal objects of the Article, one being to show how an influential business organisation amassed wealth by unlawful and questionable means, and secondly, how, when a probe into their unlawful activities was undertaken, the investigation somehow got bogged down for years on end with no tangible results.

16. If, as Mr. Chari submits, these were the objects with which the Article was written—and we shall assume for the purposes of his argument that it was so—there is no escape from the conclusion, that the subject-matter of the Article was of great public interest. The public are vitally interested in being assured that great concentration of wealth which is discouraged by Clauses (b) and (c) of Art 39 of the Constitution does not take place, and if it does, either because of Government's inaction or because of deliberate violation of the law on the part of any business organisation, the public have a legitimate interest to know about it. If again, owing to corruption, inefficiency or neglect on the part of the State investigating machinery, offenders are not speedily brought to book, that would also be a matter of vital public interest.

17. Mr. Chari, therefore, contends that this particular situation gave the newspaper "Blitz" a privileged occasion, that is to say, an occasion giving rise to a duty on the part of the newspaper to address a communication to its readers, the citizens of India, who were interested in receiving the communication. Therefore, any defamatory matter incidental to the subject-matter of the communication was protected by law unless express malice was proved by the plaintiff.

18. On the other hand, it was contended by Mr. Murzban Mistry, on behalf of the plaintiff, Respondent No. 1, that a privileged occasion cannot be created by a person for himself to enable him to publish a defamatory statement which he cannot sustain or justify. According to him, a man publishing, without undertaking an obligation to justify, that on his own investigation he had found a public officer to be corrupt cannot claim immunity from liability for defamation by saying that he published it on an occasion of qualified privilege. If the contrary were true, he urged, public or private life would become impossible, because a journalist claiming to investigate for himself facts about an individual in his private or public affairs would be entitled to publish grossly defamatory statements about him on the ground of public interest and claim protection under the principle of qualified privilege. Mr. Mistry does not agree that the Article was

but in order to meet the argument of Mr. Chari, he is prepared to assume that the Article was published in the public interest. But in his submission, the law does not permit publication of a defamatory matter even in the public interest when the journalist is not in a position to show that he has any duty to communicate the defamatory matter to the general public.

19. The proposition for which Mr. Chari contends, when reduced to general terms, would be that, given a subject-matter of wide public interest affecting the citizens of India, a newspaper publishing to the public at large statements of facts relevant to the subject-matter, though defamatory in content, should be held to be doing so on an occasion of qualified privilege.

20. In our opinion, such a broad proposition is not recognized by the law. The question arose before the Court of Appeal in England in *Adam v. Ward*, (1915) 31 TLR 299 (CA). In that case, Major Adam, as Member of Parliament, made certain defamatory observations about Major-General Scobell relating to the latter's discharge of his official duties. Scobell was the Brigadier and Major Adam's superior when Major Adam formerly held a commission in the 5th Lancers being a regiment commanded by Scobell. While Major Adam enjoyed absolute immunity for his speech made in Parliament, Major-General Scobell could, under the statutory regulations, only appeal to the Army Council to make an inquiry into his own conduct. The Army Council made the necessary inquiry and absolved Major-General Scobell from all blame. The Secretary of the Army Council, Ward, made the communication to Major-General Scobell and the same was published by Ward in all the newspapers through the usual media. This communication contained some references to Major Adam. They were admitted to be defamatory. The libel action commenced by Major Adam against Ward on the basis of this publication was resisted by Ward on the ground of qualified privilege. In the judgment delivered by Lord Justice Buckley, in which the other two Lord Justices concurred, it was distinctly accepted that the matter was of general public interest. The question was whether, assuming that the matter was of general public interest, Ward had any duty to communicate to the general public. Dealing with this question, Lord Justice Buckley observed—

"Involved in this question of duty is the question of the subject-matter being such as there exists a duty to communicate. If the communication be to the public, this question may be whether the matter is matter of public interest In *Cox v. Feeney*, (1862) 4 F and F 13 at

p. 18 a dictum of Chief Justice Tenterden is quoted in the following terms—

"A man has a right to publish, for the purpose of giving the public information that which it is proper for the public to know."

With great respect, I doubt whether there is contained in those words an accurate statement of the circumstances in which a privileged occasion arises for the publication of matter interesting to the public. I am not prepared to hold that the publication even by a public body of its proceedings or conclusions in a matter of public interest is on that account and without more privileged. *Purcell v. Sowler*, (1877) 2 CPD 215 is, I think an authority to the contrary. I doubt whether in *Mangena v. Wright*, 25 TLR 534 = (1909) 2 KB 958 Mr. Justice Phillimore was right in saying, at p. 978, that "where the communication is made by a public servant as to a matter within his province, it may be 'the subject of privilege in him' if those words are intended to convey that those facts without more will create a privileged occasion."

It is clear, therefore, that Lord Justice Buckley was clearly of the opinion that the mere fact that the subject-matter was of general public interest did not afford any protection to the publisher, because he proceeded—

"More, I think, is wanted. But the following proposition, I think, is true that if the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but, to quote Lord Justice Lindley's words in *Stuart v. Bell*, 7 TLR 502 = (1891) 2 QB 341, at p. 350, 'a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal'. It is upon these principles, I think, that I have to determine whether in the present case the publication was upon a privileged occasion".

21. It is clear from the above observations of Lord Justice Buckley that the Court was clearly of the opinion that it was not sufficient to attract the protection of qualified privilege that the subject-matter is one of general public interest. The person or the newspaper who wants to communicate to the general public must also have a duty to communicate, and if no such duty, apart from the fact that the matter is one of public interest, can be spelt out in the particular circumstances of the case, the publication could not be said to be upon a privileged occasion. This case went in appeal to the House of Lords and is reported in *Adam v. Ward*, (1917) AC 309 (HL). It is noteworthy that the proposition put forward

in the judgment of Buckley L.J. was not only not disapproved by the House of Lords, but, in fact, the whole argument turned upon the question whether Ward had a recognizable duty to perform to the public. On the facts, the House of Lords agreed with the view taken in the Court of Appeal and held that Ward had a duty to communicate the same to the public, because it was only in vindication of the character of Major-General Scobell, which had been unjustly and unfairly attacked in Parliament. In fact, Lord Dunedin in his speech at p 324 observed—

"He (Major-General Scobell) is bound to refer the matter to the Army Council and await their verdict. The verdict is in his favour. What would that avail him unless there was a right in the Army Council to publish the result at which they had arrived? If it were not so, then the absolute privilege of the House of Commons, intended to safeguard the Liberty of discussion would be really turned into an abominable instrument of oppression."

On a more or less similar grounds the other Law Lords accepted that Ward, as the Secretary of the Army Council, had a duty to communicate the subject-matter to the public. If it were the law that given a subject-matter of great public interest everyone has an interest or duty to communicate and to receive the communication, then it would not have been necessary for both the courts, viz. the Court of Appeal and the House of Lords, to deal with the question at great length as to whether Ward, the Secretary of the Army Council, had a duty to communicate. We may here further note that while examining the law on the question of qualified privilege Lord Atkinson in his speech at p. 334 has clearly defined when a privileged occasion arises. He observed,—

"... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential"

Nothing turns upon the question as to whether a matter is of general public interest. The real question is whether the person making the communication has a duty or interest and whether the person receiving the communication has a corresponding interest or duty.

22. The duty aforesaid giving rise to a privileged occasion may arise in a variety of ways, and it would be idle, as pointed out by Lord Buckmaster L.C. in *London Association for Protection of Trade v. Greenlands, Ltd.*, (1916) 2 AC 15, to put any limits on the same. However, it is

always necessary to remember in that connection the observations of Parke, B. in (1834) 149 ER 1044 already referred to which not only define what a privileged occasion is but also the principle on which it is based. The principle is that such communications are protected for the common convenience and welfare of society. Where the common convenience and welfare of the society are not involved, no occasion could be regarded as a privileged occasion. It is for this reason that qualified privilege is denied to a defamatory statement in a newspaper. For example, in *The Globe And Mail Ltd. v. Boland*, 22 Dominion LR (2d) 277, the Full Court of the Supreme Court of Canada held—

"While newspapers may rely on the defence of fair comment in publishing allegedly defamatory statements about a candidate's fitness for office during an election campaign, they cannot invoke the defence of qualified privilege in so publishing defamatory statements."

It was further pointed out in that case—

"There is no such duty on a newspaper during an election campaign as to permit it to defame a candidate, subject to liability only if express malice is shown."

In that case, the editor of the daily newspaper "Globe & Mail" wrote an editorial on 27th May 1957 containing allegations defamatory of the plaintiff Boland who was a candidate for election to the Federal Assembly from Parkdale constituency in the City of Toronto. The Editorial commented on his fitness for office with certain innuendoes. In the suit filed by Boland, the newspaper put forward the plea of qualified privilege. It pleaded that it was the duty of the defendant newspaper to publish and in the interests of public to receive the communications and comments with respect to the candidature of Boland, the plaintiff, and by reason of this, the words complained of were published under such circumstances and upon such occasion as to render them privileged. The learned trial Judge upheld the pleas of qualified privilege in the following words:

"I have come to the conclusion that a Federal election in Canada is an occasion upon which a newspaper has a public duty to comment on the candidates, their campaigns and their platforms or policies, and Canadian Citizens have an honest and very real interest in receiving their comments, and that therefore, this is an occasion of qualified privilege."

The Supreme Court of Canada held that this was an erroneous statement of the law. It was pointed out by Justice Cartwright, who delivered the judgment of the court, that the learned trial Judge had confused the right which the publisher of

a newspaper has, in common with all Her Majesty's subjects to report truthfully and comment fairly upon matters of public interest with a duty of the sort which gives rise to an occasion of qualified privilege. In that connection, he quoted the well-known passage of Lord Shaw in *Arnold v. King Emperor*, (1914) 30 TLR 462 at p. 468 = 41 Ind App 149 at p. 169 = (AIR 1914 PC 116) as follows:

"The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to this power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position." Proceeding further, Justice Cartwright observed—

"To hold that during a Federal election campaign in Canada any defamatory statement published in the press relating to a candidate's fitness for office is to be taken as published on an occasion of qualified privilege would be, in my opinion, not only contrary to the great weight of authority in England and in this country but harmful to that 'common convenience and welfare of society' which Baron Parke described as the underlying principle on which the rules as to qualified privilege are founded. (See (1834) 1 CM & R 181 at p. 193 = 149 ER 1044). It would mean that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice. I would like to adopt the following sentence from the judgment of the Court in *Post Pub. Co. v. Hallam*, (1893) 59 Fed 530 at p. 540: 'We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.'

In the same connection, Justice Cartwright referred to the opinion of Gatléy at page 242 of his book on "Libel and Slander", Sixth Edition, under footnote No. 53—

"It is, however, submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation."

The view thus taken was further supported by Justice Cartwright by referring to

the words of Cockburn, C. J. in *Campbell v. Spotswoode*, (1863) 122 ER 288.

"It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation." After quoting the above passage, Justice Cartwright has tersely remarked—

"The interest of the public and that of the publishers of newspapers will be sufficiently safeguarded by the availability of the defence of fair comment in appropriate circumstances".

This principle was applied by the same court in *Banks v. Globe & Mail Ltd.*, 28 Dominion LR 343, where it was held that the proposition of Law that given proof of the existence of subject-matter of wide public interest throughout Canada, without proof of any other special circumstances, any newspaper in Canada (and semble therefore, any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege, is untenable. In that case the same newspaper *Globe & Mail* published an editorial defamatory of one Mr. Harold C. Banks, Canadian director of the Seafarers' International Union. On a suit filed by Banks, qualified privilege was claimed on the ground that it was the duty of the newspaper to publish and in the interests of the public to receive communications and comments with respect to the strike and the resultant transfer of eight vessels from Canadian Registry, and by reason of this, the said words were published under such circumstances and upon such occasion as to render them privileged. The learned trial Judge held that the matter was of great public interest. He observed—

"The members of the public have a real, a vital I might go so far as to say — a paramount interest in receiving those comments."

He also pointed out that it was a matter of vital interest to all the citizens of Canada and, therefore, the defence of qualified privilege was available. The Supreme Court held that there was no qualified privilege and again pointed out that the learned Judge had confused the right which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest with a duty of the sort which gives rise to an

occasion of qualified privilege. After referring to its earlier decision in 22 Dominion LR (2d) 277 (SC Canada) referred to above, it held that in the absence of proof of special circumstances, there is no defence of qualified privilege with respect to defamatory statements of facts made as comments upon a matter of public interest, and the same holds good for newspapers as for anyone else. The 'special circumstances' obviously refer to circumstances giving rise to a legal, social, or moral duty, and recall to mind the words of Buckley, L. J. in (1915) 31 TLR 299 (C. A.) referred to above where he said "More, I think, is wanted."

23. That the existence of a duty for qualified privilege is more fundamental than the existence of a matter of public interest as asserted by Lord Justice Buckley is emphasised by Lord Dunedin in appeal in that case (See 1917 AC 309 (HL)) After stating at the beginning of his speech at p. 322 that the Judgment of Buckley L. J. in the Appeal Court was entirely satisfactory to his mind, he observed at p. 331 as follows:

"The second matter is more serious. In order to dispose of the question of privilege he (i.e. trial Judge) put to the Jury certain questions, of which three were as follows: Was the publication—that is, the document published—of a public nature? Was the subject-matter of that publication by defendant, matter about which it was proper for the public to know? Was the matter contained in the letter proper for the public to know? To all of which the jury returned a negative answer, and upon that the learned Judge said 'Upon these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion.' It is clear that so far as the questions go they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public importance: whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of General Scobell's honour."

This is exemplified by an older case reported in Allbutt v. The General Council of Medical Education and Registration, (1899) 23 QBD 400. The facts are that the General Medical Council published a book containing the minutes of the proceedings of the Council including a statement that the name of the plaintiff had been removed from the register of medical practitioners on the ground that he had been guilty of grave professional misconduct, and a report of the proceedings before the Council in relation to the charge. It was held, having regard to the character of the report, the interests of the public in the proceedings, and the duty of the Council

towards the public, the publication of the report was privileged. Gatley in his book "Libel and Slander", Sixth Edition, at para 532 (p. 245) has put the matter as follows:

"Duty to the Public necessary. But where no duty to the public can be proved, no privilege will attach to the publication of libellous matter in a newspaper."

24. One more case referred to by Mr. Chari remains to be noted, and that is Webb v. Times Publishing Co. Ltd., (1960) 3 WLR 352. In that case, a wife felt defamed by a fair and accurate report in the "London Times" of a judicial proceeding in a Swiss Court in which her husband made a confession containing matter defamatory of the wife. The learned Judge held that the defendant, the Proprietor of the Times, was protected by qualified privilege not on the ground that the "Times" had a duty to the English public to report on a matter of public interest but on the ground that the report was based on a judicial proceeding in a foreign court which gave it sufficient status, and that plea of "fair information on a matter of public interest" on the analogy of "fair comment on a matter of public interest" was open to the defendant under the law. It is easy to see how the facts in that case are distinguishable. As a matter of fact, Gatley in his book at page 245 in footnote 67 has stated that in spite of 1960-3 WLR 352, the correct statement of English Law is what is laid down in 28 DLR 345 (Canada) referred to above.

25. It was, however, contended for the defendants that in a case like the present where a journalist honestly believes that the public exchequer is deprived of a large sum of money and the Government is seized with paralysis in bringing the culprit to book speedily, this court, having regard to the conditions obtaining in this country, should recognize in the journalist a duty to bring the facts to the notice of the public with a view to put pressure on the Government to act. In this connection, reference was made to certain passages in the Report of the Press Commission, Part 1, 1954, particularly, paragraphs 910 and 911 in Chapter 19 at page 339. The Chapter is headed "Standards and Performance". We have gone through the paragraphs referred to, but we find there nothing to justify the contention that such a need was felt by the Press Commission. On the other hand, after stating in paragraph 914 that the newspapers ought to be accurate and fair, it sternly condemned Yellow Journalism (paragraph 929), 'Sensationalism' (Paragraph 931) and 'Malicious and irresponsible attacks' (paragraph 936) even when such attacks had been made on the plea that the newspapers wanted to expose evil in high places. We do not, therefore, feel the need of re-

cognizing any such new duty, because the journalist like any other citizen has the right to comment fairly and, if necessary, severely on a matter of public interest, provided the allegations of facts he has made are accurate and truthful, however defamatory they may be otherwise. Since his right to comment on matters of public interest is recognized by law, the journalist obviously owes an obligation to the public to have his facts right. Where the journalist himself makes an investigation, he must make sure that all his facts are accurate and true, so that if challenged, he would be able to prove the same. We think, public interests are better served that way. In our opinion, therefore, the plea of qualified privilege put forward on behalf of the defendants fails.

26. Mr. Mistry, on behalf of the plaintiff, further argued that even if qualified privilege was assumed in favour of the defendants, he was able to show that the attack on his client was malicious. The law is clear in the matter. Malice in law, which is presumed in every false and defamatory statement, stands rebutted by a privileged occasion. In such a case, in order to make a libel actionable, the burden of proving actual or express malice is always on the plaintiff. Malice in that sense means making use of a privileged occasion for an indirect or improper motive. Such malice can be proved in a variety of ways, inter alia (i) by showing that the writer did not honestly believe in the truth of these allegations, or that he believed the same to be false; (ii) or that the writer is moved by hatred or dislike, or a desire to injure the subject of the libel and is merely using the privileged occasion to defame. (See Watt v. Longsdon, (1930) 1 KB 130 and the observations of Greer, L. J. at p. 154.....) and (iii) by showing that out of anger, prejudice or wrong motive, the writer casts aspersions on other people, reckless whether they are true or false, (See observations of Lord Esher, M. R. in Royal Aquarium and Summer and Winter Gardens Society v. Parkinson, (1892) 1 QBD 431 at p. 444). Mr. Mistry contends that almost all the material defamatory allegations in the Article come under one or more of the above categories.

27. In this connection, he first refers to the episode of 1947 set out in the plaint itself. It appears that on 31st May 1947 defendant No. 1 printed and published an Article in the "Blitz" under bold headings:

- (1) "Cloth Control Boss in Black-Market Swoop" "Thackersey Mills were involved in Bombay's Biggest Black-market Swoop";
- (2) "Anti-Corruption Branch follows Blitz' clues "Phony" Cloth Control Proved by Latest Black Market Swoop";

(3) "Textile Control Boss, too, in Thick of it";

and alleged that certain bales of cotton cloth were found in a certain godown in a raid by the police and these bales of cloth were the product of Crown, Hindustan and Great Western Mills which are under the agency of Mr. Krishnaraj Thackersey (the plaintiff), the Chairman of the Textile Control Board. Since the plaintiff was not responsible for the destination of these cloth bales after the Mills had sold the same in accordance with the Control Order he, through his solicitors, served a notice on 16th June 1947 requiring defendant No. 1 to publish a full and unqualified apology in his newspaper in a prominent manner with the approval of the plaintiff's attorneys. After receipt of this notice, defendant No. 1 published in the issue of 21st June 1947 what he called an explanation. In this explanation, while he made it clear that he stood by the report, he explained that only the cloth manufactured by those mills had been seized in the black-market raid and that the Mill-owners and the Mills concerned were in no way engaged in or guilty of black-market operations. This explanation apparently did not satisfy the plaintiff. So, he filed a criminal complaint in the Court of the Chief Presidency Magistrate for defamation. It is the case of the plaintiff that after the complaint was filed, defendant No. 1 completely surrendered himself to the mercy of the plaintiff and entreated the plaintiff to accept an unconditional and unqualified apology for having wrongfully published the said statement and the Article in the "Blitz". On such apology being accepted by the plaintiff, defendant No. 1 was discharged. It is the plaintiff's submission that this episode rankled in the mind of defendant No. 1, and, therefore, when in 1960 some material was brought to him by defendant No. 4, the plaintiff (defendant?) took advantage of that opportunity to write the Article in suit maliciously. Mr. Chari submitted that more than 13 years had elapsed after this episode of 1947 and that it was more natural for defendant No. 1 to treat the episode as closed after the apology than to entertain any grouse against the plaintiff. He argued that it was not unusual for journalists to publish news or reports based upon what they thought was a reliable source, but later when they find that the source was unreliable they would be only too eager to make amends by apologising for the allegations made. That is exactly what happened, according to Mr. Chari, in 1947. The defendant No. 1 honestly believed that the plaintiff who was the Chairman of the Textile Control Board was concerned with the black-market-operations, but when it was brought to his notice that the plaintiff, after the Mills had sold the cloth,

had nothing to do with the destination of those goods, defendant No. 1 made an ample apology by publishing two explanations. As the first explanation did not satisfy the plaintiff, he made the second explanation which satisfied him and, therefore, after the same was accepted by the plaintiff, there should be nothing to rankle in the mind of defendant No. 1. The course of events, however, does not bear out Mr Chari's plea, and it appears to us that defendant No. 1 must have nursed a grievance. His own written statement shows that he never surrendered himself to the mercy of the plaintiff, nor had he entreated the plaintiff to accept an unconditional and unqualified apology. According to him, what really made him give the second explanation after the criminal complaint was filed was that it was the learned Chief Presidency Magistrate himself who intervened in the matter and told defendant No. 1 that as he had already published an explanation, he might as well publish another in a form desired by the plaintiff and then put an end to the matter. This, according to defendant No. 1, was the real background of what is deemed to be an apology in the criminal court. In his evidence before the court, he gives a different version. He says that when the complaint was filed against him, he had been legally advised that he had a good fighting case. The reason for the apology was that defendant No. 1 was at that time going abroad on an important mission and he had to obtain his freedom by apologising. He had applied to the Magistrate to postpone the hearing of the case, but since his application was opposed by the plaintiff, he accepted the suggestion made by the Magistrate that it would be desirable that he should go a little further than the first explanation, and hence he published the second explanation. That second explanation, which is called an apology by the plaintiff, is at page 1674 of the paper-book. In this explanation, defendant No. 1 says that no allegations or insinuations of black-marketing should (by reason of the words or expressions used by him) be read into the said report or its headings as against Mr. Thackersey personally or his group of Mills. Then he said—

"We unequivocally withdraw all such allegations and insinuations which could be so read in our said report and express our regret to him."

The evidence given by defendant No. 1 now would go to show that he had made this apology not because he was really satisfied about the truth of the matter but because of other considerations. As a matter of fact, he has stated in his evidence that even at that time, that is to say, prior to the publication of the Article dated 31st May 1947, he had information which led him to believe that the plaintiff was in-

dulging in black-marketing. It is therefore, obvious that the regret expressed in the second explanation was much against his grain. He could not have easily forgotten that he had been compelled to make an undeserved apology to a person who, to his own information was a black-marketeer. The things which he came to know about the plaintiff after 1947 would only help to keep this memory fresh in his mind, because in his evidence before the court he says at p 398—

".....I had a bad impression about the plaintiff. My impression was that he indulged in a number of malpractices, that he was unscrupulous. One of the general impressions which I had carried even prior to the reading of the article in the "Peep" was that the plaintiff was a black-marketeer. From the complaint which I received prior to reading the article in the "Peep", I felt that the plaintiff was engaged in black-marketing, tax-dodging and trying to influence Government officials by underhand means that is to say, corrupting Government officials. The information which led me to believe that he was concerned with tax-dodging and corrupting officials was received by me thereafter and before 1960. From 1947 I had heard of serious complaints being made to the then Bombay Government by one Doshi and by others about the misuse by the plaintiff of his position as Chairman of the Textile Control Board"

It will be thus seen that although a long time had elapsed after 1947 before he wrote the Article in suit, defendant No. 1 must have been very grievously conscious that he had been made to apologise to the plaintiff in the complaint filed before the Presidency Magistrate in 1947, most undeservedly, especially, as his impression about the plaintiff as a black-marketeer had been confirmed after 1947. He carried the worst impression of the plaintiff even before defendant No. 4 came to him with his material. As a matter of fact, the very alacrity with which defendant No. 1 decided to publish a series of Articles on the plaintiff would go to show that the episode of 1947 had not been forgotten by him. His own evidence goes to show that sometime in July 1960 defendant No. 4 saw him with his material. His first interview lasted for about two hours. Most of the time was occupied in questioning defendant No. 4 and trying to understand his case. He had hardly any time to go through the voluminous documentary material that defendant No. 4 had brought. He only cursorily glanced through it. He then called his deputy, Mr. Homi Mistry, and asked him to prepare a series of articles. But what is pertinent to be noted is that even at the very first interview, even before any of the material had been checked, he had asked Mr. Homi Mistry

to prepare a series of Articles, "because his mind was made up to expose the plaintiff". All this shows that the reason for writing this Article was not mere public interest.

28. That brings us to the actual defamatory allegations made in the Article. (Then after dealing with the allegations (paras 28 to 36) His Lordship proceeded). Therefore, although Mr. Chari has tried to put the case on a high level, viz. that whole Article was written with a view to serve public interests, we find here that the writer himself did not intend to do so.

37. Having, therefore, given our careful consideration to the Article and the aspects of malice put before us by learned counsel for the plaintiff, we are satisfied that the whole Article was conceived in express malice and, therefore, no qualified privilege can at all be claimed.

38. That brings us to the question of damages. The plaintiff claimed general damages of Rupees three lacs, and the whole claim has been decreed. The learned Judge took the view that exemplary damages were necessary to be awarded and he has made it clear in the last but one para of his judgment that the deterrent aspect was not absent from his mind. It is contended on behalf of the defendants that the damages are excessive and unreasonable, and, in any case, exemplary damages could not have been awarded. It is now settled after the decision of the House of Lords in *Rookes v. Barnard*, (1964) 1 All ER 367, and the decision of the Court of Appeal in *McCarey v. Associated Newspapers, Ltd.* (1964) 3 All ER 947, that, at common law, damages for defamation are purely compensatory. There is no room hereafter for importing the concept of exemplary or punitive damages except in two well-defined categories of cases. The first category is of those cases where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servants of the Government. The second category is comprised of those cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Except in these two types of cases, there is no departure from the ordinary compensatory principle for all torts, including libel. Where a newspaper is the defendant, it cannot be said without more that the publication has been made with a view to make profits. As pointed out in *Broadway Approvals, Ltd. v. Odhams Press, Ltd.* (1957) 2 All ER 523 at p 527, newspapers in the ordinary course of their business publish news for profits. Only when a more pecuniary benefit is shown to have been made by a newspaper would it become liable for punitive damages.

39. Mr. Mistry invited our attention to a recent decision of the Privy Council in *Australian Consolidated Press, Ltd. v. Uren*, (1967) 3 All ER 523 (PC) in which the Privy Council did not apply the principle about exemplary damages as laid down by Lord Devlin in 1964-1 All ER 367 referred to above. The case, however, shows that the Privy Council did not purport to dissent from the view taken by the House of Lords. The question before them was, whether it was necessary to overrule the unanimous view of the Full Court of the High Court of Australia which had refused to follow 1964-1 All ER 367 on the ground that the High Court had for years accepted as part of the Australian law that punitive damages was an element to be considered in the award of damages in a libel action. The Privy Council held that it was not necessary. So far as this country is concerned, that is not the position. The research of learned counsel has not been able to show us that in India punitive damages had been always considered as a part of the Indian law of libel. On the other hand, having inherited the jurisdiction of the late Supreme Court, the Original Side of this Court has always followed the common law of England in matters of torts, including libel, and since 1964-1 All ER 367 explains what the common law is in this respect, we feel we should be guided by it though by no means the decision is binding on us.

40. The present position in law with regard to damages in a libel action is stated by Lord Justice Pearson in (1964) 3 All ER 947, as follows:

"If I may summarise shortly in my own words what I think is to be derived from that case, it is this, that from henceforth a clear distinction should be drawn between compensatory damages and punitive damages. Compensatory damages in a case in which they are at large may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include natural injury to his feelings: the natural relief and distress which he may feel in being spoken of in defamatory terms; and, if there has been any kind of high-handed, oppressive, insulting or contemptuous behaviour by the defendant which increases the mental pain and suffering which is caused by the defamation and which may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in a case where the damages are at large. There is, however, a sharp distinction between damages of that kind and truly punitive or exemplary damages. To put

in another way, when you have computed and taken into account all the elements of compensatory damages which may be awarded to the plaintiff and arrived at a total of £X, then it is quite wrong to add a sum of £Y by way of punishment of the defendant for his wrong-doing. The object of the award of damages in tort nowadays is not to punish the wrong-doer, but to compensate the person to whom the wrong has been done. Moreover, it would not be right to allow punitive or exemplary damages to creep back into the assessment in some other guise. For instance, it might be said 'You must consider not only what the plaintiff ought to receive, but what the defendant ought to pay'. There are many other phrases which could be used, such as those used in the extracts which I have cited from some of the decided cases. In my view, that distinction between compensatory and punitive damages has now been laid down quite clearly by the House of Lords in (1964) 1 All ER 367 and ought to be permitted to have its full effect in the sphere of libel actions as well as in other branches of tort."

41. Therefore, aggravated damages may be awarded within the compensatory principle in circumstances specifically referred to above, viz., if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering which is caused by the defamation and which may constitute injury to the plaintiff's pride and self-confidence. But these elements cannot be taken into consideration to award what are in law punitive or exemplary damages.

42. What are then the injuries for which the plaintiff should be compensated? That is explained by Lord Justice Diplock in that same case at page 959 as follows:

"In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement, and (ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself. It is damages under this second head which may be aggravated by the manner in which, or the motives with which, the statement was made or persisted in. There may also be cases where Lord Devlin's second principle is applicable, as, for example, if a newspaper or a film company (as in *Yousouff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, (1934) 50 TLR 581) has, in the view of the damage-awarding tribunal, deliberately published a defamatory statement in the expectation of increasing its circulation

and profits by an amount which would exceed any damages awarded by way of compensation alone."

The plaintiff claimed in the present suit general damages of Rs. 3,00,000/- on the ground that the plaintiff has been injured in his character, credit, and reputation and in the way of his business and has been brought into the public hatred, contempt, and ridicule. The plaintiff, however, has not entered the witness-box or adduced evidence of his friends or associates in business to show to what extent he is avoided by friends or shunned by his associates in trade or business, nor has he shown the extent of diminution in the esteem in which he was held. There is no special damage alleged or proved in the way of business or trade. As to grief or annoyance caused to him, the plaintiff has not helped the court in making any accurate estimate by his evidence. As pointed out by both Diplock and Willmer, L. JJ. in 1964-3 All ER 947 referred to above, the presence of the plaintiff in the witness-box gives the jury or the judge an opportunity which the Appellate Court does not have to form their view of his personality whether he is a particularly sensitive man, and "to assess the grief and annoyance which it would cause him as a sort of person they thought him to be". Thus, unfortunately in this case both the incommensurables, viz. diminution in esteem and the extent of mental distress which to some extent must have been, undoubtedly, caused by the publication, present a problem of evaluation or equation.

43. The learned Judge, however, has awarded the full claim of Rs. three lacs and damages describing the same as exemplary damages. In the first place, this was not a case for exemplary damages, because it is not the case that the defendants made any profit by the publication of the Article in his journal. Undoubtedly, he has referred to some substantial aggravating circumstances and that would justify awarding aggravated damages, but it would be difficult to say what the learned Judge may have awarded as aggravated damages if the punitive element had been excluded. Since exemplary damages have been awarded when they were not due, this court has the power and the duty to interfere with the decree for damages.

44. On the other hand, there is hardly any doubt that the Article, as admitted by the defendant No. 1, is grossly defamatory. A worse libel is difficult to imagine. The plaintiff is a prominent businessman and industrialist and was sometime or the other the Chairman of the Mill-owners Association, Chairman of the Textile Control Board, and the Chairman of the Federation of Textile Mills. That would be sufficient to show his standing in trade and industry, and yet he is ac-

cused in the Article of being involved in a "Scandal bigger than Mundhra" and of being a tax-evader, financial juggler, and import-export-racketeer and a swindler. He is also accused of having smuggled foreign exchange in violation of the Customs and Foreign Exchange Regulations. He is further accused of having himself used his position as the Chairman of the Textile Control Board in order to assist his satellite concerns. He is also accused of having started bogus factories and firms with a view to obtain fabulous import-licences for goods to be eventually sold in the black-market in order to evade the income-tax. These accusations are, undoubtedly, grossly defamatory. To add insult to injury, the defendants recklessly pleaded justification and improperly persisted in it when any reasonable person after being shown his error in the witness-box would have gracefully withdrawn the allegations and apologised. In the conduct of the litigation also they showed, as pointed out by the learned Judge, concentrated venom and hostility and augmented the injury caused by the defamatory article by making baseless new allegations that the plaintiff had corrupted officials engaged in investigation in the case against his concerns and even bribed a senior Minister of the Central Government. These matters were rightly taken into consideration by the learned Judge in not only awarding substantial damages but aggravated damages.

45. Nevertheless, it appears to us that the learned Judge was in error in decreeing the full claim made by the plaintiff. It is the contention of the defendants that the damages are not only excessive but unreasonable and disproportionate in the circumstances of the case. We are aware that Appellate Courts are, and should be, most reluctant to interfere with the assessment of the learned trial Judge or a jury, but, that is so, because the latter have a unique opportunity of seeing the parties before them when equating the two incommensurables, viz., the diminution in esteem and the mental distress of the plaintiff. Where the plaintiff has not entered the witness-box or examined anybody for proving the same, it is quite open to the defendants to contend that the Appellate Court is in no worse position than the learned trial Judge in making the proper assessment. Even otherwise, what are proper damages is always a matter of impression, and, we should think that a claim of Rs. 3,00,000/- is much too high. We have only to bear in mind that a sum of three lacs is no mean sum by Indian standards. There are few persons in India who would save, after payment of taxes, that much sum in a lifetime of honest toil. Looked at that way, one may complain that this is almost a bounty.

46. Mr. Mistry for the plaintiff submitted that although at first blush rupees three lacs may appear to be a large sum, the court will also have to take into consideration the cost that his client had to undergo in order to vindicate his honour. It is true, he submitted, that he has been awarded costs in the trial court, but those costs are between party and party and are very much less than the cost which he has to pay to his Attorneys and counsel. There can be no doubt that the costs between an attorney and client are very much more than the costs between party and party, and costs actually incurred are much more than the costs awarded by the decree. The trial went on for 101 days and costs must have risen from day to day, and, therefore, the costs awarded in the decree will not cover the costs the plaintiff had incurred. But this consideration is extraneous to the question as to what damages are to be awarded for the injury caused. A party complaining about a tort like libel can only ask compensation for the injury sustained. It cannot include any part of the costs. Costs have to be decreed only in accordance with the rules of the court.

47. Mr. Zaveri for the defendants contended that there were certain matters in the evidence which ought to have been taken into consideration by the learned trial Judge in mitigation of damages. In this connection, he referred to the evidence which in his submission went to show (i) that China Cotton Exporters of which the plaintiff was one of the partners had paid Rs. 45,000/- to one Piloo Sidhwa in order to influence Central Ministers to lift the ban on the export of cotton or to obtain licences for export of cotton; (ii) that the same firm had, in the course of disposing of the imported art silk yarn in the market, purported to sell it to handloom factories, which were not in existence, the device of bogus factories being resorted to for the purpose of evading the condition of import which obliged them to sell the yarn to genuine handloom factories. Mr. Mistry objects that the defendants having given up, without any reservation, the plea of justification in this court, which the learned Judge found against the defendants, it would be incompetent for this court to consider the evidence bearing on the point of justification even for assessing damages. The danger is of inconsistent findings. To illustrate, the trial court held that no such amount was at all paid to Sidhwa. It also held that though Govardhandas & Co., who managed the yarn business on behalf of Messrs. China Cotton Exporters, had not made proper inquiries about the factories being genuine, none of the partners including the plaintiff had knowledge of the same. In other words, the finding of the learned

trial Judge is that Messrs. China Cotton Exporters or the plaintiff had no knowledge that the Concerns, National Handloom Weaving Works and Rayon Handloom Industries, to which the yarn was supposed to have been sold, were not genuine Handloom factories. If on a consideration of that evidence in this court, even for the purposes of assessing damages, we were to come to a contrary conclusion, that would be tantamount to holding that justification was partially proved. That would result in inconsistent conclusions, viz., no justification whatever on merits but partial justification in mitigation of damages. Such a result ought not to be countenanced. Since the plea of justification has been entirely given up, the evidence which relates to justification cannot be reconsidered. It is true that we have some reported cases in which it has been held that though the whole justification may not be proved, partial justification may be taken into consideration for the purposes of mitigation of damages (See for example the speech of Lord Denning at page 1142 in *Plato Films Ltd. v. Speidel*, 1961 AC 1090.) But in the present case, in the first place, there is no plea of general bad character of the plaintiff. Secondly, not even partial justification has been held proved. The utmost that can be said on behalf of the defendants is that we should take the findings of the learned Judge as they are and see if there is anything in those findings which can be properly urged in mitigation of damages. That attempt has failed.

48. On a consideration of the issues involved and discussed above, we think, the amount of damages awarded by the learned trial Judge will have to be reduced. We think that the proper damages to be awarded should be Rs. one and half lacs. The decree will have to be modified to that extent.

49. One thing more has to be noted. The decree was passed against defendants 1, 2 and 4. There was one decree against all of them, Defendant No. 4 being held to be a joint tort-feasor. As a matter of fact, the whole Article admittedly was based upon the material and documents produced by defendant No. 4 and the evidence has revealed that even the final draft of the Article was approved by defendant No. 4, who, in his own hand, made some corrections in the draft. Defendant No. 4, however, has not come in appeal. He became an insolvent after the decree and the Official Assignee has been brought on record as respondent No. 2(a). The question is whether the decree against him also requires to be varied. Gathley in his Book on *Libel and Slander*, Sixth Edition, at para 1299 (p. 606) has pointed out that there must be

one verdict and one judgment against all for the total damages awarded. What the plaintiff is entitled to receive is a sum representing the damages that he has suffered from a single wrong inflicted by all. It would, therefore, follow that there cannot be two decrees for different amounts in respect of the same libel. The fact that defendant No. 4 has not appealed is not of much consequence in view of the principles underlying Rules 4 and 33 of Order 41, Civil Procedure Code.

50. In the result, the appeal is partially allowed, the decree of the trial Court is confirmed with the only modification that for the amount of Rs 3,00,000/-, Rs. 1,50,000/- (Rs. one and half lacs) will be substituted. As regards the costs of the appeal, we are informed that the hearing of this appeal went on for about thirty days. The appeal was on all points decided against the defendants in the trial court, but at the hearing of the appeal, learned counsel for the defendants confined his arguments only to two questions, viz. (i) qualified privilege and (ii) quantum of damages. On the issue of "qualified privilege", the arguments went on for very long, for more than 22 days, and on that point, the appellants have failed. It is true that they have succeeded in the appeal partially to the extent of reduction of quantum of damages by half, but if they had confined their arguments only to the quantum of damages, the appeal would have been disposed of in not more than five or six days. In these circumstances, therefore, we think that the appellants will have to pay four-fifth of the costs of the appeal to respondent No. 1 and bear their own costs.

Appeal partially allowed.

AIR 1970 BOMBAY 438 (V 57 C 74)

VIMADALAL AND NATHWANI, JJ.

Dinkar Bandhu Deshmukh and another, Appellants v. State, Respondent.

Confirmation Case No 17 of 1969 with Criminal Appeal No 1293 of 1969 D/- 25-11-1969

(A) Evidence Act (1872), Section 134 — Conviction on basis of evidence of single witness — Corroboration, when necessary.

As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated. Unless corroboration is insisted upon by statute, the court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself required the same as a rule of prudence. The question of corroboration arises only in regard to a witness who is neither wholly reliable nor wholly unreliable in

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which the Court should be circumspect. AIR 1957 SC 614, Foll. (Para 5)

(B) Evidence Act (1872), Section 191 — Criminal trial — Accused relying on particular fact to discredit prosecution witness — Fact should be brought out in cross-examination of prosecution witness.

It is true that the onus of proving guilt rests throughout the trial, on the prosecution and never shifts on to the shoulders of the accused, but if the accused wants to rely on a particular fact for discrediting a prosecution witness, that fact must be adequately brought out in the cross-examination of the witnesses for the prosecution. (Para 7)

(C) Evidence Act (1872), Section 3 — Credibility of witness — Partisan witness — Witness having respect or loyalty to same religious institution as the victim does not make him partisan witness. (Para 9)

(D) Evidence Act (1872), Section 157 — Statement made "at or about" the time when fact took place — Tests indicated.

Where the question is whether delay in making a statement fulfils the "at or about" condition of Section 157 there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction.

[Held applying the test to the facts of the case, the statement alleged to have been made was made as early as could reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. AIR 1952 SC 54, Applied. (Para 14)]

(E) Evidence Act (1872), S. 155(1) — Applicability.

If a witness goes into the box and makes a statement that he believes that another witness is unworthy of credit there would be two safeguards: (1) the statement would be on oath and (2) it could be tested by cross-examination. To draw an inference against the credibility of a witness without anybody going into the witness box in the manner contemplated by Section 155(1) of the Evidence Act would not be legitimate. It would be a proposition which in some conceivable cases might be dangerous to accused persons themselves. Opinion evidence is, as a general rule, not admissible and Section 155(1) is exception to that rule. (Para 18)

(F) Evidence Act (1872), Section 27 — Discovery evidence is not substantive evidence but only corroborative evidence.

Discovery evidence, by itself, is subsidiary and cannot sustain a conviction, but where there is plenty of other evidence to sustain the prosecution case, discovery

evidence is a valuable piece of corroborative evidence. (Para 19)

(G) Evidence Act (1872), Section 32(1) — Deceased widow asking for police protection on account of apprehension of trouble from her brothers-in-law at the time of undertaking sowing operation — Two months later deceased found murdered — Her application for police protection held admissible under S. 32(1). (Para 20)

(H) Evidence Act (1872), Section 8 — Complaint by deceased widow, some days prior to her murder that she apprehended trouble from accused in her sowing operation — Prosecution case not that making of complaint was cause of her murder — Complaint held not admissible under Section 8 showing motive — Held, however, that previous litigation between deceased and accused formed motive for the murder. (Para 23)

(I) Evidence Act (1872), Section 8 — Evidence of subsequent conduct — Absconding of accused — Nature of evidence required stated.

In order that the Court can legitimately draw the inference that the subsequent conduct of an accused was that of a guilty person and not of an innocent man, there must be proper material placed before the court. Where all that the prosecution has placed before the Court are two bald statements, both made by Police Sub-Inspector (1) that the accused was not in the village on the day soon after the incident when the police went there, and (2) that police Sub-Inspector had sent about four constables in search of the accused to some villages, that evidence is wholly insufficient to lead to the inference that the accused was absconding since the date of the incident. In order to lead to that inference, the investigating police officer must lay before the Court further evidence to show that continuous watch was kept at the house of the accused concerned, and that a watch was also kept by him of the places which the accused frequented, including his place of work, but the accused did not turn up at all at any of those places during a certain period of time. In the absence of such evidence no inference can be drawn that the accused was absconding and his subsequent conduct was that of a guilty person. (Para 21)

(J) Evidence Act (1872), Ss. 11 and 101 — Criminal trial — Evidence of alibi — Onus of proof is on accused. (Para 21)

(K) Penal Code (1860), Section 302 — Accused creating false sense of security and confidence in their widowed sister-in-law, a helpless woman who had gone to work on her field — Sister-in-law taken unawares and pounced upon by accused and murdered — No extenuating circumstance — Maximum penalty of law held rightly inflicted. (Para 24)

Cases Referred: Chronological Paras

(1960) AIR 1960 Bom 290 (V 47) = 61 Bom LR 1620 = 1960 Cri LJ 894, Allijan Munshi v. The State	20
(1957) AIR 1957 SC 614 (V 44) = 1957 SCJ 527 = 1957 Cri LJ 1000, Vadivelu v. State of Madras	5, 6
(1956) AIR 1956 SC 460 (V 43) = 1956 Cri LJ 827, Gurcharan Singh v. State of Punjab	21
(1952) AIR 1952 SC 54 (V 39) = 1952 Cri LJ 547, Rameshwar Kalyan Singh v. State of Rajasthan	14

R. Jethmalani with S. N. Deshpande,
for Appellants, M. P. Kanade, Asst. Govt.
Pleader, for State.

VIMADALAL, J.:— This is a confirmation case in respect of the sentence of death passed by the Sessions Judge at Satara against accused No. 2 before him. The same has come up for hearing along with the appeal filed by original accused Nos. 1 and 2 from the conviction and sentence imposed upon them by the trial Judge. It may be mentioned that the trial Judge had acquitted the 3rd accused in the said case.

2. The facts necessary for the purpose of disposing of the matter before us are that accused Nos. 1 and 2 are brothers, and they had a third brother named Shankar who was married to the deceased Housabai. Shankar died some time in the year 1952, without issue and, after his death, Housabai adopted Varkari Sampaday and was residing in a Math at Pandharpur conducted by one Madan Maharaj. The deceased Madhav Buwa was the Secretary of the Math and witness Macchindra was also one of its inmates. Housabai used to reside in the premises of the Math after the death of her husband, but she claimed partition and separate possession of her share in the joint family property by filing Civil Suit No. 120 of 1960 against the two accused in the appropriate Court, and having succeeded in that suit, obtained possession of her share of the lands on the 23rd of April 1968. The enforcement by Housabai of her rights of partition and separate possession of her share of the family lands appears, naturally, to have embittered the relations between her and her brothers-in-law accused Nos. 1 and 2, and she apprehended some trouble from them at the time of undertaking sowing operations in the field of which she had been given possession pursuant to the decree of the Court. She accordingly, sought police protection by making two applications which are Exhibits 42 and 43 in the present case and, with the assistance of a constable, she went through the sowing operations without any untoward incident occurring. The time for harvesting having arrived, Housabai left the Math some

time in the beginning of December 1968, accompanied by Madhav Buwa (since deceased) and witness Macchindra, in order to go to her lands at Nandgaon. She did not put up at the house of her brothers-in-law accused Nos. 1 and 2 from whom she presumably apprehended trouble, but put up at the house of witness Ramchandra Gadhawe in the village of Targaon which is separated from the village of Nandgaon only by the river Krishna. From there, Housabai, together with Macchindra and Madhav Buwa, used to go to Housabai's field for the purpose of harvesting operations, and it may be stated that Housabai had actually introduced her two companions to accused Nos. 1 and 2 on the very first day, and had also spoken to accused Nos. 1 and 2 who had given her some jowar, flour and fuel which she needed. The work of removing the crop went on and was still incomplete after the expiration of a period of 13 days during which Housabai, Madhav Buwa and Macchindra continued to stay at the house of Ramchandra Gadhawe. As, however, they had over-stayed their hospitality, they had thereafter to shift from the house of the said Ramchandra, and they then put up in the house of one Nivrutti Bartakke which was also situated in the village of Targaon. They had put up at the said Nivrutti only for a couple of days when the incident in the present case occurred on the 19th of December 1968.

3. On that day, Housabai, Madhav Buwa and Macchindra had gone to the field of Housabai at about 8 a.m., as usual, for removing the crop and had worked in the field for the whole day. Accused Nos. 1 and 2, accompanied by accused No. 3 who was their distant uncle, had come into the neighbouring field belonging to accused Nos. 1 and 2 at about 4 p.m. that day and had started cutting the wood of a Babbul tree in their field. Accused No. 1 had for that purpose an iron bar, accused No. 2 had in his hand an axe and accused No. 3 had with him a saw. Housabai and her companions finished the day's work in the field at about 5-30 p.m. and began to collect their belongings in order to leave the field. It is the prosecution case that, seeing this, accused No. 1 left his field with the iron bar in his hand and went ahead. Shortly thereafter Housabai, Madhu Buwa and Macchindra left the field and were walking on a foot-track by the side of a canal in single file, Madhu Buwa being first, followed by Macchindra, followed by Housabai. According to the prosecution, accused Nos. 2 and 3 also left the field and followed fairly close behind Housabai and actually spoke to her as they went along. It is the prosecution case that when Housabai and her companions came to a place near the engine house of one Ghorpade, accused

No. 1 suddenly darted out from the bed of the canal and gave a blow with the iron bar which was in his hand on the neck of Madhav Buwa, whereupon Madhav Buwa fell down instantaneously. Macchindra who was following Madhav Buwa at a distance of about 10 or 11 paces was taken aback and on looking behind towards Housabai who was following him at a distance of about 15 paces, he saw that accused No. 2 gave an axe-blow on the back of her head, whereupon Housabai also fell down. According to the prosecution accused No. 3 then exhorted accused Nos. 1 and 2 not to allow Macchindra to escape, but Macchindra threw away the bag which was in his hand and ran for his life into the adjoining field. Seeing him running away, accused No. 2 is alleged to have thrown the axe towards Macchindra, with the result that the handle of the axe hit Macchindra on his right thigh, and this was followed up by accused No. 2 throwing a stone at Macchindra which hit him on the back side of his waist. The prosecution story is that Macchindra, though injured, managed to run away and he ultimately went to a temple at a village named Borban of which witness Pandurang Narayan was the pujari to whom he narrated the incident. The prosecution story is that Pandurang, however, refused to give him shelter for the night and Macchindra, therefore, proceeded to the adjoining village of Targaon where he went to the house of Ramchandra Gadhav with whom they had previously put up and narrated the incident to him. Ramchandra, however, also declined to give him shelter for the night and Macchindra, therefore, proceeded to the house of witness Nivrutti Bartakke in Targaon itself with whom they had been putting up since a couple of days. It is the case of the prosecution that Macchindra narrated the incident to Nivrutti Bartakke also, but Nivrutti advised him not to stay there and accompanied him up to Targaon Railway Station from where, after various intermediate efforts to which it is unnecessary to refer, Macchindra ultimately succeeded in proceeding by a State Transport bus to Satara which he reached at about 9 a.m. the next morning. There he contacted one Shivaji More who was known to him and narrated the incident to him also. Accompanied by the said Shivaji, Macchindra proceeded to the house of the Mamlatdar who, however, was out and on being directed by his peon to report the matter to the Police Station at Borgaon, he ultimately went to Borgaon which he reached at about 3 p.m., and had his statement recorded by the Police Sub-Inspector at the Police Station at that place. Investigation thereafter started. Macchindra was treated for his injuries at the dispensary at Satara, and on

the next day, he accompanied the police party to Nandgaon which they reached at about 12 noon. Accused No. 3 was found there and he and accused No. 1 were arrested on the same day, but it is the case of the prosecution that accused No. 2 was not to be found at his house and was arrested only on the 28th of December 1968. The dead bodies of Madhav Buwa and Housabai were recovered from the canal and were found to have several injuries upon them, and post-mortem examination was duly performed on their dead bodies. After the usual proceedings, the three accused persons were committed to stand their trial before the Court of the Sessions Judge at Satara where accused No. 1 was charged under Section 302 of the Indian Penal Code with the substantive offence of the murder of Madhav Buwa, accused No. 2 was charged under the same section with the substantive offence of the murder of Housabai, and alternatively, all the three accused were charged with the murder of Madhav Buwa as well as Housabai under Section 302 read with Section 34 of the Indian Penal Code. Accused No. 2 was also charged under Sections 323 and 506 of the Indian Penal Code with having voluntarily caused hurt as well as criminal intimidation to Macchindra, and accused No. 3 was further charged under Section 109 read with Section 302 of the Indian Penal Code with having abetted the commission of the offences of the murders of Madhav Buwa and Housabai by accused Nos. 1 and 2. The three accused were, in due course, tried by the Sessions Judge who by his judgment dated the 30th of August 1969 acquitted accused No. 3, but convicted accused Nos. 1 and 2, inter alia, under Section 302 read with Section 34 of the Indian Penal Code in respect of the murder of Housabai as well as of Madhav Buwa.

4. The prosecution evidence consists of the following:—

1. The evidence of eye-witness Macchindra, which the prosecution states is corroborated by the First Information Report (Exhibit 7).

2. Corroborative evidence in the form of,

- (a) medical evidence;
- (b) the oral evidence of Pujari Pandurang;
- (c) the evidence of Ramchandra Gadhav;
- (d) the evidence of Nivrutti Bartakke;
- (e) the finding of the iron bar from the house of accused Nos. 1 and 2 who, it may be stated, lived together, that iron bar being found, on chemical analysis, to be stained with human blood;
- (f) the statement of accused No. 1 and the production by him of an axe from a dung-pit near the house of

accused Nos. 1 and 2 which, on chemical analysis, has been found to be blood-stained.

3 Evidence in regard to the alleged motive of the crime.

The above evidence is relied upon by the prosecution against both accused No 1 as well as accused No 2, but in addition to the same, the prosecution relies on one more piece of evidence as against accused No 2 and that is, the evidence in regard to his conduct subsequent to the alleged offence in absconding for a period of one week.

5. Before I proceed to deal with the above evidence, I may dispose of one submission which was made by Mr. Jethmalani on behalf of the accused, and that was, that the Court should be slow to convict on the testimony of a single witness. Reference may be made in this connection to the decision of the Supreme Court in the case of *Vadivelu v. State of Madras*, 1957 SCJ 527 = (AIR 1957 SC 614) in which an identical submission was advanced before the Supreme Court as being a rule of prudence. After referring to a decision of the Privy Council in an earlier case, the Supreme Court laid down (at p. 533 of SCJ) = (at p. 618 of AIR) that as a general rule, a Court can and may act on the testimony of a single witness though uncorroborated, that unless corroboration was insisted upon by statute the Court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself required the same as a rule of prudence, as for example, in the case of a child witness or a witness in a position analogous to that of an accomplice, and that whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and much would depend upon the judicial discretion of the Judge concerned. The Supreme Court then proceeded (at p. 534 of SCJ) = (at p. 619 of AIR) to categorize witnesses into three classes, viz., (1) wholly reliable; (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. It then laid down that the question of corroboration arises only in regard to the third category in which the Court was called upon to be circumspect. It is in the light of these principles laid down by the highest Court that I will now proceed to discuss the evidence of Macchindra in the present case.

6. Macchindra has deposed that he hailed originally from a village in Osmanabad district and that since about 2½ years prior to his giving evidence in Court he had been residing permanently in the Math at Pandharpur of which Madan Maharaj is the head. He has then deposed to the fact that Madhav Buwa and

Housabai were also residing in the Math and to the respective duties performed by them to which it is unnecessary to refer. Macchindra then deposed that Housabai had told him that there was litigation about her landed property between her and her brothers-in-law, and she had succeeded in the litigation and obtained possession of her lands. She had further told him that she had sought police protection at the time of undertaking sowing operations on her lands. Macchindra has then proceeded to state in the course of his evidence that he and Madhav Buwa had accompanied Housabai who went to her lands at Nandgaon for the purpose of harvesting the crop that had grown upon it, and that they had put up at the house of witness Ramchandra Gadhave for 13 days, and had then moved to the house of witness Nivrutti Bartakke where they were required to live only for a day or two more for completing the harvesting work. Macchindra has then proceeded to the actual incident which occurred on the evening of the 19th of December 1968 in much the same terms in which I have set out the prosecution case at the beginning of this judgment. There are, no doubt, some contradictions which have been brought out in the evidence of the said Macchindra, and I must proceed to deal with them. In the course of his evidence in the trial Court Macchindra stated that accused No. 3 had twice incited accused Nos. 1 and 2 not to permit Macchindra to run away, but no such statement appears in the First Information Report (Exhibit 7) which Macchindra made on the 20th of December 1968 at Borgaon. Whilst I am not prepared to say that this is a major contradiction which should lead the Court to discredit the testimony of Macchindra altogether, it is certainly a contradiction which might well be in the nature of an improvement made by him in the trial Court and should, therefore, make the Court look for corroboration of the testimony of Macchindra. It is a sort of contradiction which would bring the case within the third category laid down by the Supreme Court in *Vadivelu's* case, 1957 SCJ 527 = (AIR 1957 SC 614) viz., of a witness who is neither wholly reliable nor wholly unreliable, and would make the Court circumspect and look for corroboration to the evidence of such witness. (His Lordship further considered the other alleged contradictions and held them to be minor and not material).

7. There are several other discrepancies on account of which Mr. Jethmalani has attacked the veracity of Macchindra, and I must proceed to deal with the same. Mr. Jethmalani has contended that Macchindra's description of the incident is contrary to the medical evidence and that we should, therefore, take the view that he has fabricated the story after consultation

with Shīvajī at Satara, having had 24 hours' time within which to do so. As I will point out when I deal with the medical evidence, in my opinion, there is nothing in that evidence which would discredit the testimony of Macchindra. On the other hand, I take the view that it corroborates his evidence in the trial Court. The next point which was sought to be made by Mr. Jethmalani was that the First Information Report of Macchindra starts with what he has characterised as a proved falsehood viz., that Ramchandra had asked Housabai and her companion to leave his house because of threats given to him by her brothers-in-law, a fact which Macchindra himself has not, in terms, deposed to in the course of his evidence. If one turns to the evidence of Ramchandra, he has, however, stated that he had asked them to look for some other house for their stay, as they stayed much longer than expected. Merely because Ramchandra has not, in terms, referred to threats by the brother-in-law of Housabai it cannot be inferred that no such threats must have been given to him. Ramchandra has not been asked in cross-examination whether any threats had been given to him by her brother-in-law. If he had been so asked and had denied the same, there might have been a strong foundation for the comment which Mr. Jethmalani now seeks to make against Macchindra. It is true that the onus of proving guilt rests, throughout the trial, on the prosecution and never shifts on to the shoulders of the accused, but if the accused wants to rely on a particular fact for discrediting a prosecution witness, that fact must be adequately brought out in the cross-examination of the witnesses for the prosecution. Without risking the asking of that question to Ramchandra in cross-examination, Mr. Jethmalani cannot be heard to say that the mere fact that Ramchandra has not referred to any such threat shows that Macchindra is not an honest witness. Mr. Jethmalani has also commented on the fact that, according to him, Macchindra has tried to increase the distance from the site of the offence to the temple at Borban by stating that it would require half-an hour to run that distance, whereas the distance is only about a mile, as the Police Sub-Inspector has stated in his evidence. It must not, however, be overlooked that the Police Sub-Inspector has stated that that is the distance "by a

given in the First Information Report, and as given by Macchindra in the trial Court. I am afraid, however, there is no substance whatsoever in the distinction which he sought to draw, either in regard to the manner in which they were all walking when the incident occurred, or in regard to the reaction of Macchindra and Housabai when they saw Madhav Buwa being hit on the head by accused No. 1.

8. There is, however, one point urged by Mr. Jethmalani which needs consideration and that is that whilst Macchindra claims to have given the names of his assailants viz., the three accused, to all the three witnesses whom he met shortly thereafter viz., Pujari Pandurang, Ramchandra as well as Nivrutti, none of those witnesses bears him out as far as the actual giving of names of the assailants is concerned. In this connection it must, however, be pointed that the said three witnesses all state that Macchindra had told them that the assailants were the brothers-in-law of Housabai. Mr. Jethmalani has contended that it is unnatural that the said witnesses should not ask for the actual names of the assailants from Macchindra, but I fail to see any unnaturalness in the same. Housabai's husband had only two full brothers and if any of the said witnesses knew their names, they may not ask for the names. If on the other hand, they did not know the brothers-in-law of Housabai, or their names, they might not be interested in knowing their names, so long as Macchindra had told them who the assailants were by describing them as the brothers-in-law of Housabai. I also do not accept the contention of Mr. Jethmalani that since the actual names of the assailants were not given by Macchindra to Pandurang, Ramchandra, or Nivrutti their evidence could not be said to be corroborative of the evidence of Macchindra.

9. It was next contended by Mr. Jethmalani that to none of the said three witnesses viz., Pandurang, Ramchandra or Nivrutti, did Macchindra describe the assault on himself or the injuries suffered by him, though he claimed to have described the whole incident.

(His Lordship examined the contention and rejected it. His Lordship then continued)

nesses whose presence was necessary in the witness-box for the unfolding of the narrative on which the prosecution case was based. None of them claimed to have seen the incident at all, or to have had anything to do with it and, under those circumstances, no adverse inference can possibly be drawn by the Court from the fact that these witnesses have not been called. (Further examining the contention, His Lordship proceeded.)

Mr. Jethmalani next contended that the witnesses viz. Macchindra, Pandurang, Ramchandra and Nivrutti are all persons belonging to a spiritual brotherhood being all Varkaris, and that spiritual relationship like natural relationship makes them partisan witnesses. That contention has only to be stated to be rejected, for merely because persons may owe loyalty or respect to the same religious institution cannot make them partisan witnesses. In this connection judicial notice may be taken of the fact that there are lakhs of Varkaris in this country and it would be a curious situation indeed, if in any incident in which they are involved or with which they are connected, they should be dubbed partisan witnesses merely on that account. The last criticism of Mr. Jethmalani in regard to the evidence of Macchindra was that his version of the incident is inherently improbable as there was no reason why of all places the first accused should be hiding in a canal, but I am afraid there is no substance whatsoever in that contention of Mr. Jethmalani. The first accused, if he intended to surprise Housabai and her companions, had to hide somewhere, and he may very well have found the hump of the canal to be a safe hiding place from which to ambush them.

10. Having given anxious consideration to the various points raised by Mr. Jethmalani in regard to the credibility of Macchindra on whose testimony the decision of this case largely depends, I have come to the conclusion that he is a witness of truth and that none of the contradictions pointed out or criticism levelled by Mr. Jethmalani are such as to warrant my discarding his testimony altogether. As already stated by me, in view however, of the fact that he has introduced in his evidence in the trial Court the alleged incitement by accused No. 3 which does not find place in his First Information Report (Exhibit 7), in my opinion, it is necessary that the Court should be circumspect and should look for corroboration of his testimony.

11-12. There is ample corroborative evidence in this case. Turning, first and foremost, to the medical evidence which, Mr. Jethmalani has stated, contradicts Macchindra's evidence, I cannot help

feeling that, far from contradicting the same, it substantially corroborates the testimony of Macchindra. (After considering the medical evidence, His Lordship proceeded). That finishes with the medical evidence in the case and disposes of the contention of Mr. Jethmalani in regard to the same in so far as, in my opinion, far from contradicting the evidence of Macchindra, it corroborates that evidence.

13. I must now turn to the corroborative evidence afforded by the testimony of Pujari Pandurang, Ramchandra Gadhave and Nivrutti Bartakke

14. Before, however, I deal with their evidence itself, I must consider the legal objection which was raised by Mr. Jethmalani in regard to the admissibility of the evidence of Ramchandra Gadhave and Nivrutti Bartakke. It was the contention of Mr. Jethmalani that the evidence of these two witnesses cannot be said to be admissible under Section 157 of the Evidence Act, because it is intended to be evidence of former statements made by Macchindra which, the prosecution claims, corroborates his testimony in the trial Court, and such former statements would be admissible under Section 157 only if they were made "at or about the time when the fact took place" to which they relate. Mr. Jethmalani has further submitted that the word "at" in Section 157 connote statements which were part of the *res gestae*, i.e., the event or the transaction itself, whereas the words "or about the time when the fact took place" connote statements made very soon after the transaction which constitutes the *res gestae*. Mr. Jethmalani has therefore, contended that whilst the statements alleged to have been made by Macchindra to Pujari Pandurang might be admissible as having been made "about the time when the fact took place", the alleged repetition of these statements by Macchindra subsequently to Ramchandra Gadhave and Nivrutti cannot be said to have been made "about the time when the fact took place" so as to fall within the terms of Section 157, and the evidence of the said two witnesses in regard to the same is, therefore, not admissible. The objection raised by Mr. Jethmalani has to be dealt with in the light of the law on the point as laid down by the Supreme Court in the case of Rameshwar Kalyan Singh v. State of Rajasthan, AIR 1952 SC 54. The statement in question in that case was made by Mt. Purni to her mother about four hours after the incident had occurred, the reason for the delay being that her mother was not at home when she went there, and that statement was sought to be admitted in evidence for the particular purpose of corroboration under Section 157 of the Evidence Act. In regard to the question whether the statement having

been made four hours after the incident, fulfilled the condition laid down by Section 157 viz. as having been made at or about the time of the incident, the Supreme Court observed as follows (paragraph 29):—

“The question is whether this delay fulfils the “at or about” condition. In my opinion, here also there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction.”

The Supreme Court then proceeded to hold that, having regard to the facts of that case, the statement did fall within the ambit of Section 157 of the Evidence Act and was rightly admitted in evidence. Applying the test laid down by the Supreme Court in Rameshwar's case to the facts of the present case, the question that I must proceed to consider is whether the statements alleged to have been made by Machhindra to Ramchandra Gadhave and Nivrutti Bartakke were made as early as could reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. Machhindra was stranger to the locality and after having been refused shelter in the temple, it would be natural for a person placed in the situation in which he was, to run to the houses of people with whom he and his two companions had been putting up in Targaon. He could not really have gone to them earlier than he actually did. His going first to the temple is explicable, because he probably thought that the accused person might find him out and do harm to him if he went to the place of Ramchandra or Nivrutti where he had been putting up, but would not expect to find him at the temple, or in any event may not dare to enter the temple and inflict injuries upon him in the presence of Pujari. Having been refused shelter in the temple, he had no alternative but to go to the only two persons who were known to him in Targaon. Having regard to these facts, in my opinion, the statements which he made to Ramchandra Gadhave and Nivrutti were made as early as might be expected, and there is not the least doubt that there was no opportunity for concoction in the interregnum between his running away from the site of the incident and his narrating the incident to the said two persons. I, therefore, overrule Mr. Jethmalani's objection to the admissibility of the statements of Macchindra which were deposed to by Ramchandra and Nivrutti and hold that the same are admissible as corroborative evidence under Section 157 of the Evidence Act. I will now turn to the corroborative evidence of Pandurang, Ramchandra and Nivrutti.

15-17. (His Lordship considered the evidence of Pujari Pandurang, Ramchandra and Nivrutti Bartakke and held that it substantially corroborated the evidence of Macchindra. His Lordship then continued.)

18. Mr. Jethmalani sought to contend that the fact that the police had chosen to record the statements of Pandurang and Nivrutti under Section 164 of the Code of Criminal Procedure shows that the police thought that these three witnesses were all unreliable. In support of that contention, he has relied upon the provisions of Section 155(1) of the Evidence Act which lay down that the credit of a witness may be impeached by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit. I am afraid that section has no application at all to the present case, for there is no question of anybody having gone into the witness-box to depose that these three witnesses, or any of them, were in his opinion unworthy of credit. If a witness goes into the box and makes such a statement there would be two safeguards: (1) the statement would be on oath and (2) it could be tested by cross-examination. In my opinion, to draw such an inference against the credibility of a witness without anybody going into the witness-box in the manner contemplated by Section 155(1) of the Evidence Act would not be legitimate. It would be a proposition which in some conceivable cases might be dangerous to accused persons themselves. Opinion evidence is, as a general rule, not admissible and Section 155(1) is exception to that rule. Since the matter does not fall within the terms of Section 155(1), or any of the other sections relating to opinion evidence, in my opinion, such an inference would not be legitimate or permissible. I must, therefore, reject this contention of Mr. Jethmalani also.

19. The next piece of corroborative evidence which has been relied upon by the prosecution is the recovery of the iron bar from the house of accused Nos. 1 and 2 on a search of that house, which iron bar has been found, on chemical analysis, to be stained with human blood. I have no hesitation in rejecting Mr. Jethmalani's contention that if the iron bar was struck on the nape of the neck, there would be no blood on it, in view of my finding on the evidence that the actual impact was at a place slightly higher than the nape of the neck, and in view of the fact that the base of the skull of Madhav Buwa had been found to be fractured. The blood that is found on the iron bar is human blood, and, therefore, though the iron bar may be regarded as an agricultural implement which the accused could be expected to possess for innocent use, the finding of human blood on it changes the entire

complexion and lends considerable corroborative value to the evidence in support of prosecution case. It is true that discovery evidence, by itself, is subsidiary and cannot sustain a conviction, but that is not the position in the present case in which there is plenty of other evidence to sustain the prosecution case. Both the panchas to the recovery of the iron bar have turned hostile, but it appears to be fairly clear that they have been won over by the defence, and I hold that the iron bar was recovered in the manner alleged by the prosecution.

20. A further piece of corroborative evidence that is relied upon by the prosecution is the statement alleged to have been made by accused No. 1, and the production by him of an axe from a dung-pit near the house of accused Nos. 1 and 2 which was found to be stained with blood, though it could not be ascertained whether that blood was human blood. The fact that the blood on the axe was not shown to be human blood, coupled with the fact that the axe was, even according to the prosecution, not used by accused No. 1, deprive this evidence of the probative value it might otherwise have had. The statement which the accused is alleged to have made (Exhibit 28) contains a portion which was clearly inadmissible in evidence under Section 27 of the Evidence Act, the admissible portion being only, "I produce that axe which is buried in dung-pit near my house". That statement does not even say that it was accused No. 1 who had buried the axe at the place from where it was recovered. The admissible portion of the statement is therefore, of very little probative value. The panchas to the making of that statement and the recovery of the axe who were the same as in regard to the recovery of the iron bar have both turned hostile, but even if the admissible portion of the statement (Exhibit 28) is taken to have been made by the first accused, for the reasons stated above, neither the said statement nor the recovery of the axe is of any appreciable value as evidence corroborative of the prosecution case. The only other corroborative evidence on which the prosecution has relied is the evidence in regard to motive. The prosecution relies, in that connection, on Exhibits 42 and 43 which are applications made by the deceased Housabai for Police protection at the time when she had undertaken sowing operations on this very land. In those applications she had expressed apprehension of trouble from her brother-in-law and had mentioned there is having been given to her by them Mr. Jethmalani has contended that the said two documents are inadmissible in evidence as they do not fall either under Section 32 (1) of the Evidence Act, or under Section 8 of that Act. Reference may be made in that connection to a decision of a Division

Bench of this Court in the case of Allijan Munshi v. The State, 61 Bom LR 1620 = (AIR 1960 Bom 290). In that case also, what was sought to be admitted in evidence was a complaint in writing made by the deceased nearly two months prior to her death expressing apprehension of death at the hands of the accused. The view expressed by the Division Bench in the said case was (at pp. 1623-1624) (of Bom LR) = (at p. 291 of AIR) that, whilst the said complaint "may be admissible" under Section 32 (1) of the Evidence Act, the same was in any event admissible under Section 8 of that Act as constituting a motive or preparation for the fact in issue, and as being explanatory of the conduct of the deceased. It was however, further held by the Court in the said case (at pp. 1624-1625) (of Bom LR) = (at pp. 291-92 of AIR) that by the mere production of the document the truth of its contents could not be regarded as established and that the document in question, whilst admissible for the purpose of proving the fact that Rashida had made a complaint against the appellant which may have constituted a motive for the appellant to commit the offence charged, was not admissible for proving the truth of the contents of that complaint. The position in the present case is that as Mr. Jethmalani has contended, it is not the prosecution case that the murder of Housabai was committed because she had made the complaint to the police (Exhibits 42 and 43). The making of the complaint, therefore, does not itself constitute "motive" within the terms of Section 8 of the Evidence Act. In my opinion, however, these two documents (Exhibits 42 and 43) do fall within the terms of Section 32 (1) of the Evidence Act and are admissible thereunder. In any event, there is oral evidence on record to show that there was litigation between Housabai and accused Nos. 1 and 2 which Housabai had launched for the purpose of ascertaining her right to her husband's share in the family property. The evidence with regard to that is to be found in the testimony both of witness Macchindra as well as of witness Madan Gopal who was the head of the Math in which the deceased Housabai had been residing. She had succeeded in obtaining a decree as a result of that litigation and had actually enforced the same by obtaining possession of the land. Having regard to these facts which are on record even apart from Exhibits 42 and 43, it would be a reasonable inference for the Court to draw that relations between Housabai and accused Nos. 1 and 2 had been strained as a result of that previous litigation. There is therefore, evidence in the present case with regard to the motive of accused Nos. 1 and 2 to commit the crime in question. No question of the adequacy of motive arises, for it is a]

matter of common experience that very heinous crimes have sometimes been committed out of very slight motive. Motive, however, is of particular importance only in cases of purely circumstantial evidence for, in such cases, motive itself would be a circumstance which the Court would have to consider. In cases in which there is an eye-witness or eye-witnesses, motive, however, plays a very subsidiary role. Absence of motive should, in such cases, only make the Court circumspect in the matter of assessment of the evidence of the eye-witness. On the other hand, motive, if proved, merely adds to the weight and value of the evidence of the eye-witnesses. The fact that Housabai had made a will and that she intended to change the same, on which Mr. Jethmalani has relied, cannot possibly lead to the inference that she had created potential enemies, who might have committed her murder. It must once again be noted that in cases of direct evidence as opposed to circumstantial evidence, the fact that there might be other persons interested in killing the deceased is of little value, if the eye-witness or eye-witnesses are believed by the Court.

21. That leaves for consideration only the additional bit of evidence as against accused No. 2 viz., that he was absconding for a week after the incident. The date of the offence was the 19th of December 1968, and accused No. 2 was arrested only on the 28th of December 1968. In order that the Court can legitimately draw the inference that the subsequent conduct of an accused was that of a guilty person and not of an innocent man, there must be proper material placed before the Court. All that the prosecution has placed before the Court in the present case are two bald statements, both made by Police Sub-Inspector Borkar: (1) that the second accused was not in the village on the day soon after the incident when the police went there; and (2) that Police Sub-Inspector Borkar had sent about four constables in search of accused No. 2 to some villages. That evidence is, in my opinion, wholly insufficient to lead to the inference that the second accused was absconding since the date of the incident. In order to lead to that inference, the investigating police officer must lay before the Court further evidence to show that continuous watch was kept at the house of the accused concerned, and that a watch was also kept by him at the places which the accused frequented, including his place of work, but the accused did not turn up at all at any of those places during a certain period of time. In the absence of such evidence, I am afraid, no inference can be drawn that accused No. 2 was absconding and his subsequent conduct was that of a guilty person. It may, at this stage, be mentioned that accused No. 2 has, in his

statement, raised a plea of alibi and has contended that since the 18th of December 1968 he had gone to a cattle fair at the village of Pusegaon and had returned to Nandgaon only on the evening of the 27th of December 1968. That statement may not be sufficient to sustain a plea of alibi, the onus of proving which is clearly on the accused, AIR 1956 SC 460 para. 5 at p. 562. Even so, if the prosecution evidence falls short of proving that the accused was absconding ever since the time of the incident for a week, as the prosecution itself alleges no question as to whether the statement of the accused concerned is true or not, arises at all. I, therefore, hold that the prosecution has not proved this circumstance against accused No. 2.

22. It was lastly contended by Mr. Jethmalani that there was considerable scope for mistaken identity on the part of Macchindra on the facts of the present case. He has contended that Macchindra's mind was already conditioned into believing that accused Nos. 1 and 2 whose relations with Housabai had been strained had assaulted Housabai, and there was admittedly darkness at the time and place of the incident which, according to Mr. Jethmalani would make it impossible for Macchindra to identify the assailants with any degree of certainty. It is true that there must have been some darkness at the time of the incident. I have already expressed the opinion that the incident must have occurred some time between 6-30 p. m. or 7 p. m. that day, sunset being at 5-54 p. m. The incident, therefore, occurred just as twilight was about to end, and it could certainly not have been pitch dark at that time, as I have already stated above. For the reasons stated by me, I have also come to the conclusion that in any event since accused Nos. 1 and 2 were persons whose faces had been seen by Macchindra every day for a continuous period of 15 days and were not strange faces, even making all allowance for darkness, it would be possible for Macchindra to identify them as the assailants. As far as accused No. 2 was concerned, there was the further fact that Macchindra had actually seen him following closely behind Housabai and talking to her very shortly before the incident itself. The incident disclosed concerted action by the two assailants and Macchindra's evidence that it was accused No. 1 who darted out from the canal and inflicted a blow with the iron bar on Madhav Buwa is in accord with the probabilities of the case, in so far as the facts show that accused No. 1 had been seen leaving the field with the iron bar shortly before the incident. Moreover, accused Nos. 1 and 2 were not only brothers who were living together, but had common motive or ill-will against Housabai. Whilst

these facts would be of no direct assistance as far as the question of mistaken identity which I am now considering is concerned, they do show that Macchindra's evidence is in accord with the probabilities of the situation. In the result, I reject the plea of mistaken identity, either with regard to accused No. 1 or accused No. 2.

23. I hold that both the accused have been rightly convicted of the murder of Madhav Buwa as well as of Housabai under Section 302 read with Section 34 of the Indian Penal Code. Once the conviction of the accused under Section 302 read with Section 34 of the Indian Penal Code in respect of the said two murders is confirmed, it must, on the same evidence follow that accused No. 2 has also been rightly convicted of the offence under Sections 323 and 506 (Part II) of the Indian Penal Code in respect of having voluntarily caused hurt as well as criminal intimidation to witness Macchindra.

24. As far as sentence is concerned, Mr. Kadam on behalf of the accused has submitted that the sentence passed on accused No 2 by the learned Sessions Judge should be commuted to the lesser sentence of life imprisonment. In my opinion, however, there is no extenuating circumstance whatsoever as far as accused No 2 is concerned. The conduct of both the accused persons appears to have been

to create a false sense of confidence and security in Housabai, a helpless woman who had come to work on her own field, and thereafter to trap her unawares in the manner in which they have done. I, therefore, hold that the maximum penalty of the law has rightly been inflicted upon accused No. 2. Accused No. 1 is fortunate in having the lesser punishment imposed upon him by the trial Court, for, reasons stated in paragraph 45 of its judgment which, in my opinion, are not proper reasons for inflicting the same. As far as Madhav Buwa was concerned, his only "sin" was to have accompanied Housabai and helped her in harvesting the crop. Since, however, accused No. 1 has played a somewhat less cruel part in the actual incident as compared to the part played by accused No. 2, it may be possible to take the view that the sentences imposed on the two accused should not be the same. I hold that the convictions as well as the sentences passed on both the accused persons must be confirmed and the appeal filed by them dismissed.

NATHWANI, J.:— 25. I agree

PER CURIAM— 26. Appeal dismissed, Convictions and sentences confirmed.

Appeal dismissed,

END

January 1, 1957 in the hands of the then Manager, there is no evidence, according to the trial Court, that it came in the hands of the defendant No. 1 or he misappropriated it and we also agree that the resolution writing off the amount was not legal or authorised. In the context of the death of the said Manager in the meantime, we are not in a position to impute any mala fides or misconduct to the defendant No. 1 in writing off a debt due from a dead person by a resolution of the said committee.

26. It appears that there are further allegations of misappropriation of the funds of the Imambarah by the defendant. There is no firm finding in respect thereof by the trial Court except some tentative findings. It appears that an Account Commissioner was appointed but his work was suspended by order of the Court. We are in full agreement with the trial Court that there should be a thorough examination of the account of the Imambarah during the period from January 1957 till August 29, 1957 when the Receiver Official Trustee took over the charge of the estate, to determine if the defendant No. 1 misappropriated any amounts from the Imambarah funds which he would be liable to refund. If the examination of accounts discloses any act of misappropriation of the fund of the Imambarah by the defendant No. 1 it will be open to persons interested to take such steps as they may be advised in the circumstances.

27. Upon the materials on record we are in agreement with the trial Court that the defendant took up the office of being almost the in-charge of the Imambarah which Section 11 of the Act XX of 1863 expressly prohibits. In the contingency created by the illness and death of the then Manager and in absence of a suitable Manager being available and in the background of the unfortunate disputes between the remaining members of the original committee and in the circumstance then prevailing we are not in a position to hold the Defendant No. 1 guilty of such misconduct or unfitness as to remove him from the membership of the committee for acting as Supervisor of the Imambarah and receiving emoluments for his service in bona fide belief that he was entitled to the same being sanctioned by the erstwhile committee or for non-payment of electric charges which claim was disputed by him. We are, however, in agreement with the trial Court that the defendant No. 1 must refund to the Imambarah all emoluments he had received from the funds of Imambarah together with the sum of Rupees 144.74 P. due on account of electric charges.

28. In the circumstances the appeal is allowed in part and the judgment and decree under appeal is affirmed subject only to the modification of the order removing the defendant No. 1 from the member of the committee which is hereby set aside. As the

vacancies, in view of our findings, are yet to be filled up and as there has been a further vacancy caused by the death of the plaintiff No. 1, we direct that the Receiver Official Trustee shall continue to be in possession of the Imambarah till the vacancies in the committee of Management are filled up and the said committee takes charge from the Receiver Official Trustee.

S. K. CHAKRAVARTI, J.:— 29. I agree.
Appeal allowed.

AIR 1970 CALCUTTA 513 (V 57 C 103)

B. C. MITRA AND S. K. MUKHERJEA, JJ.

Life Insurance Corporation of India, Appellant v. United Bank of India Ltd. and another, Respondents.

A. F. O. D. No. 62 of 1967, Suit No. 1705 of 1961, D/- 13-3-1970.

(A) Insurance Act (1938), S. 2 (11) — Life insurance — Definition — Proposal to effect life insurance — Terms of policy providing for payment of single premium and for payment of secured sum on fixed date — Insurance is not life insurance.

A person of advanced age proposed the insurer to effect life insurance. A policy for Rs. 33,000 was taken out on payment of single premium of Rs. 15,000/-. Under the terms of the policy only one single premium was payable and the moneys payable under the policy were payable not on the death of the assured but at a fixed date.

Held, according to the terms and conditions of the policy, the policy did not effect a contract of insurance upon human life because neither the payment of the sum secured nor the payment of premium depended on the duration of any kind of human life. The insurance, therefore, was not life insurance within the meaning of Section 2 (11).

(Para 7)

(B) Insurance Act (1938), Section 39 — Nomination of policy — Policy must be of life insurance — Insured purporting to nominate policy other than life insurance — Legal consequences of nomination under Section 39 do not attach to such nomination.

(Para 8)

(C) Insurance Act (1938), Section 39 — Nominee — Status of — Proceeds of policy though payable to nominee do not vest in him — He cannot assign policy — AIR 1962 All 355, Dissented from.

Sub-clauses (1) to (5) of Section 39 make it clear that the proceeds of the policy do not vest in the nominee though they are payable to the nominee in the event of the death of the holder of the policy. They do not, by virtue of nomination under Sec. 39 alone, become a part of the nominee's estate before or after the policy matures. The right of the nominee to receive money is a personal and not a heritable right. The

HN/IN/DS03/70/DVT/B

nominee has no title to the policy money and therefore, he can neither surrender the policy nor can he transfer by assignment any right, title or interest in the moneys payable under the policy. AIR 1962 All 855, Diss. from.; Case law discussed.

(Pars 12, 13, 19 and 24)

(D) Married Women's Property Act (1874), S. 6 — Section applies only to life insurance policies and not to policies of any other description. (Para 20)

Cases Referred: Chronological Pars

(1962) AIR 1962 All 855 (V 49) = 1962 All LJ 265, Kesari Devi v. Dharma Devi 10, 25

(1958) AIR 1958 All 569 (V 45) = 1958 All LJ 262, Shanti Devi v. Shri Ram Lal 18

(1957) AIR 1957 Andh Pra 757 (V 44) = 1957-2 Andh WR 174, M. Brahmamuna v. K. Venkataramana Rao 17

(1957) AIR 1957 Mad 115 (V 44) = ILR (1957) Mad 326, D. M. Mudaliar v. Indian Insurance and Banking Corporation Ltd. 18, 25

(1956) AIR 1956 Cal 275 (V 43) = 97 Cal LJ 119, Ramballav v. Gangadhar 15, 25

(1928) AIR 1928 Cal 518 (V 15) = ILR 55 Cal 1315, Krishna Lal v. Pramila Bala Dasi 14

(1892) 1 QBD 147 = 61 LJ QB 123, Cleaver v. Mutual Reserve Fund Life Association 14

S. K. MUKHERJEE, J.: The question which has to be decided in this appeal is whether a nominee under a life insurance policy can validly assign the claim in respect of the policy after the holder of the policy dies but before the policy matures. It also raises a larger question namely whether a nominee can assign the claim under the policy or surrender the policy at all.

2. One Narayan Chandra Ghosh, a person considerably advanced in age, took out a policy of insurance on January 24, 1947, by payment of a single premium of Rupees 15,000/-. Under the policy a sum of Rs 33,000/- was payable on January 17, 1978 to the assured or his nominees, executors, administrators or other representatives-in-interest as the case might be. It is not without significance that the moneys payable under the policy were payable not on the death of the assured but at a fixed date. Moreover, as only one single premium was payable there was no question of premiums ceasing to be payable on the death of the assured. The policy contained the following clause:

"1. Surrender value. After one year from the within mentioned date of commencement of Assurance this policy will acquire a cash surrender value payable on the surrender of the policy provided there be no legal impediment. The amount of such sur-

render value will vary with the duration of the policy but will be not less than 80 per cent of the within mentioned single premium."

3. The assured nominated one Nitish Chandra Ghosh, his younger son as his nominee, under Section 39 of the Insurance Act. Soon thereafter, the assured died intestate on August 25, 1952, leaving his widow and two sons, as his heirs and legal representatives.

4. As the policy did not mature on the death of the assured the nominee did not prefer any claim under it. In 1957 the nominee, in order to obtain a loan from the United Bank of India Ltd. by pledging the policy made enquiries of the Life Insurance Corporation of India as to what surrender value the policy had acquired. By a letter dated December 23, 1957 the Life Insurance Corporation of India hereinafter referred to as the insurer, intimated to the United Bank of India Ltd. that the surrender value of the policy was Rs. 12012/-. Immediately thereafter the nominee assigned the policy to the Bank by way of pledge and secured a loan of Rupees 10,000/- on interest. By a letter dated November 5, 1958 the Bank notified to the insurer that the policy had been assigned to the Bank for valuable consideration and the Bank was the beneficiary of the policy. By a letter dated November 28, 1958 the insurer intimated to the Bank that the assignment had been duly registered. Thereafter by another letter dated December 2, 1958 the insurer made it clear that in registering the notice of the assignment it had not accepted any responsibility for the validity of the assignment and that the policy is payable only on the expiry of the period, i.e. on 17th January, 1978. By another letter dated April 5, 1960 the insurer pointed out that the legal validity of the assignment in favour of the Bank "is not free from doubt" and the matter was, therefore, being referred for legal opinion. By a letter dated December 17, 1960 the insurer, presumably on the basis of legal opinion it had received, wrote:

"Sri Nitish Chandra Ghosh is the nominee under Section 39 of the Insurance Act and nothing more. A nomination of the policy under Section 39 of the Insurance Act gives the right to collect the money only; policy money does not vest in the nominee by mere nomination. We are afraid, therefore, that the assignment made by the nominee is not legally valid and your right to surrender the policy on the basis of assignment is doubtful. Please note in this connection that we simply registered the assignment without expressing any opinion as to the legal validity."

5. It appears from an endorsement on the policy that on December 28, 1957 the nominee purported to assign his right, title and interest in the policy to the United

Bank of India Ltd. On the failure of the nominee to repay the loan with interest the Bank brought an action against the nominee Nitish Chandra Ghosh, the defendant No. 1 for Rs. 10,741/- and against the Life Insurance Corporation of India, the defendant No. 2, as the assignee of the policy for Rs. 12,012/- i.e. the surrender value of the policy. The defendant No. 1 did not contest the suit. He gave evidence and submitted to an instalment decree. The suit was, therefore, contested only by the defendant No. 2. On July 5, 1966 the learned Judge passed a decree against the defendant No. 1 for a sum of Rs. 10,741/- with interest, payable in certain instalments. The decree also provided that in the event of the decretal dues not being paid by the defendant No. 1 in terms of the decree the plaintiff would be entitled to realise from the defendant No. 2 the balance of the decretal sum. It was further provided by the decree that the sum paid to the plaintiff by the defendant No. 2 under the decree should be treated as a loan to be deducted with interest thereon at the rate of 6 per cent per annum from the moneys payable under the policy on the stipulated date i.e. 17th January, 1978.

6. From this decree the defendant No. 2, the Life Insurance Corporation of India, has come up in appeal.

The issues on which the parties went to trial were:

(i) Did the defendant No. 1 have any right, title or interest to assign or pledge the policy forming the subject-matter of the suit in favour of the plaintiff?

(ii) If so, has the plaintiff any right to surrender the insurance policy? Strictly speaking, neither of these issues arises on the pleadings read in the context of the insurance policy.

7. Although it appears, from the policy that the assured proposed to the insurer to effect an assurance on his life, it is abundantly clear from the terms and conditions of the policy that the policy did not effect a contract of insurance upon human life. It did not, because neither the payment of the sum secured on the policy nor the payment of premiums depended on the duration of any kind of human life. The insurance is not, therefore a life insurance within the meaning of sub-section (11) of Section 2 of the Insurance Act 1938.

8. The holder of the policy purported to nominate a nominee under Section 39 of the Insurance Act. Under that section only the holder of a policy of life insurance can nominate a person or persons to whom the money secured by the policy shall be paid in the event of his death. As the policy is not a life insurance policy the purported nomination is not a nomination under Section 39 and the nominee is not a nominee under the statute. The legal con-

sequences of nomination under Section 39 do not, therefore, arise in the present case.

9. It was said in course of argument that the parties treated the policy as a life insurance policy at the trial and therefore in the appeal we ought not to treat it as anything else. When the court is invited to give effect to a statutory provision which applies only to life insurance and the case to which it is sought to be applied is patently not a case of life insurance, I do not think there is any principle of law under which the court is obliged to shut its eyes and misapply the statute. The parties cannot by their failure to raise an objection to the applicability of a statutory provision compel the court to apply the provision to a case to which it is not applicable.

10. There is also no averment in the plaint that the policy was surrendered or sought to be surrendered nor is there any evidence in that behalf. It is one thing to enquire what the surrender value of a policy is and quite a different thing to surrender it. In the absence of any pleading or evidence of surrender, the question as to whether the assignee of the nominee had any right to surrender the policy assumes a purely academic character.

11. The case could have been disposed of on either of these points. That was not done because the parties tacitly assumed that the policy was a life insurance policy; they also assumed that the policy was surrendered or sought to be surrendered by the plaintiff that is to say, the assignee from the nominee. It must be conceded that a nominee can validly surrender or assign a policy only if he has a title to the moneys payable under it, or in other words, only if he is a beneficiary of the policy. If the right of the nominee is merely a right to collect the moneys from the insurer, such a right cannot confer any title. It is, therefore, necessary to examine the precise nature of the interest of a nominee in the contemplation of Section 39 of the Insurance Act.

12. Sub-section (1) of Section 39 provides that the holder of a policy of life insurance on his own life may nominate the person to whom the money secured by the policy shall be paid in the event of his death. It is not without significance that the sub-section speaks of the transaction of payment and not of any right, title or interest in the money which is payable. In saying that the money shall be paid to the nominee, the sub-section underlines the obligation of the insurer to pay to the nominee and not the right of the nominee to receive payment, though the obligation and the right are the obverse and reverse of the same transaction. It scrupulously avoids the use of any word implying proprietary right, title or interest such as 'vest', 'transfer' or 'assign'. Sub-section (2) of Section 39 provides that nomina-

tion may at any time before the policy matures for payment be cancelled by an endorsement or a will. The sub-section therefore clearly indicates that the nominee does not acquire any title to the money by virtue of the nomination because if he did, he could not have been divested of his right, title or interest by any unilateral act on the part of the holder of the policy who nominated him. Sub-section (4) of Section 39 provides that a transfer or assignment of a policy shall automatically cancel a nomination. It goes without saying that if the nominee had acquired any title by nomination, the policy-holder could not have assigned the policy without his concurrence, far less could the nomination have stood cancelled automatically by reason of assignment or transfer. Sub-section (5) provides that where the policy matures for payment during the lifetime of the person whose life is insured or where the nominee, or if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy-holder or his heirs or legal representatives or the holder of a succession certificate as the case may be. Here again, there is clear indication that the nominee does not acquire any title to the money, because if he did, his heirs and not the heirs of the deceased policy-holder should have been entitled to the money when the policy matures. An interesting but speculative argument was addressed to us by Mr. Somenath Chatterjee. He argued that although the sub-section says that the money shall be payable to the heirs and legal representatives of the deceased policy-holder if the nominee dies before the policy matures, it does not say that the money will be payable to the heirs of the policy-holder if the nominee dies after the policy matures. It is, therefore, implied that in a situation where the nominee dies after the policy matures the money will be payable not to the heirs and legal representatives of the policy-holder but to the heirs and legal representatives of the nominee or in other words the money will go to the nominee's estate. He contended that although in the scheme of Section 39 the nominee does not acquire any title to the money before the policy matures, he does so after the policy matures on the death of the policy-holder. In my opinion, the argument is untenable. There is good reason for thinking that sub-section (5) was introduced *ex abundanti cautela*. The first limb of the sub-section prescribed that if the policy matures during the lifetime of the policy-holder the money shall be payable to him. This provision is clearly redundant because sub-section (1) of Section 39 has already provided that the money will be payable to the nominee only in the event of the policy holder's death. The other limb of the sub-section which

enjoins payment to the heirs and legal representatives of the policy-holder if the nominee dies before the policy matures may very well be also treated as superfluous. In my opinion, the legal position should have remained the same even if sub-section (5) were not in the statute. Sub-section (6) of Section 39 confirms that the nominee does not acquire any title to the money when the policy matures on the death of the policy-holder. It provides that where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors. The sub-section contemplates that the money will not be payable jointly to the surviving nominee and the heirs and legal representatives of the deceased nominee but to the surviving nominee alone. If the money had vested in the nominees, the estate of the deceased nominee should have shared in the proceeds of the policy. On a consideration of sub-sections (1), (2), (4), (5) and (6) of Section 39 the proposition clearly emerges that the proceeds of the policy do not vest in the nominee though they are payable to the nominee in the event of the death of the holder of the policy. They do not, by virtue of nomination under Section 39 alone, become a part of the nominee's estate before or after the policy matures.

13. Nomination under Section 39, like a testamentary disposition speaks only after death but the analogy ends there. No title to the policy moneys passes in praesenti or in future by nomination. If the title passed to the nominee on the death of the policy-holder his legal status would have been indistinguishable from that of an assignee, or a legatee, the assignment or legacy taking effect on the death of the policy-holder. The subject of assignment is dealt with not by Section 39 but by Section 38 of the Insurance Act. Mr. Chatterjee relied on a passage in Halsbury's Laws of England, Third Edition, Vol. 4 Article 908 where it is said: "Legal choses in action are those which can be recovered or enforced by action at law, as, for instance, a debt, a bill of exchange, or a claim on a policy of insurance." On this basis he argued that the right of the nominee to payment of moneys payable under the policy is a chose in action and as such is assignable. In footnote (p) to the paragraph cited by Mr. Chatterjee it is said: "In the Supreme Court of Judicature Act 1873 Section 25 (6) the expression 'legal chose in action' was employed with a special peculiar meaning. That sub-section is repealed by the Law of Property Act 1925 and re-enacted by Section 130 of the Act, the phrase 'legal thing in action' being used." It is unnecessary for our present purpose to go into the technicalities of the concept of a chose in action. Under the Indian Law, an actionable claim is no

doubt transferable but it is transferable only by the person who has a title to the property in respect of which the claim lies. The position is the same in English Law. *Nemo dat quod non habet*, no one gives what he does not possess. If the nominee has no title to the policy money he can neither surrender the policy nor can he transfer by assignment any right, title or interest in the moneys payable under the policy. In the contemplation of the statute, the right of a nominee is a mere right to collect the proceeds of the policy and the right has been given only to obviate the inconvenience of obtaining representation to the estate of the deceased policy-holder or a succession certificate.

14. Judicial precedents also do not support the contention that the nominee has any title to the moneys payable under the policy or that they become a part of his estate. In *Krishna Lal v. Pramila Bala Dasi*, AIR 1928 Cal 518, a case decided before the Insurance Act came into force, the insurer was to pay to the wife of the insured, as his nominee, a certain sum payable under the policy. Negating the claim of the wife that she was beneficially, entitled to the money, the Bench which was presided over by Rankin, C. J. held that the money was a part of the estate of the deceased policy-holder and, therefore, the creditors of the policy-holder's heirs could proceed against the policy money in execution of the decree passed against them. C. C. Ghose, J. who delivered the leading judgment in that case strongly relied on the decision in *Cleaver v. Mutual Reserve Fund Life Association*, (1892) 1 QBD 147 where under the policy the money was payable to the insurer's wife, if living, otherwise, to his legal representative. In that case, Lord Esher, M. R. observed:

"The husband might have altered the destination of the money at any time and might have dealt with it by will or settlement. I think that apart from any statute, no interest would have passed to the wife by reason merely of being named in the policy."

This case has a peculiar relevance to the facts of this appeal because here, the policy not being a life insurance policy, Section 39 under which the nomination was made, has no application. The nomination must, therefore, be treated as one *de hors* Section 39 of the Insurance Act as in AIR 1928 Cal 518. Later decisions of this Court and other courts agree that the rights of a nominee under Section 39 are no larger.

15. In *Ramballav v. Gangadhar*, AIR 1956 Cal 275, P. B. Mukharji, J. held that a nominee who is nominated under Section 39 of the Insurance Act does not become the owner of the money payable to him under the policy and the nomination only indicates the person who should receive the money should the owner die. All that sub-

section (6) of Section 39 of the Insurance Act does is to confer on the nominee the right to receive the insurance money as between the insurance company and such nominee but it does not provide for the title or ownership of that money in general. The decision of P. B. Mukharji, J. was relied on in a Bench decision of the Madras High Court in *D. M. Mudaliar v. Indian Insurance and Banking Corporation Ltd.*, AIR 1957 Mad 115. The court held that nominee as payee is nothing more than an agent to receive the money, which money remains the property of the assured and at his disposal during his lifetime and on his death forms part of his estate. The result is that the nominee takes no beneficial interest in it. Ramaswami, J. in course of his judgment said:

"There are thus important differences between a nomination and an assignment which can be summed up as follows: An assignment of life policy passes to the assignee the right to the insurance money, even though the assignor's interest in the life has ceased before the date of assignment. The life policy forms part of the estate of the assured and may be dealt with at his absolute discretion, sold, charged, settled, etc. Once an assignment is made it cannot be cancelled at the option of the assignor.

It creates a vested right in the assignee who no doubt takes it subject to the equities in the case of assignor, because the assignee cannot have a better title than his assignor. On the other hand, a nomination unless there is a special clause inserted to make it irrevocable, does not deprive the policy-holder of his rights, privileges, options and benefits under the policy including the right to alter the beneficiary."

16. Elsewhere he says:

"A nominee is entitled to receive policy moneys only. There is no statutory trust created by Section 39 in favour of the nominee, nor is he conferred as the nominee under Section 5 of the Provident Funds Act 1925, with the right to receive the moneys absolutely.

"The nominee being only given the right to receive money after the death of the assured, he can neither surrender the policy nor have it converted to be paid up."

17. Similar views were expressed on the nature of the rights of a nominee nominated under Section 39 of the Insurance Act in *M. Brahmamma v. K. Venkataramana Rao*, AIR 1957 Andh Pra 757 where Chandra Reddy, J. observed:

"A reading of the relevant provisions of the section can only lead to the conclusion that the holder of a policy continues to have interest in the policy notwithstanding the nomination effected in regard to the policy. It does not divest him of the rights in the policy and he retains disposing power over it. Under sub-sections (2) and

(4) it is competent for the holder of the policy to bequeath to somebody or make an assignment of it and this automatically cancels the nomination which implies that a nominee has no vested right in the document.

In fact, under sub-section (5), if the policy-holder survives the nominee, the money is payable to the holder himself and not to the heirs or the legal representatives of the nominee which would not be the case if the nominee had acquired any vested interest in the policy. Therefore, the title does not pass to the nominee by reason of the nomination."

18. In *Shanti Devi v. Shri Ram Lal*, AIR 1958 All 569 the holder of a decree against the assured put his decree into execution after the assured died and attached the money due under his insurance policy. The widow of the assured made an application for the release of the insurance money which had been attached upon the ground that she had been nominated under Section 39 of the Insurance Act to receive the money. The executing court held *inter alia* that mere nomination did not create any interest in favour of the nominee and the money still continued to be the property of the assured and was, therefore, liable to attachment as a part of the estate of the deceased. In that view of the matter her objection was dismissed. The widow preferred an appeal. The Appellate Court held that merely because the appellant was nominated to receive the money from the insurance company she did not become the owner of the money; the nomination only dispensed with the necessity of obtaining a succession certificate. The appeal was, therefore, dismissed. The appellant preferred a second appeal to the High Court which was also dismissed. In course of his judgment the learned Judge who spoke for the Court observed at page 572 of the Report:

"If the nomination is made only under Section 39 it is not an assignment but merely gives the right to the nominee to receive the assured amount without creating any interest in the nominee."

19. Mr. Chatterjee relied on a Bench decision of the Allahabad High Court in *Kesari Devi v. Dharma Devi*, AIR 1962 All 355. There the insurance money was payable to the assured, his nominees, executors, administrators, assigns or other representatives as the case may be. The assured nominated his brother Mannul under Section 39 of the Insurance Act as his nominee. Shortly thereafter the assured died leaving his widow Sm. Kesari Devi as his heir and legal representative. Before he could collect the insurance moneys, the nominee died leaving his widow Sm. Dharma Devi as his heir and legal representative. She applied for a succession certificate in respect of insurance moneys. Her application

was contested by Sm. Kesari Devi, who claimed that she was entitled to the succession certificate as the heir of the assured. The learned District Judge granted the succession certificate to the nominee's widow. Kesari Devi as the heir and the legal representative of the assured appealed to the High Court. The appeal was dismissed. In course of his judgment Desai, C. J. said:—

"Under the insurance policy the money became payable to Mannul; this means that the company was bound to pay to him. Since he died before it could be paid to him it must be paid to his heir or representative, i.e. to the respondent. It must be paid in such a manner as to amount to payment to him. It is only if it is paid into his estate that it can be said to be paid to him, and the respondent is the person who indisputably represents it. If it had been paid to him as it ought to have been on his death it would have gone to the respondent as part of his estate and the respondent must be placed in the position in which she would then have been."

I am unable to agree with the learned Chief Justice. The nominee's right is the right to receive the money only. Section 39 does not confer on him any title to the money. The right to receive is a personal and not a heritable right. The right is not in the nature of any title to the money and, therefore, the money when receivable or received by the nominee does not become a part of his estate. No doubt, if the nominee had been alive he could have validly laid claim to payment of the money, but on his death his heirs and legal representatives should not have successfully claimed the money as part of the nominee's estate. The learned Chief Justice said that 'the company must pay the money to him, that is to say, to the nominee'. I agree. But when he says 'if he has died in the meanwhile it is payable to his estate, I respectfully disagree. The money is payable to the nominee as receiver of the money but it does not become part of his estate. In so far as the learned Judges of the Allahabad High Court held in that case that insurance moneys payable to a nominee under Section 39 of the Insurance Act becomes a part of the nominee's estate, I am unable to agree. In my opinion, in the facts of that case, on the death of the nominee the insurance money became payable to the heirs or legal representatives of the assured and, therefore, to the appellant Sm. Kesari Devi. The ratio of the Allahabad decision, runs counter to the ratio of the decisions of the Calcutta High Court, Madras High Court, Andhra Pradesh High Court and of the Allahabad High Court itself to which reference has already been made.

20. Mr. Chatterjee in course of his argument contended that the nominee who is a son of the deceased policy-holder is a beneficiary within the meaning of Section 6

of the Married Women's Property Act 1874 and as such he has an absolute and indefeasible title to the money. He was, therefore, legally competent to assign the policy. This is a case neither made in the plaint nor argued at the trial. No mention of it is to be found in the grounds of appeal. The policy is embodied in a printed form. Some of the printed clauses are patently inapplicable to the contract of insurance evidenced by the policy. No doubt, the words "children's endowment" appear at the top of the policy in print. Be that as it may, nowhere is there any indication that the policy is taken out for the benefit of any son of the policy-holder nor is the name of any beneficiary indicated in the policy. All that the assured has done is to have nominated Nitish Chandra Ghosh, under Section 39 of the Insurance Act as his nominee to whom the money is payable. In the plaint it is expressly stated that the nominee assigned his right, title and interest as nominee and not as a beneficiary. In any event, Section 6 of the Married Women's Property Act 1874 applies only to life insurance policies and not to policies of any other description. As the policy in the present case is not a life insurance policy the section can have no application.

21. In the view we have taken we must hold neither the defendant No. 1 nor the plaintiff as his assignee was or entitled to surrender the policy and the surrender, if any, of which there is no evidence, is invalid. If a nominee cannot validly surrender the policy, his assignee cannot do so either. The assignment by the nominee of his right, title and interest in the policy in favour of the plaintiff is also invalid. He has assigned nothing. We are not only unable to uphold the judgment of the learned trial Judge on merits but we are also of opinion that the learned Judge was not justified in passing a decree directing the defendant No. 2 to pay certain sums of money to the plaintiff and treat the payments as loans. It is nobody's case that any application was made for any loan or that the appellant Life Insurance Corporation is obliged to grant any loan in the facts and circumstances of this case. The learned Judge has passed a decree on the basis that the policy has been validly surrendered and the claim under it validly assigned by the nominee to the defendant Bank and yet at the same time has treated the policy as subsisting and the insurance moneys payable when the policy matures. It is only on that basis that the direction to treat the moneys recoverable from the appellant under the decree as a loan can be explained. It seems to us that there is no warrant for such an order either in the contract of insurance or in the statute.

22. It only remains for us to pronounce the order. The appeal succeeds. The decree of the learned Judge against the appellant, the Life Insurance Corporation of India is

set aside and the suit is dismissed as against the said Life Insurance Corporation of India. The respondent No. 1 the United Bank of India, will pay the appellant's costs of the appeal and of the trial.

B. C. MITRA, J.: 23. I agree with the judgment and order made by my learned brother but would like to add a few words of my own. The respondent No. 2 is the nominee of an Endowment insurance policy which was taken out by his father who died on August 25, 1952. The appointment of the nominee was made under Section 39 of the Insurance Act, 1938, (hereinafter referred to as the Act.) The policy was single premium policy, the premium being Rupees 15,015. The sum assured was Rs. 33,000 payable on January 17, 1978, on expiry of the endowment period of 31 years.

24. The nominee purported to assign the policy in favour of the respondent No. 1 who filed the suit for recovery of a loan. The question is if the respondent No. 2 as the nominee of the policy had the right to assign the claim under the policy, to the respondent No. 1 so as to enable the latter to obtain a decree against the appellant for recovery of the money due on the policy. On a plain reading of sub-sections (5) and (6) of section 39 of the Act it is clear to me that the only right which a nominee of an insurance policy has is the right to collect and receive the money, if he is alive at the date of maturity and if the policy-holder is dead at that time. If the policy-holder is alive when the policy matures, the nominee has no right whatsoever and the amount secured by the policy is payable to the policy-holder, and if he is dead and the nominee is also dead to his heirs or legal representatives or the holder of a succession certificate. Under sub-section (6) of Section 39 of the Act if there are more than one nominee, and one or more of such nominees survive the assured, the amount secured by the policy would be payable to the survivor or survivors of the nominees. This position makes it amply clear that a nominee has no proprietary interest in the money payable under the policy. He does not by any means become the owner or proprietor of the sum assured. If he did, the sum assured would have become payable, in a case where there are more than one nominees one of whom survives the other, to the surviving nominee and the heirs and legal representatives of the deceased. But that is not what the statute prescribes. Under the statute, upon the death of a nominee where there are more than one the sum assured becomes payable to the survivor or survivors of the nominees. This provision makes it clear that the only right which a nominee has is a right to receive and to collect the money, and if he dies this right passes not to his heirs and legal representatives but to the survivor or survivors of the nominees, where there are more

than one. The right which a nominee has is not a heritable interest so as to enable the heirs and legal representatives of a deceased nominee to claim and enforce such a right.

25. This position has been clearly stated by P. B. Mukharji J. in AIR 1956 Cal 275 which was followed by the Division Bench of the Madras High Court in AIR 1957 Mad 115. I respectfully agree with the views expressed in these two decisions and I do not agree with the contrary views expressed in the Bench Division of the Allahabad High Court reported in AIR 1962 All 355. In my opinion a nominee under Section 39 of the Act takes no beneficial interest in the sum assured, and he had no right to assign the policy so as to enable the assignee to recover the money due under the policy and appropriate the same.

26. Assignment under Section 38 and nomination under S. 39 of the Act are two entirely different concepts altogether. The assignment of the policy confers upon the assignee the benefits under the policy, and by virtue of the assignment he is the only person who is entitled to such benefit. But a nominee under Section 39 of the Act is not entitled to any benefit under the policy at all. As I said earlier his only right is to receive and collect the money upon maturity of the policy, provided that the policyholder is dead at the time of such maturity. While a nominee has no right whatsoever by virtue of nomination, if the policyholder is alive at the time when the policy matures for payment, the assignee under Section 38 is the only person entitled to the benefit of the policy even though the assured is alive at the maturity of the policy. To hold that a nominee is entitled to assign and transfer his rights by virtue of the nomination, would be equating his position to that of an assignee and this in my view will be entirely contrary to the provisions in the statute.

27. The next question is if the policy could be surrendered by the respondent No. 2 as the nominee or by the respondent No. 1 as the assignee of the nominee. In my view the respondent No. 2 as the nominee had no right to surrender the policy, and the respondent No. 1 could have no better or higher right than the respondent No. 1 had. But quite apart from the question of the right of the respondent to surrender the policy, there is nothing on record to show that the policy was ever surrendered. By a letter December 23, 1957 the appellant had informed the respondent No. 1 of the surrender value of the policy, no doubt on inquiry made in that behalf. But there is no evidence that the policy was ever surrendered or that intimation of such surrender was given by either of the respondents to the appellant. There is no averment in the plaint that the policy was

ever surrendered by either of the respondents and no evidence was tendered on behalf of the respondent No. 1 that there was a surrender of the policy. Even assuming that the assignment of the policy by the respondent No. 2 to the respondent No. 1 is a valid and lawful assignment, which in our view, it is not, the respondent No. 1 would have no cause of action against the appellant until surrender of the policy. And in this case such a surrender has neither been pleaded nor proved. Counsel for the respondent No. 1 contended that the parties proceeded on the basis of a surrender. I cannot accept this contention. In order to succeed in this suit the respondent No. 1 is bound not only to establish a valid and lawful assignment of the policy in his favour but must also prove a surrender of the policy, and in my view it has failed to prove either.

28. For these reasons this appeal must succeed and I concur in the order made by my learned brother.

Appeal allowed.

AIR 1970 CALCUTTA 520 (V 57 C 104)

D. BASU, J.

Rameshwarlal Harlalka, Petitioner v. Union of India, Respondent.

Matter No. 223 of 1964, D/- 28-5-1970.

(A) Constitution of India, Art. 226 — Petition, under — Omission to state in petition about existence or prosecution of alternative remedy — Effect.

A petition under Article 226 which is not frivolous cannot be dismissed in limine on ground of existence of an alternative remedy without going into the question of merits. The fact of suppression or omission to state in the petition about existence of an alternative remedy or the petitioner having pursued an alternative course cannot be taken to be such a suppression as will disentitle the petitioner to any consideration under Article 226 on ground of fraudulent or reprehensible conduct. Court should determine whether the Court which issued the rule was deceived. No question of deception arises if notwithstanding a disclosure of such facts the Court might have been inclined to issue the Rule. Case law discussed.

(Para 2)

(B) Constitution of India, Art. 226 — Petition under Article 226 — Challenge to unconstitutionality of Act — Locus standi of petitioner to maintain petition.

A petition under Article 226 challenging unconstitutionality of an Act may be maintained by a person if the Act be such that mere coming into force of the Act itself is likely to abridge the fundamental rights of a person coming within its ambit. In such a case the aggrieved person may at once come

CN/CN/D82/70/SSG/B

to Court without waiting for the State to take some overt action threatening to infringe his fundamental rights. Thus a trader in edibles is entitled to urge that the provisions of the Prevention of Food Adulteration Act contravene Article 14 or 19 (1) (g) of Constitution because there is ground for immediate apprehension of the Act being applied against him. Fact that at the stage of hearing of the petition there are no criminal proceedings pending against the petitioner is not material. AIR 1959 SC 725, Rel. on. (Para 4)

(C) Constitution of India, Art. 14 — Prevention of Food Adulteration Act (1954), Pre. Ss. 12, 19 — Act does not violate Article 14.

Act is not violative of Article 14 for the following reasons:

(1) Under Section 12 read with relevant rules it is open to persons other than the purchasers also to have an analysis of their articles made by the public analyst on payment of fees. (Para 7)

(2) The word "vendor" in Section 19 should be given wider connotation because it is relative to concept of sale. The defence in proviso to Section 19 (2) will also be available to a person who may have in his possession as a commission agent, goods which may be offered for sale even by any other person, namely his principal. (Para 8)

(D) Constitution of India, Articles 19 (1) (g), 226 — Statute prohibiting trade in dangerous commodity or activity — Challenge to constitutionality of — Grounds.

Though a person may not claim a fundamental right to carry on trade in an inherently dangerous commodity or activity when it is so prohibited by the Legislature it will not prevent him from challenging the constitutionality of the Statute itself on the ground that it offends against the fundamental right guaranteed by Article 19 (1) (g) by showing that the restrictions imposed by the statute are unreasonable either because the restrictions go in excess of the right or because activities which are not pernicious are included within the sweep of the statute or because the procedure laid down in the statute for curbing such activities is unreasonable or unjust or arbitrary. Case law discussed. (Paras 9, 10)

(E) Constitution of India, Article 19 (1) (g) — Prevention of Food Adulteration Act (1954), Pre., Section 2 (i) (f) — Act or Section 2 (i) (f) in particular is not violative of Article 19 (1) (g) on ground of vagueness.

In determining whether a statute should be condemned on the ground of vagueness it should be read as a whole and if upon such reading a reasonably certain meaning can be imputed to a provision no complaint of vagueness can be imputed to the statute. (Para 11)

The vice of the particular article will be governed not only by the definition of adulteration in Section 2 (i) (f) but by standards of purity which have been prescribed by the rules made under the Act. So the definition of adulteration in Section 2 (i) (f) must be read together with the rules. The word "otherwise" suggests that all the adjectives refer to the quality of the article being unfit for human consumption. Thus the vagueness of the adjectives standing by themselves is eliminated. (Amendment to delete the word "disgusting" from the definition of adulteration in Section 2 (i) (f) suggested). (Paras 11, 12)

The absence of laying down the precise method is not itself a ground for striking down the statute as unreasonable. The presumption is in favour of constitutionality and all circumstances which might uphold the validity of the statute are to be presumed by the Court and must be shown as non-existent by person who wants to challenge it. AIR 1951 SC 41 & AIR 1953 SC 394, Relied on. (Suggestion made to expedite, to include in the rules, the precise method of analysis for various articles.) (Para 13)

Cases Referred: Chronological Paras

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| (1970) Writ Petns. Nos. 468 to 469 and 489 to 490 of 1969, D/- 31-3-1970 = (1970) 2 SCC 71, Andhra Pradesh Grains & Seeds Merchants Association v. Union of India | 5 |
| (1969) Criminal Appeals Nos. 179 and 204 of 1964, D/- 4-12-1969 (Cal) | 3 |
| (1968) AIR 1968 SC 13 (V 55) = (1968) 1 SCR 82, Collector of Customs v. Bava | 2 |
| (1968) AIR 1968 SC 98 (V 55) = (1968) 1 SCR 1, Zila Parishad Muradabad v. Kundan Sugar Mills, Amroha | 2 |
| (1965) AIR 1965 SC 307 (V 52) = 1965 (1) Cri LJ 347, Krishnachandra v. State of M. P. | 9 |
| (1965) AIR 1965 SC 913 (V 52) = (1965) 16 STC 412, State of Rajasthan v. Karamchand | 2 |
| (1964) AIR 1964 SC 1135 (V 51) = 1964 (2) Cri LJ 229, State of Uttar Pradesh v. Kartar Singh | 5 |
| (1964) AIR 1964 SC 1279 (V 51) = 1964 (2) Cri LJ 354, Corporation of Calcutta v. Calcutta Tramways Co., Ltd. | 15 |
| (1961) AIR 1961 SC 293 (V 48) = 1961 (1) Cri LJ 442, State of M. P. v. Baldeo Prasad | 11 |
| (1960) AIR 1960 SC 430 (V 47) = (1960) 2 SCR 375, Narendra Kumar v. Union of India | 9 |
| (1959) AIR 1959 SC 725 (V 46) = 1959 Supp (2) SCR 316, Kochunni v. State of Madras | 4 |
| (1957) AIR 1957 SC 699 (V 44) = 1957 SCR 874, State of Bombay v. Chamarbaugwalla | 9 |

- (1955) AIR 1955 SC 661 (V 42) =
 (1955) 2 SCR 603, Bengal Immunity
 Co. Ltd. v. State of Bihar 2
 (1954) AIR 1954 SC 220 (V 41) =
 1954 SCR 873, Cooverjee v. Excise
 Commr. 9
 (1954) AIR 1954 SC 403 (V 41) =
 1954 SCR 1122, Himmatlal v. State
 of Madhya Pradesh 2
 (1953) AIR 1953 SC 394 (V 40) =
 1953 SCR 1188, Shiv Bahadur Singh
 v. State of Vindhya Pradesh 13
 (1951) AIR 1951 SC 41 (V 38) =
 1950 SCR 869, Charanjit Lal v.
 Union of India 13
 (1917) 1917-1 KB 486 = 86 LJ FB
 257, The King v. General Commrs.
 for the Purposes of the Income-tax
 Acts for the District of Kensington 2
 A. C. Bhabra, for Petitioner; Noni Kumar
 Chakravarti, for Respondent.

ORDER.—The petitioner in this case, who is a trader in edibles such as spices, has challenged the validity of the Prevention of Food Adulteration Act, 1954 on the ground, inter alia, that the Act contravenes the provisions of Articles 14, 19 (1) (f) and 19 (1) (g) of the Constitution of India and asks for a declaration of such invalidity of the Act and the rules made thereunder and also for an appropriate writ to restrain the respondents from enforcing the Act and the rules against the petitioner. The petition was filed on the 4th June 1964 and was subsequently amended to add paragraphs 11(a) and 11(b), which seek to explain the cause of action to support the petition.

2. The grounds of the alleged invalidity of the said Act are eventually confined to two only inasmuch as the ground under Article 19 (1) (f) has not been pressed. Before I enter into the merits of the said allegations as to unconstitutionality, the preliminary objections in Bar raised by Mr. Nani Kumar Chakraborty on behalf of the respondent must be disposed of. The first preliminary objection raised by Mr. Chakraborty is that the petition should be dismissed in limine and the Rule discharged on the ground that the petitioner obtained the Rule after suppressing a material fact, namely, that there had been two convictions of the petitioner under the Act on 16-1-62 and 17-8-64 and that from the second conviction as aforesaid the petitioner had preferred an appeal to this Court on 20-3-62 and such appeal was pending at the time when the petitioner moved the present petition for the Rule Nisi. It is also argued by Mr. Chakraborty that during the pendency of this Rule the appeal has been disposed of (on 4-12-69) and that since the petitioner has already availed of an alternative remedy he is not entitled to maintain a petition under Article 226 of the Constitution which is a discretionary remedy particularly because the question of unconstitutionality of the statute could have been raised in defence or as a plea

in appeal in the criminal proceedings. It has, however, been laid down in various cases by the Supreme Court that the existence of an alternative remedy is not an absolute bar to relief under Article 226 where there has been a contravention of fundamental rights (*Himmatlal v. State of Madhya Pra.*, 1954 S. C. R. 1122 = (AIR 1954 SC 403); *Bengal Immunity Co. v. State of Bihar*, (1953) 2 S. C. R. 603 (620, 627) = (AIR 1955 SC 661 at pp. 669, 672); *Zila Parishad v. Kundan Sugar Mills, Amroha*, AIR 1968 SC 93 (100); *Collector of Customs v. Bava*, AIR 1968 SC 13 (15); *State of Rajasthan v. Karamchand*, AIR 1965 SC 913 (916)). It follows therefore that where there are allegations of infringement of a fundamental right in the petition which are not frivolous enough, a petition under Article 226 cannot be dismissed in limine on the ground of existence of an alternative remedy without going into the question of merits. It further follows, if the above proposition be correct, that the fact of suppression or omission to state in the petition anything about the existence of an alternative remedy or the petitioner having pursued an alternative course may not be taken to be such a suppression as would disentitle the petitioner to any consideration under Article 226 of the Constitution on the ground of fraudulent or reprehensible conduct as has been explained by the Court of Appeal in England in the case reported in (1917) 1 KB 486 (*The King v. General Commrs. for the Purposes of the Income-tax Acts for the District of Kensington*). The point which is to be determined by the Court where such an allegation is made is whether the Court which issued the Rule can be said to have been deceived. No question of deception arises if notwithstanding a disclosure of such facts the Court might have been inclined to issue the Rule.

3. As to the petitioner having already availed of an alternative remedy it might be pointed out that the judgment of the Court of Appeal in the criminal case (*Criminal Appeals Nos. 179 and 204 of 1964*) D/- 4-12-1969 (Cal.) shows that the appeal was disposed of on the simple question as to whether the ingredients of the offence were proved and no question of unconstitutionality was raised. If that is so, I don't think that this Court can avoid going into the question of unconstitutionality as has been raised by the petitioner in this case.

4. There is also another preliminary question to be disposed of, namely, whether the petitioner has got locus standi to maintain this petition to challenge the unconstitutionality of a statute. Curiously, in the original petition the petitioner did not specifically show as to how he was aggrieved but by the subsequent amendment it has been stated that samples are from time to time taken from the petitioner's firm of the commodities in which he is dealing and they are being examined by Food Inspectors under the im-

pugned statute and that if the statute remains on the statute book the petitioner is likely to be proceeded against for offences under the Act, which, according to the petitioner, is unconstitutional and void. It is true that prosecutions on two occasions have already been disposed of and at this stage there are no criminal proceedings pending against the petitioner, but, as has been laid down by the Supreme Court in the case of Kochunni v. State of Madras, AIR 1959 SC 725 (731), a petition under Article 226 of the Constitution may be maintained by a person if the Act be such that the mere coming into force of the Act itself is likely to abridge the fundamental rights of a person coming within its ambit and that in such a case the aggrieved person may at once come to the Court without waiting for the State to take some overt action threatening to infringe his fundamental rights. In the instant case, the penal provision is contained in Section 7 read with Section 16 of the Act. Once the food, which is defined in Section 2(v) of the Act in wide terms, is found to be adulterated as defined in Section 2 (i), the vendor or a person who stores or distributes such adulterated food is liable to be punished under Section 16 with imprisonment or fine or both; and provision is made in Section 8 onwards of getting samples of such articles of food as come within the purview of the Act from dealers of such articles of food and to launch prosecution under Section 11 of the Act. The petitioner is therefore entitled to urge that the provisions of the Act contravene Articles 14 or 19 (1) (g) of the Constitution because there is ground for immediate apprehension by the Act being applied against him at any moment if any sample taken from his shop is found to be adulterated, in the opinion of the authorities specified in the Act.

5. On the merits, however, the petitioner starts with an initial handicap inasmuch as the Supreme Court has already discussed the validity of this Act from various points of view in two cases — the first one being State of Uttar Pradesh v. Kartar Singh, AIR 1964 SC 1135 and the other one being an unreported decision — Andhra Pradesh Grains & Seeds Merchants Association v. Union of India, Writ Petns. Nos. 468 to 469 and 489 to 490 of 1969, disposed of on 31-3-1970 (SC), a Blue Print of which was produced before this Court.

6. Taking up the question of Article 14, it was held in the earlier case of 1964 that the Act could not be struck down as contravening Article 14, in the absence of proper pleading which only could show that the standards which were to be adopted by the statutory authorities in the matter of analysing the food samples were arbitrary or discriminatory. It was contended by the learned Advocate on behalf of the petitioner before me that in the instant case there are such allegations in the petition. The challenge under Article 14 was also made in the

second case of 1969. In this case, the Supreme Court held that there was nothing in the provisions of the Act from which it could be held that the standards prescribed were arbitrary or that arbitrary power had been vested in the authorities who were to administer the Act. The Court analysed the provisions of the Act and held that the standards were to be formulated by a committee of experts and representatives of the Central Government and the State Governments, with the Director-General of Health Services as its Chairman and that the standards fixed in the rules by such an authority could not be held to be arbitrary, unless that was clearly demonstrated.

7. On behalf of the petitioner the allegation of discrimination as a ground of challenge under Article 14 has been directed against two points. It has been urged that while, under Section 12 of the Act, a purchaser was entitled to have an article of food analysed by the Public Analyst on payment of prescribed fees, a trader was not so entitled, so that while the purchaser might avoid distress by anticipatory examination of the article of food which he was going to purchase perhaps for re-sale, the vendor or the manufacturer at the first stage had no such opportunity of averting danger by voluntarily offering the sample of the goods produced, to learn from the Government experts if such articles could be held to be adulterated or not. As against such contention it has been urged by the learned Advocate on behalf of the respondent that though Section 12 speaks of the 'purchaser' sending the article for analysis by the public analyst, the relevant rules made under the Act enable any person to do the same on payment of fees. In the instant case, we need not go to verify whether this interpretation of the Rule is correct and it would suffice to record this statement made on behalf of the respondents who are the only possible authorities to administer the Act, that it is open to persons other than the purchasers also to have such an analysis made by the public analyst on payment of fees, particularly, because it appears that though the petitioner approached the various authorities by correspondence to have some samples examined he did not eventually turn to the public analyst when somebody pointed out to him that the public analyst was the competent authority. As I have already stated, the statements made on behalf of the respondent in Court that other persons are also entitled would give the petitioner and other traders similarly situated ample protection in future.

8. The second ground on which discrimination is alleged on behalf of the petitioner is with reference to sub-section (1) of S. 19 which says that "it shall be no defence in a prosecution for an offence pertaining to the sale of any adulterated or misbranded article of food to allege merely that the vendor was ignorant of the nature, substance or quality

of the food sold by him or that the purchaser having purchased any article for analysis was not prejudiced by the sale". This sub-section expresses in a negative form the general proposition that in a charge for sale of adulterated articles of food, ignorance of the vendor that the article was so adulterated would be no defence. But there is an exception to this general proposition with which we are concerned in this case, viz., proviso (1) which says:—

"Provided that such a defence shall be open to the vendor only if he had submitted to the food inspector or the local authority a copy of the warranty with a written notice stating that he intends to rely on it and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to that person."

Speaking in brief, a vendor of an article of food may, notwithstanding the general proposition stated earlier, plead in defence that he was ignorant of the adulterated nature of the article of food if he can produce a copy of a written warranty given by the person from whom he had received the article. It is argued on behalf of the petitioner that this defence in the first proviso is available only to a vendor but not to a commission agent or any person other than the vendor who may be storing or distributing an article of food inasmuch as Section 7 of the Act is levelled not merely against the vendor of an adulterated article but also against a person who stores or distributes any such article. The vendor in the usual sense of the term would not, of course, include a commission agent because after all what he does is not on his own behalf but only as agent of the principal. But it has been pointed out on behalf of the respondent that the definition of 'sale' in Section 2 (xiii) is an artificial definition which is wider than the ordinary concept of the word 'sale' as it is understood under the Sale of Goods Act or otherwise, because it includes the act of "exposing for sale or having in his possession for sale of any such article and even includes also an attempt to sell of such article". Prima facie, if this be the definition of the word 'sale', the term 'vendor' in Section 19 may also be given a wider connotation because it is relative to the concept of sale. If that be so the defence in the proviso to Section 19 (2) would also be available to a person who may have in his possession as a commission agent, goods which may be offered for sale even by any other person, namely, his principal. Here also, the stand taken by the respondent in this Court might be of aid to the petitioner and like traders inasmuch as the defence in question would be open in view of this concession on behalf of the State to commission agents and like persons who might be hauled up in future. As to the standards being arbitrary, I would propose to deal with that under Article 19 (1) (g).

9. As to Article 19 (1) (g); this again has been dealt with by both the decisions of the Supreme Court referred to earlier. In the earlier case of 1964, of course, the question was not dealt with elaborately but only a passing observation was made that "the respondent cannot assert any fundamental rights under Article 19 (1) to carry on business in adulterated food stuffs". Curiously, however, notwithstanding such broad proposition having been asserted in the earlier case, in the subsequent decision in 1969 the question of unreasonableness of the restrictions imposed by the Act on the fundamental rights under Article 19(1)(g) was gone into in details. It had been asserted in some decisions of the Supreme Court since the case of *State of Bombay v. Chamaraungwalla*, (1957) SCR 874 = (AIR 1957 SC 699) that there were certain articles of trade which were *res extra commercium*. In other words, they involved activities which were so inherently pernicious or dangerous to the community that nobody could claim any right to trade in such commodities or activities. It is not possible to say whether this stand of the Supreme Court has been maintained subsequently in relation to Article 19, but Article 19 (1) (g) does not exclude *prima facie* any trade or business. It says — "all citizens shall have the right to practise any profession or to carry on any occupation, trade or business assuming that all trades or businesses might come under Article 19 (1) (g)". Clause (6) of that Article empowers the State for imposing reasonable restrictions on the exercise of the right conferred in the interest of the general public. The power, thus, is reserved in the State to impose reasonable restrictions on the exercise of the right to carry on any trade or business in the public and certainly it would be in the public interest to suppress a dangerous trade or business and it has, in fact, been held that the expression 'reasonable restrictions' also includes total prohibition in the case of business or trade which is inherently dangerous (*Cooverjee v. Excise Commr.*, (1954) SCR 873 = (AIR 1954 SC 220); *Narendra Kumar v. Union of India*, (1960) 2 SCR 375 = (AIR 1960 SC 430); *Krishnachandra v. State of M. P.*, AIR 1965 SC 307 (308)). If that is so, it is not necessary to resort to any doctrine of *res extra commercium* for the conclusion of any particular trade or business from the ambit of Article 19 (1) (g) inasmuch as the legislature can impose an absolute prohibition upon carrying on any particular trade or business as soon as it comes to hold that such trade or business is altogether pernicious or inherently dangerous to the community.

10. It is thus evident that though a person may not claim a fundamental right to carry on trade in an inherently dangerous commodity or activity when it is so prohibited by the Legislature it would not prevent him from challenging the constitutionality of

the statute itself on the ground that it offends against the fundamental right guaranteed by Article 19 (1) (g) by showing that the restrictions imposed by the statute are unreasonable, either because the restrictions go in excess of the object or because activities which are not pernicious are included within the sweep of the statute or because the procedure laid down in the statute for curbing such activities is unreasonable or unjust or arbitrary. We have, therefore, to enter into the core of the statute crossing the preliminary objections in Bar.

11. In the decision of 1969 (the Andhra Pradesh case) the Supreme Court has discussed the question of reasonableness of the impugned statute from various standpoints and so far as the question of absence of mens rea is concerned it has been dealt with fully so that this point may be said to be concluded. There are also some other observations which dispose of other points taken in the present petition. I would, therefore, confine myself only to those points on which there is no direct decision in the Supreme Court case of 1969. The first point which I might mention is the contention advanced on behalf of the petitioner that the definition of adulteration in Section 2 (i) is vague and uncertain. There is no doubt that a penal statute may be held to be unconstitutional if it is so uncertain and vague that it gives no guidance either to the public or to the Court or to the persons who are to administer the statute, as has been held both in England and in India. Of course in England, the conviction is quashed but the Courts have got no power to strike down the statute itself; but in India, in such a contingency the Court may not only quash the conviction but annul the statute itself as was done by the Supreme Court in the case of *State of Madhya Pra. v. Baldeo Prasad*, AIR 1961 SC 293. But in determining whether a statute should be condemned on the ground of vagueness it should be read as a whole and if upon such reading a reasonably certain meaning can be imputed to a provision no complaint of vagueness can be imputed to the statute. The only provision to which my attention was drawn on behalf of the petitioner in this behalf is sub-clause (f) of Section 2(i) of the Act which says "An article of food shall be deemed to be adulterated if the article consists wholly or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or is insect-infested or is otherwise unfit for human consumption". It was argued that it is difficult, if not impossible, to avoid the mischief of this definition because there may hardly be found any sample of certain food articles like cereals or other crops which is absolutely free from insects. The conditions of such products also vary under different climates or different parts of the country. The expression "filthy, putrid, disgusting, rotten etc." also does not give any definite standard for

adjudging the quality of the thing. There are, however, two answers to such a contention, namely, that the vice of the particular article will be governed not only by the definition but by the standards of purity which have been prescribed by the rules made under the Act, under Section 23. So the definition must be read together with the rules. Secondly, the adjectives which precede in the said definition must be read with the concluding words "or is otherwise unfit for human consumption". The word "otherwise" suggests that all the adjectives refer to the quality of the article being unfit for human consumption, which condition may be due either because the article is filthy or infested or rotten and the like. If that is so, the vagueness of the adjectives standing by themselves is eliminated. On these grounds, therefore, I do not think that the statute or the definition in particular is liable to be condemned as constituting an unreasonable restriction upon the fundamental right guaranteed by Article 19 (1) (g). Whether the standards as laid down are vague is another question to which I shall advert presently.

12. But before disposing of the question relating to the definition I would observe that I am not very happy with the use of the word "disgusting" because that word refers to a subjective condition and what is disgusting to one person who may perhaps be called 'neurotic' by medical people may not be disgusting to many others. In fact, the objectivity of the test of "being unfit for human consumption" is apparently incompatible with the subjective condition of being "disgusting". Even without the word "disgusting" the object of the legislator would be served by the residuary clause "or is otherwise unfit for human consumption." I would, therefore, draw the attention of the authorities in charge of the administration of this Act to consider the question of deleting the word "disgusting" on the occasion of any future amendment that might be undertaken in respect of the statute, specially as it has been pointed out to me that various amendments have already been made in various provisions of this Act and that some of them have taken place during the pendency of the instant Rule.

13. Coming now to the reasonableness of the standard laid down in the rules, various complaints have been made in the petition a reference to which may be nearly impossible within the course of this judgment inasmuch as this Court should not pose as an expert in the matter of judging the propriety or reasonableness of the standard relating to chemical analysis of different food articles. But, subject to certain observations which I am going to make at once it is enough to point out that though the standards might be improved by furnishing

further details it has not been established that while using the standards the Public Analyst or the Central Food Laboratory uses different processes or methods or holds the tests under different conditions in different cases. Whatever be the method used by them, it must be presumed unless the contrary is shown that the same standard and the same process is being followed by them in the case of every person who is brought before them. It was argued that different standards than those which have been prescribed under the instant impugned Act are to be found in other statutes, such as Agricultural Produce (Grading and Marking) Act, 1937. But this contention cannot be accepted inasmuch as the object of these other statutes is not identical. The object of the Agricultural Produce Act 1937, for instance, is to classify and properly describe different articles having regard to their nature and quality, from the standpoint of marketing and not from the standpoint of assuring the purity of such articles. The object of grading according to quality under the Agricultural Produce Act 1937 is to make it clear to the purchaser what was the quality or standard of the article he was going to purchase and at what price. It would also facilitate the trade from the standpoint of traders because things of different quality would not fetch the same price. A more stringent standard must, on the other hand, be adopted in the legislation where the object is to prevent adulteration of food articles in order to protect the health and safety of the citizens, particularly in a democratic country and it is with that object in view that very drastic measures and stringent standards have been provided for in the instant legislation as well as in comparable legislation in all civilized countries, including the United Kingdom. It is in this connection fit and proper to refer that even an absolute liability, negating the plea of absence of mens rea, has been imposed by such statutes both in the U. K. and in India and this aspect has been fully discussed by the Supreme Court in the 1969 decision. It is therefore of no avail to say that a more relaxed standard has been prescribed under other statutes which have been referred to on behalf of the petitioner at the hearing. But even though I don't accept the contention raised in this behalf on the present point, I would point out to the respondents two features which have struck me as remediable by further amendments either in the Act or in the rules, for a better administration of the statute. While it is absolutely justifiable in a democratic country that pernicious activities should be suppressed with the maximum of strength at the command of the State, at the same time it is also essential that an innocent citizen of a country which professes equality before the law should not be punished unless the law is not only certain but is also precise and ex-

haustive so as to prevent miscarriage of justice in so far as that can be humanely eliminated. Oftentimes it is complained on behalf of the public that laws are amended too frequently. No doubt, if the amendment simply adds to confusion and bewilderment it is unwelcome, but if the amendment seeks to improve the law and is conducive to the interest of the members of the public hardly any complaint can reasonably be raised. With this end in view I should point out to the respondents the statement in para 6 (g) of the counter-affidavit filed by Dr. A. P. Roy, Deputy Director-General of Health Services, who must be vitally concerned with the administration of this Act because it has been stated that it is the Director-General of Health Services who is the Chairman of the Central Committee for Food Standards as referred to in Section 3 of the Act. This gentleman in his affidavit has stated that "the incorporation of method of analysis for various articles of food for the Prevention of Food Adulteration Rules 1955 is in contemplation" and one of the grievances made on behalf of the petitioner is that precise method of analysis not being mentioned in the rules different results as to the quality of the sample might be arrived at by different experts. If the precise method, for example, whether it is to be the 'dry process method' or 'wet method', were prescribed in the rules the chances of coming to different conclusions would be obviated. The absence of laying down the precise method, as I have already said, may not be itself a ground for striking down the statute as unreasonable because the fact that a statute is capable of improvement and that the legislator has not been able to make it fool-proof is no ground for invalidating it. On the other hand the presumption is in favour of constitutionality, and all circumstances which might uphold the validity of the statute are to be presumed by the court and must be shown as non-existent by the person who wants to challenge it [Charanjit Lal v. Union of India, 1950 SCR 869 (879) = (AIR 1951 SC 41 at p. 45); Shiv Bahadur v. State of Vindhya Pradesh, (1953) SCR 1188 (1202) = (AIR 1953 SC 391 at p. 399).] But at the same time, as I have stated earlier, it must be an object of the persons empowered to amend the statute or rules to improve it by supplementing it by proper materials or by deleting faulty expressions if possible. Since the Deputy Director-General in his affidavit has stated that an attempt is already afoot to incorporate in the rules the precise method of analysis for the various articles I think it proper on my part to draw the attention of the respondent, namely, the Government of India, in the Ministries of Commerce and Industries, Food and Agriculture and the Ministry of Health, that the process of 'consideration' of this question should be expedited so that it can be completed before many more per-

sons are not hauled up as accused under the Act.

14. The other matter to which I would like to draw the attention of the respondents is that stated in paragraph 9 of the affidavit sworn by Dr. Sudhir Chandra Neogy who is specialist in this branch of Applied Chemistry and has got sufficiently advanced academic proficiency in the subject. He has said that the conditions of test should be made more precise under the different heads relating to various articles inasmuch as the result of analysis might not be the same if the analysis is held under different conditions. He has referred to the case of Fenu-greek (Methi) which is item No. A.05.13 of the Rules. Clause (a) of this item says that this article must not contain more than 10 per cent of moisture. The Doctor of Science has rightly observed that the question of the quantum of moisture will vary with the condition of temperature under which the analysis is held. There is no doubt that if the trader or vendor himself wants to have his article tested he cannot have it done unless the temperature under which the test is to be held is specified in the Rule. It may be that the public analyst or the Central Laboratory hold their examination in a particular condition in the laboratory pertaining to their establishment so that the chances of variation may be reduced but for the members of the public who want to avoid the mischief of the Act, better guide should be offered by the laboratory test or the conditions of analysis as are applied under the different items of the Act.

15. The other ground which was taken on behalf of the petitioner was in relation to the conclusiveness of the certificate of the public analyst contained in the proviso to Section 13 (5) of the Act which says "provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive evidence of the facts stated therein". This aspect of the matter has, as a matter of fact, been dealt with by the Supreme Court in another case — *Corporation of Calcutta v. Calcutta Tramways Co. Ltd.*, AIR 1964 SC 1279 (1281), where it was held that the provision in S. 437 (1) (6) of the Calcutta Municipal Act, 1951 constitutes unreasonable restriction upon the citizens' right guaranteed by Article 19 (1) (g) inasmuch as it makes the opinion of the Municipal authorities as conclusive and non-justiciable that the premises in question were being used for a purpose which was dangerous to life, health or property and was likely to create a nuisance. It was held by the Supreme Court that the subjective opinion of a municipal body which has the effect of imposing restrictions on carrying on trade cannot be said to be a reasonable restriction within the meaning of Article 19 (6) because it would put the citizen residing within the limits of the municipal Corpora-

tion entirely "at its mercy, if it chooses to exercise that power capriciously, arbitrarily or unreasonably, though not mala fide". The circumstances under the instant Act however are not of the same nature. The opinion under Section 13 (5) is not that of a municipal authority but that of experts who have the business of analysing the sample of food taken under the Act. This drastic provision has been adopted in this Act because of the nature of the mischief which the Act arrived at and this feature has been elaborately dealt with by the Supreme Court in the second case.

16. Having given my anxious consideration on all the points raised by the petitioner, I am of the opinion that this Rule must fail and it is accordingly discharged subject, however, to the observations which I have made in the judgment to draw the attention of the respondent.

17. I make no order as to costs.

Rule discharged.

AIR 1970 CALCUTTA 527 (V 57 C 105)

D. BASU AND AJAY K. BASU, JJ.

S. K. Srivastava and others, Appellants v. Vullubhdas Kalyanji and Co. (P) Ltd., Respondent.

A. F. O. O. No. 42 of 1969, D/- 24-3-1970.

(A) Sea Customs Act (1878), Sec. 167 (3) — Declaration under Section 12 (1), Foreign Exchange Regulation Act 1947, by exporter containing incorrect information on points on which Section 12 (1), Foreign Exchange Regulation Act not requiring declaration — Exporter cannot be penalised under Section 167 (8) — Authorities may proceed under other provisions but not under Section 167 (8). AIR 1970 SC 1597, Affirmed in Civil Appeal No. 1173 of 1967, D/- 12-9-1969 (SC) and (1970) 1 SCWR 303, Foll.

(Para 8)

(B) Foreign Exchange Regulation Act (1947), Section 12 (1), as amended by Amendment Ordinance 1969 on 13-11-69 — Amendment requiring declaration under S. 12 (1) to be true in all material particulars as to amount representing full export value or when it is not ascertainable the value which exporter expects to receive on sale of goods in course of international trade — Notification G. S. R. 2641, D/- 14-11-69 superseding previous notification — Both the amendment and the notification have no retrospective operation, and will not affect declaration made prior to amendment. (1875) 10 QB 195, Explained; AIR 1966 Ker 5 and AIR 1953 SC 95, Civil Appeal No. 654 of 1965, D/- 6-1-1966 (SC) (unreported), Rel. on.

(Paras 10, 15)

(C) Civil P. C. (1908), Preamble — Interpretation of Statutes — Fiscal statutes —

FN/FN/C721/70/RGD/T

Retrospective operation of amendment will not readily be inferred, so as to impose or enhance liability of citizen *ex post facto* — Rule applies even where statute is expressly retrospective in which case no greater retrospectivity than expressly given by statute will be given — This principle applies with greater force where transaction has been completed prior to amendment. AIR 1963 SC 1356 and AIR 1965 SC 171 and AIR 1967 SC 849 and AIR 1957 SC 657 and AIR 1962 SC 918, Rel. on. (Para 10)

(D) Civil P. C. (1903), Preamble — Interpretation of Statutes — Penal statute — Amendment — Not to be construed retrospectively in absence of express words — Act legal at time when done — Cannot be made unlawful by construing subsequent amendment retrospectively — Such retrospective construction would be wider than immunity conferred by Article 20 (1) of Constitution. (1861) 142 ER 419 and (1891) 2 QB 145 and (1948) 2 Ex 22 and (1913) 2 KB 401, Ref. (Para 11)

(E) Constitution of India, Article 226 — Findings arrived at by Customs Authorities in the absence of procedural irregularity cannot be disturbed in writ petition — AIR 1964 SC 1519, Rel. on. (Para 19)

(F) Sea Customs Act (1878), Sec. 167 (37) — Charge under Section 12 (1), Foreign Exchange Regulation Act for misstatement in declaration by exporter — Though Sec. 29 or 137 of the Sea Customs Act was not specifically mentioned held that by understating the value of exported goods accused had committed offence under Section 167 (37) — Section 167 (37) has to be read with Sections 29 and 137 of Sea Customs Act — Defence and proceeding for adjudication proceeding on this twofold basis — Held that it was not correct to say that petitioner was charged only with violation of Section 12 (1) of Foreign Exchange Regulation Act. (Para 24)

(G) Sea Customs Act (1878), Ss. 167 (8), 167 (37) — Foreign Exchange Regulation Act (1947), Section 12 (1) — Order of confiscation founded both on items (8) and (37) of Section 167 — Charge of violation of Section 12, Foreign Exchange Regulation Act failing — Confiscation order cannot be struck down. (Para 23)

(H) Sea Customs Act (1878), Sec. 167 (8) — Personal penalty under, can exceed lower alternative of Rs. 1,000 and penalty up to three times of value of goods concerned can be imposed where amount exceeds Rs. 1000 — Since it was held that Customs Authorities had no jurisdiction to proceed under Section 167 (8), the order imposing penalty of Rs. 35,000 was quashed — Refund ordered in proceedings under Article 226. (1888) 21 QBD 313 and AIR 1959 SC 135 and AIR 1961 SC 284 and (1967) 16 STC 689 (Ker), Obiter in (1969) 2 SCC 658, Rel. on; AIR 1963 SC 1740, Distinguished. (Para 30)

(I) Constitution of India, Article 19 (1) (g) — Collection of customs duty on exports and imports is restriction upon fundamental right, guaranteed by Article 19 (1) (g) — Such restriction can only be justified under authority of law — Imposition or collection of customs duty *ultra vires* — Fundamental right is infringed — Refund can be ordered in writ proceedings. (Para 37)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 1597 (V 57) = (1969) 1 SCC 91, Union of India, v. Shreeram 8, 5, 6, 9, 16, 17, 27

(1970) 1970-1 SCWR 303 = (1970) 1 SCC 352, Backer Gray and Co. v. Union of India 6, 16, 36

(1969) 1969-2 SCC 658 = (1970) 2 SCJ 5, Union of India v. Narasimhalu 63

(1969) Civil Appeal No. 1173 of 1967, D/- 12-9-1969 (SC), McLeod & Co. v. Collector of Custom 6

(1967) AIR 1967 SC 849 (V 54) = (1967) 1 SCR 1004, George v. Controller of Estate Duty, Mysore 10

(1966) Civil Appeal No. 654 of 1965, D/- 6-1-1966 (SC), Dayalbagh Co-operative Society v. Sultan Singh 15

(1966) AIR 1966 Ker 5 (V 53) = (1967) 64 ITR 117, Income Tax Officer v. Ponnose 15

(1965) AIR 1965 SC 171 (V 52) = (1964) 8 SCR 72, S. S. Gadgil v. Lal & Co. 10

(1965) AIR 1965 SC 1740 (V 52) = (1965) 1 SCJ 443, Suganmal v. State of Madhya Pradesh 64

(1965) 16 STC 689 = 1965 Ker LT 517 (SC), State of Kerala v. Aluminium Industries Ltd. 63

(1964) AIR 1964 SC 1006 (V 51) = (1964) 6 SCR 261, State of Madhya Pradesh v. Bhailal Bhai 65

(1964) AIR 1964 SC 1519 (V 51) = 1964 (2) Cri LJ 461, Girdharilal v. Union of India 19

(1963) AIR 1963 SC 1356 (V 50) = (1964) 1 SCR 29, Prashar v. Vasantsen 10

(1962) AIR 1962 SC 918 (V 49) = (1962) 44 ITR 809, Income Tax Officer v. Habibullah 10

(1961) AIR 1961 SC 284 (V 48) = (1961) 1 SCR 719, State of Orissa v. Chakobhai 63

(1961) AIR 1961 SC 307 (V 48) = 1961 (1) Cri LJ 450, State of Bombay v. Vishnu 13

(1961) AIR 1961 SC 935 (V 48) = 1961 (2) Cri LJ 31, Ranchhodas v. Union of India 20

(1959) AIR 1959 SC 135 (V 46) = 1959 SCR 1350, Sales Tax Officer, Banaras v. Kanhaiya Lal 63

(1957) AIR 1957 SC 657 (V 44) = 1957 SCJ 689, Fernandez v. State of Kerala 10

- (1957) 1957-3 All ER 617 = (1957) 1 WLR 1219, In re, A Solicitors' Clerk 12
- (1955) AIR 1955 SC 188 (V 42) = 1955-1 SCR 1065, Ganapati v. State of Ajmer 37
- (1953) AIR 1953 SC 95 (V 40) = 1953 SCR 439, Strawboard Mfg. Co. Ltd. v. Gutta Mill Workers' Union 15
- (1952) AIR 1952 SC 115 (V 39) = 1952 SCR 572, Mohammad Yasin v. Town Area Committee, Jalalabad 37
- (1913) 1913-2 KB 401 = 82 LJKB 726, Butchers' Hide Skin and Wool Co. v. Seacombe 11
- (1895) ILR 22 Cal 767 (FB), Jogoda-nund v. Amrita Lal Sarkar 14
- (1891) 2 QB 145 = 60 LJMC 93, R. v. Griffiths 11
- (1888) 21 QBD 313 = 36 WR 776, R. v. Income Tax Special Purposes Commrs. 33
- (1875) 10 QB 195 = 44 LJMC 60, R. v. Vine 10, 12
- (1861) 142 ER 419 = 10 CBNS 179, Midland Ry. Co. v. Pye 11
- (1848) 2 Ex 22 = 154 ER 389, Moon v. Durden 11
- Kar, for Appellants.

D. BASU, J.:— This appeal is against the judgment of T. K. Basu, J. dated 3-2-69, by which he quashed the order of penalty passed on 17-8-62 by the Additional Collector of Customs (pp. 111-120 of the Paper Book) and the orders dated 13/15-12-63 and 21-9-64, passed by the Central Board of India and the Government of India, rejecting the appeal and revision preferred by the Petitioner Company under Article 226 of the Constitution, — the Respondent before us. The Additional Collector and the Government have preferred the present appeal.

2. The charge upon which the impugned order (p. 119 of the Paper Book) was made by the Appellant was that 1000 bales of B. Twills which the Respondent sought to export to Kenya per SS Ispinge "have been misdeclared in the relevant Shipping Bills in respect of the F. O. B. value thereof", and the Appellant (Addl. Collector) held that by such misdeclaration, the Respondent had contravened Section 167 (8) of the Sea Customs Act, read with Section 23A of the Foreign Exchange Regulation Act as well as Section 167 (37) of the Sea Customs Act. He, therefore, confiscated the goods in respect of which Shipping Bills had been presented at the Customs House, but gave an option to the Respondent to redeem the goods on payment of a fine of Rs. 2 lakhs, and also imposed a personal penalty of Rs. 35,000. After paying the sum of Rs. 235,000 as aforesaid, under protest, the Respondent got the goods released and thereupon challenged the impugned order by sta-

tutory appeal and revision, as stated at the outset. The Government of India having dismissed the application for revision on 21-9-64, the Respondent brought his application under Article 226 of the Constitution on 14-5-65 (pp. 4-16 of the Paper-book), to quash the impugned orders, asking for a refund of the sum of Rs. 2,35,000 which the Respondent had paid under protest, as fine in lieu of confiscation and personal penalty. From a reading of the impugned order at pp. 119-20, it is evident that the Addl. Collector relied upon both Section 167 (8) and (37) in imposing the order of confiscation and penalty.

3. The judgment of the Court below was a short one. In the main, the Court relied upon the majority judgment of the Supreme Court in the case of Union of India v. Shree-ram, which is set out at pp. 208 et seq. of the Paper-book (since reported as (1969) 1 SCC 91 = (reported in AIR 1970 SC 1597)) in holding that the only obligation of an exporter under the provision in Sec. 12 (1) of the Foreign Exchange Regulation Act, 1947 was to furnish "a declaration... that the amount representing the full export value of the goods has been, or will within the prescribed period, be, paid in the prescribed manner" and that no offence under S. 167(8) of the Sea Customs Act, 1878, read with Section 12 (1) of the Foreign Exchange Regulation Act, was committed where a declaration as aforesaid had been furnished by an exporter, however, false the contents of the declaration might have been. The Customs Authorities might have other remedies for such misdeclaration but not one under Section 167 (8) of the Sea Customs Act, to confiscate the goods sought to be exported and to impose penalty upon the exporter. Upon this view, he held that the impugned order was vitiated by an error apparent on its face. He, therefore, quashed the impugned order and also issued a writ of mandamus directing the Appellants "to refund to the Petitioner the sum of Rs. 2,35,000 realised by way of fine in lieu of confiscation and personal penalty". At the same time he gave liberty to the Appellants to proceed according to law.

4. Mr. Kar, appearing on behalf of the Appellants, has taken a number of points which should be dealt with separately.

5. I. The first point is that the majority decision in Sreeram's case, (1969) 1 SCC 91 = (AIR 1970 SC 1597) has no application to the facts of the instant case.

6. Before going into the merits of this contention, it should be pointed out that the majority decision in Sreeram's case, (1969) 1 SCC 91 = (reported in AIR 1970 SC 1597), has since been affirmed by unanimous Benches of the Supreme Court in *McLeod & Co. v. Collector of Customs, C. A. No. 1173 of 1967, D/- 12-9-1969 (SC)* and *Backer Gray & Co. v. Union of India, C. A.*

No. 1178 of 1967, D/- 23-1-1970 reported in (1970) 1 SCWR 303. In Backer Gray's case (1970) 1 SCWR 303, the Court reiterated the majority judgment in Sreeram's case, (1969) 1 SCC 91 = (AIR 1970 SC 1597), in these words —

"It is true that the declarations required to be made under the Rules in Form GRI contained incorrect information, but that incorrect information related to points on which Section 12 (1) does not require a declaration. A declaration, which is in contravention of the Rules or the Forms prescribed under the Rules, may be penalised under Section 23 of the Act, but such contravention will not attract the provisions of the Sea Customs Act.

Under Section 23-A of the Act, only a breach of restrictions imposed under Section 12 (1) of the Act is to be deemed to be a contravention of the restrictions imposed by Section 19 of the Sea Customs Act. An incorrect declaration in contravention of the Rules made under S. 27 of the Act is not to be deemed a contravention of the restriction imposed by Section 19 of the Sea Customs Act. It is therefore quite clear that in these cases the imposition of the penalties under Section 167 (8) of the Sea Customs Act was totally unjustified."

7. The above observations of the Supreme Court answer the arguments advanced by Mr. Kar that—

(a) Since the prescribed Form requires the exporter to state the real value of the goods exported, a misstatement under that column would constitute an offence under the Sea Customs Act, read with Sec. 12 (1) of the Foreign Exchange Act; and that

(b) Since Section 12 (1) required the exporter to declare the 'full export value of the goods', it cannot be interpreted to mean that the exporter would be exonerated from his statutory liability by declaring an incorrect value

8. The law, as laid down by the Supreme Court in the foregoing cases, is that for making an incorrect or false declaration, the authorities may proceed against the exporter under other provisions of the law, but not under Section 167 (8) of the Sea Customs Act. Hence, the impugned order of confiscation and penalty imposed under S. 167 (8) of the Sea Customs Act cannot be upheld, so far as the present point goes.

9. Learning that the Government of India had amended the law in order to plug the loophole created by the Supreme Court judgment in Sreeram's case, (1969) 1 SCC 91 = (AIR 1970 SC 1597) we directed a further hearing of these appeals before us. At that hearing the materials relating to the amendment have been produced before us. It appears that by promulgating the Foreign Exchange Regulation (Amendment) Ordinance, 1969, on 13-11-69, Section 12 (1) of the

Foreign Exchange Regulation Act has been amended by requiring that the declaration must be "true in all material particulars" as to the amount representing 'the full export value' or 'if the export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the course of international trade....' In exercise of the power conferred by this amendment, the Government has issued a fresh notification on 14-11-69 (GSR 2611), superseding its previous notification under Section 12 (1), requiring the exporter to make a declaration 'true in all material particulars' in terms of the amended section.

10. It is clear from a plain reading of the provisions of the Ordinance that the effect of the change, whatever it might be, is not retrospective and would not affect any declaration which was made under S. 12 (1) prior to the making of the Ordinance and the issue of the new notification. It was, of course, vehemently argued by Mr. Kar that since the object of the Amendment Ordinance was to protect the public from fiscal loss by roping in a fraudulent exporter, the amendment must be construed, by implication, to be retrospective in operation. In support of this contention, Mr. Kar relied upon the observations in *Craies on Statute Law*, 6th Edn., at p. 395, where the learned Author refers to the decision in *R. v. Vine*, (1875) 10 QB 195. In that case, the majority of the Court applied the provisions of Section 14 of the Wine and Beerhouse Amendment Act, 1870 which enacted that "every person convicted of felony shall be for ever disqualified from selling spirits by retail" to a person who had been convicted before the Act came into force but was still holding a licence to sell spirits, on the ground that it would advance the object of the statute, which was to protect the public against the abuse of inns being kept by persons of bad character. There are, however, various reasons why the aforesaid decision cannot be applied to the case before us.

(a) In *Vine's case*, (1875) 10 QB 195 the ground of disqualification had already been incurred by conviction. But in the instant case, if retrospective operation is to be given to the Ordinance, the Respondent would be penalised for not doing something which the law then existing, as interpreted by the Supreme Court, did not require him to do. It is only, in the declarations furnished after the 14th November, 1969 that the duty to furnish true material particulars attaches and a man may be penalised only for violation of that duty.

(b) The primary rule of construction of a fiscal statute that imposes a burden upon a citizen is that it must be strictly construed upon the language used within the four corners of the statute. [*Fernandez v. State of Kerala*, AIR 1957 SC 657 (661)]. It follows,

therefore, that the Court will not readily infer a retrospective operation so as to impose or enhance the liability of the citizen, ex post facto, and this rule applies even where a statute is expressly retrospective. In such a case no greater retrospective effect will be given by the Court than what has been granted expressly by the statute [Income Tax Officer v. Habibullah, (1962) 44 ITR 809 = (AIR 1962 SC 918 (921.))] This principle of construction operates with greater force where a transaction has been completed prior to the amendment of the statute, as in the case before us [ibid]; Prashar v. Vasantsen, AIR 1963 SC 1356 (1367); Gadgil v. Lal and Co., AIR 1965 SC 171 (177); George v. Controller of Estate Duty, Mysore, AIR 1967 SC 849 (852).

(c) Further, the law which is sought to be amended, in the case before us, is penal in nature and will make that a statutory offence which was not an offence when the act, namely, the submission of the disputed declaration, was done. It is to be noted that even in Vine's case, (1875) 10 QB 195 the dissenting Judge Lush, J. observed—

"This is a highly penal enactment. The sound and well-established canon of construction is that such an enactment is to be read as prospective, unless a contrary intention be clearly established from the language used".

The majority Judges, Cockburn, C. J. and Mellor, J., overcame this objection only by holding that the object of the legislation in that case was not to punish, but to impose 'restraints upon the persons who should be qualified to hold licenses': (1875) 10 QB 195 (199-201). The only sanction, in Vine's case, (1875) 10 QB 195 was that the convicted man was to be disqualified for holding a licence.

11. In the case before us, not only will the exporter lose his goods but he would be subjected to pay pecuniary penalty, for non-payment of which he may be sent to jail (S. 193 of the Sea Customs Act, read with Section 33 of the Criminal Procedure Code). Even on suspicion that he has committed an offence under Section 167, he may be arrested (S. 173 of the Sea Customs Act). No doubt, the bar under Article 20 (1) of the Constitution extends only to 'conviction' by a Court of law, but the question before us is not one of a constitutional bar against conviction under an ex post facto law, but that of construction of a change in a penal statute, which is wider than the immunity conferred by Article 20 (1). It is an age-old proposition that a penal statute or amendment thereof should not be construed to be retrospective, in the absence of express words to that effect because "it manifestly shocks one's sense of justice that an Act, legal at the time of doing it, should be made unlawful by some new enactment." [Midland Ry v. Pye, (1861) 142 ER 419 (424); R. v.

Griffiths, (1891) 2 QB 145 (148); Moon v. Durden, (1848) 2 Ex 22; Butchers, Hide Co. v. Seacome, (1913) 2 KB 401.]

12. We have already said that in Vine's case, (1875) 10 QB 195 the law imposed only a disqualification and not a penalty. The distinction between the two has also been pointed out in the recent English case of Re A Solicitor's Clerk, (1957) 3 All ER 617 (619), in these words:—

"It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force..... was made void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act was made...."

13. The same distinction has been observed by our Supreme Court in the case of State of Bombay v. Vishnu, AIR 1961 SC 307.

14. The other case relied upon by Mr. Kar, namely Jogodanund v. Amrita Lal Sarkar, (1895) ILR 22 Cal 767 (FB) also does not help him, because the observations at pp. 777 and 780 of the Report show that the implication of retrospective operation was made in that case on the footing that the statutory provision involved (i. e., S. 174 of the Bengal Tenancy Act) was a remedial provision. The court made it clear that no such implication would be made where the statutory provision created a 'new obligation' as in the case before us.

15. From whatever standpoint, thus, the matter is looked at, the Amending Ordinance in question before us cannot be given retrospective effect to render an act or omission an offence which was not an offence before the Amending Ordinance was promulgated; and where a statute cannot be construed as retrospective, no subordinate legislation issued under such statute can be given retrospective effect [Income Tax Officer v. Ponnose, (1967) 64 ITR 117 = (AIR 1966 Ker 5); Strawboard Mfg. Co. Ltd. v. Gutta Mill Workers' Union, (1953) SCR 439 (448) = (AIR 1953 SC 95 at p. 98); Dayalbagh Co-operative Society v. Sultan Singh, Civil Appeal No. 654 of 1965, D/- 6-1-1966 (SC) unreported].

16. We, therefore, conclude that the Amendment Ordinance of 1969 cannot be given retrospective effect so as to affect the Respondent and that the law which is applicable to the instant case is Section 12 (1) as it stood prior to the amendment and as interpreted in Sreeram's case, (1969) 1 SCC 91 = (AIR 1970 SC 1597) and (1970) 1 SCWR 303. If that law be applicable, the judgment of the Court below cannot be assailed with respect to Section 167 (8).

17. II. Mr. Kar, therefore, advanced his second contention that Sreeram's case, (1969)

1 SCC 91 = (AIR 1970 SC 1597) has no application in the instant case inasmuch as though the Additional Collector in his order at pp. 119-120 of the Paper Book referred to both Sections 167 (8) and 167 (37) of the Customs Act, the appellate authority, i. e., the Central Board had observed (p. 140) that the Respondent had committed a separate offence under Section 167 (37), which is independent of Section 167 (8) and that the

(8) If any goods, the importation of which is for the time being prohibited or restricted by or under Chap. IV of this Act, be imported into or exported from India contrary to such prohibition or restriction.....

(37) If it be found, when any goods are entered at, or brought to be passed through, a custom-house, either for importation or exportation, that

.....
(b) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty, are being imported or exported :

(c) the contents of such packages have been misstated in regard to sort, quality, quantity or value....."

19. In connection with Section 167 (37), it is necessary to read Section 137, which imposes the substantive liability upon the exporter to state the required particulars in the prescribed form, as follows:

"137. No goods shall be shipped for exportation until—

(a) the owner has delivered to the Customs Collector, or other proper officer, a shipping bill of such goods....., in such form and containing such particulars in addition to those specified in Section 29 as may from time to time be prescribed by the Chief Customs Officer;

(b) such owner has paid the duties (if any) payable on such goods; and

(c) such bill has been passed by the Customs collector

The question is whether the offence under Section 167 (37), read with S. 137 of the Sea Customs Act has been committed in the instant case. As has been held in *Girdharilal v. Union of India*, AIR 1964 SC 1519 (1522), in the absence of any procedural irregularity, the findings arrived at by the Customs Authorities cannot be disturbed by the High Court, sitting under Art. 226 of the Constitution.

20. In the case before us, a complaint as to violation of natural justice was raised at some stage, but it has been established beyond doubt that it was at the instance of the Respondent Company that the formalities

Revisional authority simply rejected the revision application (p. 136).

18. In order to appreciate this argument, it is necessary to refer to the provisions in Section 167 (8) and (37).

"S. 167. The offences mentioned in the first column of the following Schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

such goods shall be liable to confiscation; any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees.

such packages...shall be liable to confiscation, and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.

Section of this Act to which offence has reference: 86 & 137

for adjudication by issuing notice etc. were dispensed with. The impugned orders were, however, made after hearing the Respondent.

21. The findings arrived at by the Appellants cannot, therefore, be reopened by this Court. Those findings, as appear from the order of the Board of Revenue (pp. 139-140), are—

(i) the contract disclosed by the Respondent did not relate to the disputed goods and that the Respondent has not disclosed the relevant contract, as required by the relevant Forms etc.;

(ii) the value of the goods declared in the Form prescribed was not correct.

22. If these two findings stand, an offence under Section 167 (37), read with Section 137, is established. It was, however, contended on behalf of the Respondent that misstatement cannot be an offence under Section 167 (37) (a), unless there is a substantive provision requiring the exporter to make a correct statement. But though that requirement cannot be found in Section 137 itself, Clause (a) of that section refers to Section 29, namely, that the Bill must contain 'such particulars in addition to those specified in Section 29 as may be prescribed'. The requirement to state the correct value in the Bill has therefore to be drawn from Section 29, and 'real value', for this purpose, is defined in Section 30. The relevant portions of the provisions in these two sections are:

"29. Owner to declare real value, etc. of goods in bill of entry or shipping bill. — On the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

Power to require production of invoice, etc. — In case of doubt, the Customs Collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information:

30. For the purposes of this Act the real value shall be deemed to be— (a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or

(b) Where such price is not ascertainable the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or reduction except as aforesaid."

23. It was, therefore, contended on behalf of the Respondent that the charge was not that the Respondent had failed to state the 'real value' within the meaning of Section 29 of the Sea Customs Act but that his declaration under Section 12 (1) of the Foreign Exchange Act was wrong. This, however, is not correct. From the Respondent's own pleading in the petition under Article 226, it is clear that, for the sake of expedition, he had agreed to dispense with a formal charge in writing but that the charges were explained to him verbally and on the footing of that he had filed his explanation or statement (paras. 18-19), and that the adjudication proceeded on that foundation. That 'statement' of the Petitioner is to be found at pp. 171-2 of the Paper Book. What charges were communicated to the Respondent are stated at (i) and (ii) of p. 173. It is true that the first charge was that "the FOB value declared by us on the Shipping Bills and on the GRI Forms do not represent the full export value of the goods as defined in Section 12 (1) of the Foreign Exchange Act and the notifications issued thereunder", but the second charge was that—

"We have also been told that the declaration of a lower value as a full value on the Shipping Bill is a misdeclaration of value attracting penal action under Sec. 167 (37) of the Sea Customs Act."

24. It is quite evident that though Section 29 or 137 of the Sea Customs Act was not specifically mentioned, the Respondent was told that by understating the value, he had also committed an offence under Section 167 (37), which must be read with Sections 29 and 137 of the Sea Customs Act and that his defence as well as the proceeding for adjudication proceeded on this twofold basis. It is, therefore, not correct to say that the petitioner was charged only with a violation of Section 12 (1) of the Foreign Exchange Act, and this contention of the Respondent is rejected.

25. III. We are not to deduce the conclusions from the findings so far arrived at, in order to determine the relief, if any, which the Respondent could get in his petition under Article 226.

26. The order at pp. 119-120 clearly shows that —

(a) The order of confiscation was made both under Section 167 (8) and 167 (37);

(b) The option to redeem the goods on payment of a fine was offered under Section 183 which is relatable to both Section 167 (8) and (37);

(c) The penalty of Rs. 35,000 was purported to be imposed under both S. 167 (8) and (37).

27. (a) We have held that the order, in so far as it was founded on Section 167 (8) was without jurisdiction, on the footing of the decision in *Sreeram's case*, (1969) 1 SCC 91 = (AIR 1970 SC 1597) but that it was *intra vires* so far as it was founded on Section 167 (37).

28. Since the order of confiscation was founded both on items (8) and (37) of Section 167, the order of confiscation cannot be struck down even though the charge of violation of Section 12 (1) of the Foreign Exchange Act fails. The bearing of the impugned order to Section 167 (37) was not considered by the Court below (p. 187). Hence, the order of the Court below quashing the confiscation, as well as the direction to refund the fine of Rs. 20,00,000 which the Respondent had paid in order to redeem the confiscated goods cannot be upheld.

29. (b) As regards the personal penalty of Rs. 35,000, however, it must be pointed out that though the additional Collector relied upon both items (8) and (37) of Section 167, a sum as big as 35,000 could not *prima facie* be imposed under that item which specifies the maximum of Rs. 1,000/-. The impugned order of penalty must, therefore, be regarded as one under item (8) of Section 167 and its validity must be determined with reference to that item.

30. As has been held by the Supreme Court in *Ranchhoddas v. Union of India*,

AIR 1961 SC 935, though that item mentions two alternatives in Col. 3, it is competent for the Customs Authority to exceed the lower alternative of Rs. 1,000/- and impose a penalty up to three times the value of the goods concerned, where that amount exceeds Rs. 1,000/-. In the instant case, the penalty of Rs. 35,000 was, therefore, within the alternative maximum prescribed in Section 167 (8), but since we have held that in the case before us, the appellants had no jurisdiction to proceed under Section 167 (8), the order imposing the penalty of Rs. 35,000 must be quashed.

31. Subject to the preliminary objections raised by Mr. Kar, to be taken up just now, the Respondent has a case for refund to the extent of Rs 35,000, following from the order imposing the personal penalty being quashed, according to our decision.

32. IV. When all is said, Mr. Kar contended, the Court below was not justified in directing the Appellants to refund any amount realised from the Respondent, in a proceeding under Art. 226 of the Constitution.

33. The claim for refund arises out of the finding of this Court that the imposition and recovery of the penalty in question was without jurisdiction since there was no violation of Section 12 (1) of the Foreign Exchange Act out of which the offence under Section 167 (8) of the Sea Customs Act arose. Since the jurisdiction of the Appellants to do so was statutory, a duty to refund arises as soon as it is held that the impugned order was ultra vires. Such a claim in a proceeding for mandamus has been allowed in England in *R. v. Income-tax Special Purposes Commrs.*, (1888) 21 QBD 313 and in numerous cases in India e.g., *Sales Tax Officer v. Kanhaiyalal*, AIR 1953 SC 135; *State of Orissa v. Chakrabhai*, AIR 1961 SC 284 (maintainability not questioned); *State of Kerala v. Aluminium Industries Ltd.*, (1965) 16 STC 659 (692) (SC). On this point, the observations of the Supreme Court in the case of *Union of India v. Narasimhalu*, (1969) 2 SCC 655 (662), though obiter, are illuminating. In this case, the claim had been made by suit, but a suit was barred by Section 40 of the Sea Customs Act. It was on this ground that the suit was dismissed, but at the same time, the Supreme Court observed—

"If the plaintiffs had moved the High Court in exercise of its jurisdiction under Article 226 the Union had practically no defence. The Union could without loss of face acceded to the request of the plaintiff to refund the amount collected. . . . This was essentially a case in which when notice was served the Central Government should instead of relying upon technicalities have refunded the amount collected"

34. Mr. Kar, however, relies upon the observations of the Court in *Suganmal v. State of Madhya Pradesh*, AIR 1965 SC 1740. But

this decision, when closely read, does not establish the proposition that an order of refund cannot, under any circumstances, be made in a petition under Article 226, but only that refund cannot be made the sole relief in a petition under Article 226. In that case, there was no judicial decision invalidating the imposition or collection, but the assessment had been quashed by an administrative appellate authority. Founding his claim upon that administrative decision, the Petitioner brought his mandamus petition with the sole prayer that the Taxing Authority be directed to refund the amount illegally collected. The Court rejected this prayer on the ground inter alia,—

"We therefore hold that normally petitions solely praying for the refund of the State by a writ of mandamus are not to be entertained" (para 9, p 1742, *ibid*).

35. On the other hand, that the Court, in a proceeding for mandamus, has the jurisdiction to direct refund, as an ancillary relief, is clearly laid down by the Court in *Bhailal's case* AIR 1964 SC 1006 (1011), para 16 thus—

"we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering the payment of money realised by the Government without the authority of law".

36. In *Backer Gray's case*, (1970) 1 SCWR 303 (305), refund has been ordered by the Supreme Court, as ancillary relief, in an appeal by special leave (under Article 136 of the Constitution) against an order of the Central Board of Excise and Customs.

37. Needless to say, the collection of customs duty on exports or imports is a restriction upon the fundamental right of a citizen guaranteed by Article 19 (1) (a), and such restriction, therefore, can only be justified under authority of a law, under clause (6) of Article 19. Where the imposition or collection is ultra vires, the fundamental right of the citizen under Article 19 (1) (a) is infringed. *Mohammad Yasin v. Town Area Committee*, (1952) SCR 572 = (AIR 1952 SC 115). *Ganapati v. State of Aizer*, (1957) 1 SCR 1035 = (AIR 1955 SC 188). The claim for refund, again is not the only relief claimed in the proceeding before us; hence, the contention of Mr. Kar, in this behalf must be rejected.

38. V Mr. Kar finally contended that though the Addl Collector had founded his order upon both items (8) and (37) of Section 167, the appellate authority, — the Board — had relied upon item (37) only so that the Respondent could not get any relief on the footing that the impugned order was made also under item (8). This is not factually true since the appellate authority dismissed the appeal in toto (p 141) and merely stated that the offence under Section 167 (37) was an offence 'independent' of Sec-

tion 167 (8). That the Board, too, relied upon both items 8 and 37 of Section 167, is apparent from the following words in para 6 of the Board's order (p. 140) —

"In this regard, the Board observed that since the facts disclosed two separate offences, there was nothing to bar actions being taken under the provisions of both Sections 167 (8) and 167 (37) of the Sea Customs Act".

39. But, as we have just held, the personal penalty amounting to Rs. 35,000 could not be imposed under Section 167(37) at all, it must be held to be founded under S. 167 (8) and, therefore, must be quashed as being without jurisdiction, in the facts of the case before us.

40. In the result, this appeal is allowed in part and the order of the Court below is modified as follows:

41. There will be a writ in the nature of certiorari quashing only that part of the impugned order of the Additional Collector which imposed a personal penalty of Rupees 35,000 upon the Respondent and a writ in the nature of Mandamus directing the Appellants to refund to the Respondent the sum of Rs. 35,000/-, within a period of two months from this date. In view of the divided success, we make no order as to costs.

42. In view of the above decision the amount of Rs. 2,00,000 out of Rs. 2,35,000 which is lying deposited with the Registrar, Original Side, in pursuance of the Court's order at the time of interim injunction dated 31-3-1969 and 1-4-69 be now refunded to the appellants on their making a proper application in that behalf.

AJAY K. BASU, J.:— 43. I agree.
Order accordingly.

AIR 1970 CALCUTTA 535 (V 57 C 106)

R. N. DUTT AND SARMA SARKAR, JJ.

The Superintendent and Remembrancer of Legal Affairs, West Bengal, Petitioner v. Satyen Bhowmik and others, Opposite Parties.

Criminal Revn. Case No. 5 of 1970, D/- 24-2-1970.

(A) Criminal P. C. (1898). Section 548 — Right of accused to copies of any part of record of trial — Right available even during committal proceedings.

An accused person even during course of committal proceedings, can exercise right to obtain copies of order sheets, deposition of witnesses and all documents marked exhibits in the proceeding. Even apart from Section 548 an accused has an inherent right to copies of any part of the record of the trial. Rule 308 of the Criminal Rules and Orders framed by the High Court under Article 227 of the Constitution also entitles the parties to a criminal proceeding to copies, certified

or uncertified, of any portion of the record of trial or enquiry. (Point conceded.)

(Para 4)
(B) Criminal P. C. (1898), Section 548 — Right of accused to copies of any part of record of trial is controlled by order under Section 14 of Official Secrets Act (1923).

An order under Section 14 of Official Secrets Act excluding the public from hearing the trial controls the right of accused under Section 548 to get copies of any part of the record of the trial. (Para 4)

In respect of each individual copy prayed for the Magistrate has to consider and apply his mind to come to a finding whether the grant of the copy would affect his own order under Section 14. If there is conflict, then copies cannot be and should not be granted. (Para 13)

Even where the copies are not granted, there must be a reasonable opportunity given to the accused persons to prepare for the defence and particularly to contradict the witnesses with reference to previous statements under Section 145 of Evidence Act. The accused or their lawyers should have access to the public record of the Court and they may inspect the same and take short notes. (Para 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 Cal 540 (V 55) =

1968 Cri LJ 1411, Supdt. and Remembrancer of Legal Affairs, West Bengal v. Vimla Dassi 9

Balai Chandra Roy, for Petitioner; J. N. Bose (for No. 12) and Jagadish Krishna Banerjee (for No. 16), for Opposite Parties.

R. N. DUTT, J.:— An enquiry under Chapter XVIII of the Code of Criminal Procedure is pending against the opposite parties before a Presidency Magistrate under various sections of the Official Secrets Act. On an application on behalf of the prosecution under Section 14 of the Official Secrets Act the learned Magistrate made an order on April 28, 1969, excluding the public during the trial.

2. On November 19, 1969, opposite party No. 12 filed an application before the Magistrate for "copies of deposition of the witnesses" and opposite party No. 16 filed an application for "copies and for permission to inspect the records and take necessary notes". The learned Magistrate considered these applications and passed an order on November 22, 1969, allowing them under Section 548 of the Code "to take copies of depositions and other documents on payment of proper fees". The State has thereafter obtained this Rule against this order of the learned Magistrate.

3. Mr. Roy appearing on behalf of the State first contends that the commitment enquiry has just started and only a few witnesses have been examined or, in other words, no trial has yet commenced and no "judgment" has as yet been "passed" by the learn-

ed Magistrate and so, Section 548 of the Code is not attracted at this stage.

4. Section 548 of the Code reads as follows:

"If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the Jury or of any order or deposition or other part of the record, he shall on applying for such copy, be furnished therewith."

Mr. Roy submits that Section 548 of the Code is attracted only after the trial is over and a "judgment" has been passed by the trial Court. We have quoted the Section and it will be seen that a person has been given the right to get copies only when he has been affected by a "judgment passed by a Criminal Court." There is no doubt that an accused may be affected by a judgment passed by a Criminal Court. But the words used are "passed by a Criminal Court" and not "passed or to be passed by a criminal court"; nor can it be said that the word "passed" here was intended to mean not only passed but also to be passed by a criminal court. If that was the intention of the legislature, the legislature would have made it clear. We cannot for the purpose of interpretation of a statute add words to the statute to find out its real meaning. On the face of it, therefore, it seems that Section 548 of the Code is attracted only after a trial is over and a judgment had been passed. But Section 548 of the Code speaks of not only judgment but "order passed by a criminal court". True, there is no judgment as yet in this case, but there is no doubt that during the course of the proceeding several "orders" have been passed by the learned Magistrate and it cannot be denied that an accused is affected by an order passed by a Magistrate in the course of the commitment proceeding. "Order" here does not mean the final order or the order which finally disposes of the case because that would be "judgment" within the meaning of Section 366 of the Code. Since Section 548 of the Code uses both the words "judgment or order", "order" must be interpreted to mean something different from the final order or judgment and since several orders have been passed by the learned Magistrate in the course of the proceeding before him and since these orders must have affected the accused persons, Section 548 of the Code would be attracted even during the course of this committal proceeding. Furthermore, an accused has the constitutional right to defend himself and to defend himself properly. It may just be necessary for his proper defence that he should get copies of the order-sheet, depositions of witnesses and all documents marked exhibits in the proceeding. Unless the accused gets these copies, which are all part of the record of the case, the accused may be prejudiced in his trial. Thus, even apart from Sec. 548 of the Code, an accused has an inherent right to obtain copies of the order-

sheet, copies of the depositions and copies of documents marked exhibits or, in short, copies of any part of the record of the trial. Rule 308 of the Criminal Rules and Orders framed by the High Court under Article 227 of the Constitution also entitles the parties to a criminal proceeding to obtain copies, certified or uncertified, of any portion of the record of trial or enquiry. Mr. Roy ultimately concedes this but submits that in view of the learned Magistrate's order under Section 14 of the Official Secrets Act to the effect that the public shall be excluded during the hearing, the accused can no longer get the copies. Section 14 of the Act states that "If, in the course of proceedings before a Court against any person for an offence under this Act, or in the course of a trial under this Act, an application is made by the prosecution on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect." Here, the prosecution made an application that the publication of any evidence to be given or of any statement to be made in the course of the enquiry would be prejudicial to the safety of the State and the learned Magistrate accepted this contention and excluded the public during the enquiry. Mr. Roy contends that, if an accused is permitted to obtain copies of depositions or of documents marked exhibits in the case, the purpose of the exclusion of the public from the enquiry would be frustrated and the publication of the evidence to be given in the trial would be prejudicial to the safety of the State. The application of both opposite party No. 12 and opposite party No. 16 is vague inasmuch as it is not clear copy of the deposition of which witness is required or copy of which document is required. The order made by the learned Magistrate is also vague inasmuch as he only permits the accused "to take copies of the depositions and other documents on payment of proper fees". He does not specify the deposition of which witness or copy of which document. Since the enquiry is being held under Section 14 of the Official Secrets Act and since publication of any evidence that may be given in the course of the enquiry would be prejudicial to the safety of the State, which contention the learned Magistrate has accepted, the accused persons cannot be given the right to obtain copies of the depositions of all witnesses or copies of all documents marked as exhibits. Clearly enough, if such depositions or such documents contain matters publication of which would be prejudicial to the safety of the State, grant of copies of such depositions or documents may end in their publication. True, but for the order under Section 14 of the Official Secrets Act in the instant en-

quity the accused persons would have been entitled to get copies of order-sheet, deposition of all witnesses and all documents marked as exhibits. But the order made by the learned Magistrate under Section 14 of the Act controls this right of the accused; otherwise, the purpose of excluding the public from the enquiry for the safety of the State will be frustrated. We hold, therefore, that in view of the order made by the learned Magistrate under Section 14 of the Act the accused in the instant enquiry cannot get copies of the depositions or of documents publication of which would be prejudicial to the safety of the State. We do not hold that, merely because there is an order under Section 14 of the Act, the accused would not get copies of any deposition or of any document but we hold that the accused will not be entitled to get copies of depositions or documents publication of which would be prejudicial to the safety of the State. Both Mr. Bose and Mr. Banerjee have argued that in that case the accused would be prejudiced in their defence. So, even though the accused may not get copies of such depositions or documents publication of which would be prejudicial to the safety of the State, the accused should be given all facilities so that the accused may be properly defended. We find that the learned Magistrate had permitted the lawyers of the accused persons to inspect the record of the case. We hold that the lawyers of the accused persons have the right to inspect the record of the case, obviously after obtaining orders from the Magistrate and in presence of the Court officers or particular police officers as may be directed by the learned Magistrate. Mr. Banerjee submits that he was prevented from taking notes from the record. He will seek specific orders of the Magistrate in this respect but he can do no more than take pencil notes of dates or figures but no copies of what is contained in the record.

5. In the result, the Rule is made absolute. The order of the learned Magistrate is set aside but we direct that the learned Magistrate will permit the accused to obtain copies of the order-sheet, and of such depositions and documents marked exhibits or such other part of the record publication of which would not be, in his opinion, prejudicial to the safety of the State. The accused will not be entitled to get copies of other depositions, documents or other part of the record. We should make it clear that we have, in connection with this proceeding previously held that the accused persons are not entitled to get copies of statements (either) under S. 161 of the Code (or) under S. 173 (4) of the Code. The accused will not also get copies of such statements under Section 548 of the Code — such statements not being part of the record. The lawyers of the accused will have the right to make inspection of the record as and when necessary for their proper defence. The learned

Magistrate will consider prayers for copies of specific matters or for permission for inspection and pass appropriate orders as and when necessary in the light of the directions and observations made above.

SARMA SARKAR, J.:— 6. I respectfully agree with the order passed by my Lord but I may be permitted to add a few words.

7. In a proceeding under Section 208 of the Code of Criminal Procedure (hereinafter referred to as the Code) on charges under Secs. 3, 9 and 10 of the Official Secrets Act, 1923, (hereafter referred to as the Act) the learned Magistrate has passed an order under Section 14 of the Act that “all or any portion of the public shall be excluded during any part of the hearing” on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceeding would be prejudicial to the safety of the State. This order is different from an order under proviso to S. 352 of the Code which empowers the Magistrate to pass an order “that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court”. When an order is passed under Section 352 of the Code, the exclusion of the public is from the room in the interest of the trial but, when an order is passed under Section 14 of the Act, the exclusion of the public is from the proceeding and from the hearing. Opposite Parties Nos. 12 and 16 filed applications for “copies of depositions of the witnesses” and also for “copies and for permission to inspect the records” and the learned Magistrate passed an order under Section 548 of the Code “to take copies of depositions and other documents on payment of proper fees.”

8. It was urged on behalf of the State that the purpose of Section 14 of the Act would be frustrated and safety of the State will suffer if the copies, as prayed for, are granted to the accused persons without any restriction. It was further urged that Section 548 of the Code has no application to the statements and documents collected by the police during investigation. The learned Advocates appearing on behalf of the opposite parties Nos. 12 and 16, on the other hand, contend that the defence would be seriously prejudiced in the preparation of the defence and in cross-examination of the witnesses if such copies are not supplied to them. They relied not only on Rule 308 of the Criminal Rules and Orders made by the High Court but also on the provisions of Sections 74 and 76 of the Indian Evidence Act. It is, therefore, necessary to consider the case in some details both from the standpoint of abstract legal right of the accused to get copies and also from the standpoint of convenience and necessity for proper defence. In coming to our conclusion, we have to consider separately the question of grant of copies with regard to the various

items prayed for by the accused. I shall deal generally first with regard to the statements and documents referred to in Section 173 (4) of the Code and then I shall take up the question of granting copies from the records of the Court.

9. As regards the statements and documents referred to in Section 173 (4) of the Code, an extreme view was taken by a Judge of this Court sitting singly in the case of *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Vimla Dassi*, reported in AIR 1968 Cal 540, that even when cognizance was taken on the basis of a complaint under Section 190 of the Code in a case wherein no report under Section 173 of the Code was filed, the accused was entitled to the benefit of Sec. 173 (4) of the Code. This view was expressly overruled by an unreported Division Bench decision of this Court in Criminal Appeal No. 358/63 decided on May 7, 1969, and it was held that in a case like the present one where the complaint procedure is followed, the accused are not entitled to free copies under Section 173 (4) of the Code. But the question still remains whether the accused persons are entitled to copies outside the provisions of Sections 173 (4) and 548 of the Code. This matter was not directly raised nor decided in this case and it is not necessary to pronounce an opinion on this point. But in this connection I may refer to the provisos to Section 162 of the Code prior to the amendment in 1955 which run as follows:

"Provided that, when any witness is called for the prosecution in such enquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872."

Provided, further that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused."

10. These provisions with some modifications have been incorporated as Section 173 (4) and (5) of the Code after the amendment of 1955. But since the amendment of 1955 there is no provision for getting such copy outside Section 173 (4) or Section 173 (5) of the Code. It may, therefore, be necessary to consider whether, even though a party to a proceeding may not be entitled to get such free copies as of right, a party to such proceeding will be entitled to copies or, at any rate, access to such police papers for the purpose

of preparing defence and more particularly, to contradict witnesses with reference to the previous statements under the provisions of Section 145 of the Indian Evidence Act. On these points therefore, no final decision is made in this case and the order proposed does not cover this aspect of the case as the matter was not raised in the Court below and has not been disposed of by the committing Magistrate.

11. I now take up the question of grant of copies from the record of the Court. With regard to such documents there is provision in Section 548 of the Code for granting copies. It is not very necessary, so far as this case is concerned, to interpret the exact scope and effect of Section 548 of the Code. As I find, there is a specific provision in Rule 303 of the Criminal Rules and Orders framed by the High Court under the provisions of Article 227 of the Constitution. Rule 303 runs thus:

"Parties to a criminal proceeding are entitled to obtain copies, certified or uncertified, of any portion of the record of trial or enquiry including such police papers as may be made use of as evidence at the trial or enquiry and final reports submitted by police under Section 173 of the Code of Criminal Procedure."

Note — Police reports on which proceedings are instituted under Chapters VIII, X, XI and XII form a portion of the record of trial or enquiry."

Copies are granted in respect of these documents under Rule 310 of the Criminal Rules and Orders. It will be seen that there is some difference in the provisions of Section 548 of the Code and Rule 303 of the Criminal Rules and Orders. Section 548 of the Code is wider and may apply not only to the parties but also to outsiders, but Rule 303 of the Criminal Rules and Orders is confined to the parties in a criminal proceeding. It will be seen that, so far as Rule 303 is concerned, the question whether the parties are affected or not by a particular order is not made a condition precedent to the grant of copies. Parties to a criminal proceeding, therefore, are entitled to copies of the documents mentioned in Rule 303 as a matter of right and as a matter of course subject to any extraneous considerations which may arise apart from Rule 303 of the Criminal Rules and Orders. In my view the opposite parties are entitled to copies covered by Rule 303 as a matter of right subject to any extraneous considerations.

12. The order of the learned Magistrate granting copies of documents from public record may be supported, if not under Section 548 of the Code, at least under Rule 303 of the Criminal Rules and Orders and normally, the opposite parties will be entitled to those copies as a matter of right subject to other considerations, if any.

13. In the present case, as already observed, an order has already been passed

under Section 14 of the Act which not only excludes the public from the Court room but also excludes the public from the proceeding or hearing in the Court room. If that be so, it has to be considered whether the granting of such copies will be in conflict with the order under Section 14 of the Act. The learned Magistrate passed a general and vague order granting copies as a matter of course in respect of documents as may be found in his order. But, in my view, such general order of granting or refusing will not be proper in the instant case. The general rule will be that the opposite parties are entitled to such copies but in respect of each individual copy prayed for, the Magistrate has to consider and apply his mind to come to a finding whether the grant of the copy would affect his own order under Section 14 of the Act. If there is no conflict, then the copies may be granted; but, if there is conflict, then the copies cannot be and should not be granted.

14. Even where the copies are not granted, there must be a reasonable opportunity given to the accused persons to prepare for the defence and particularly, to contradict the witnesses with reference to the previous statements under Section 145 of the Evidence Act. For this purpose the opposite parties or their lawyers should have access to the public record of the Court and they may inspect the same and take short notes as restricted by my Lord in his Order.

15. Subject to the reservations and observations made above, I respectfully agree with the proposed order.

Order accordingly.

AIR 1970 CALCUTTA 539 (V 57 C 107)
P. N. MOOKERJEE AND AMIYA KUMAR
MOOKERJI, JJ.

Gowardhandas Rath, Appellant v. Corporation of Calcutta and another. Respondents.

A. F. O. D. No. 160 of 1964, D/- 25-6-1970.

(A) Municipalities — Calcutta Municipal Act (33 of 1951), Section 58(1), (4) — Notice — Suit for declaration and permanent injunction against Corporation not to enforce invalid order for demolition of structures — Permanent injunction though claimed as additional relief suit held, in essence one for permanent injunction — Absence of notice not fatal to suit — Specific Relief Act (1877), Section 54.

Where in a suit against the Corporation for declaration and injunction the relief for permanent injunction restraining the Commissioner from giving effect to his invalid order for demolition of structure is claimed only as an additional relief, the suit is, nevertheless, a suit for permanent injunction within the meaning of Section 54 of the

Specific Relief Act. Consequently, such suit would be protected under Section 58(4) and notice under Section 58(1) would not be necessary for the institution of the suit. In such suit, the relief for declaration has to be regarded as ancillary to the relief of perpetual or permanent injunction.

(Para 16)

Under Section 54 of the Specific Relief Act every suit for perpetual injunction must involve a declaration or determination as to the existence of a right in the plaintiff and its threatened violation or the threatened commission of an act to injure that right of the plaintiff, or in other words, such a declaration would necessarily be implied in such suit. Consequently, in law, such a declaration would not alter the character of the suit as a suit for permanent injunction.

(Paras 15, 16)

(B) Civil P. C. (1908), Sections 80, 2(17) (h) — Notice under Section 80 — Commissioner of Corporation of Calcutta is not government servant — Notice to him is not necessary.

As the State Government do not exercise any control over the discharge of duties by the Commissioner of Corporation of Calcutta as such Commissioner, nor he is in the pay of the Government, the Commissioner cannot be said to be a government servant in spite of the control the government has over his appointment and his removal and his functions outside the office of the Commissioner, and hence, no notice to him under Section 80 is necessary. (1960) 64 Cal WN 60, Not followed in view of AIR 1959 SC 539.

(Para 18)

(C) Civil P. C. (1908), Order 41, Rule 2 — Point not raised in trial Court either in pleading or in argument — Not considered in appeal.

(Para 21)

Cases Referred: Chronological Paras (1965) AIR 1965 Cal 442 (V 52) =

69 Cal WN 584, M/s. Metro General Traders v. Commr., The Corporation of Calcutta 22

(1960) 64 Cal WN 60, Shivadhar Sulda v. Corporation of Calcutta 22

(1959) AIR 1959 SC 539 (V 46) =

(1959) 2 SCA 168, Raja Bahadur K. C. Deo Bhanj v. Raghunath Misra 19

Satyendra Prosad Sen, for Appellant; Dwijendra Narain Ghose, for Respondents.

P. N. MOOKERJEE, J.:— This appeal is by the plaintiff. It is directed against a decree of the learned trial Judge, dismissing the plaintiff's suit on a preliminary issue. That issue was in these terms:

"Where notices under Section 586 of the Calcutta Municipal Act and under Section 80 Civil Procedure Code necessary before filing this suit? If so, should the suit fail for want of the said notice?"

This issue was answered by the learned trial Judge in the affirmative in both its parts, that is, against the plaintiff and, as a result thereof, the plaintiff's suit was dismissed.

2. Another issue was also discussed and decided by the learned trial Judge, namely, the issue of limitation, which was in the following terms:

"Is the suit barred by limitation?"

The issue, however, was found in favour of the plaintiff but, as, on the other issue, the suit had to be dismissed according to the learned trial Judge, his ultimate decree was a decree of dismissal. Against this decree, the present appeal has been filed by the plaintiff.

3. The point before us arises in the following manner:

4. The instant suit was a suit, in substance, for a permanent injunction against the defendants, the Corporation of Calcutta and Sri S. B. Roy, Commissioner, Calcutta Corporation, to restrain them, "their men, officers and agents from giving effect to an illegal order, dated May 12, 1960, and/or in any way interfering with the plaintiff's right of property in respect of the disputed structures, namely, the C. I. sheds at Premises No. 33/2B, Wellesley Street, now known as No. 33/2B, Rafi Ahmed Kidwai Road, Calcutta.

5. The order, referred to above, namely, the order, dated May 12, 1960, was an order for demolition of the disputed structures. That order was challenged in the plaint as illegal, invalid and an abuse of the statutory powers, vested in the Commissioner, and, as such, unenforceable in law.

6. In the suit, there was a prayer for a declaration to the above effect, which was prayer No. 1 in the plaint, the prayer for permanent injunction, as noted above, being prayer No. 2.

7. In the suit, the two objections, which had been considered by the learned trial Judge, namely, of a preliminary nature, related to the question of service of notice under Section 588 of the Calcutta Municipal Act and Section 80 of the Code of Civil Procedure and the question of limitation.

8. The suit was dismissed by the learned trial Judge on the ground of want of the above notices, even though the question of limitation was decided by him in favour of the plaintiff. The learned trial Judge did not go into the merits of the suit but dismissed it on the above preliminary ground. The propriety of the said decision has been challenged before us on behalf of the appellant and Mr. Sen, arguing this appeal on behalf of his client, the appellant, has contended before us that the learned trial Judge was wrong on the question of both the above notices and his submission was that neither of the above two notices was necessary or a pre-requisite in law in the instant case.

9. It is an admitted fact that none of the above notices was served by the plaintiff. If, therefore, the learned trial Judge's view that the said two notices were necessary for maintaining the present suit or if even one

of them be necessary for the said purpose, his decree of dismissal would have to be affirmed. If, however, it be held that neither of the above two notices was necessary in the instant case, the learned trial Judge's decree of dismissal would have to be set aside, his finding on the other preliminary question of limitation being, as already stated, in favour of the plaintiff, and the case will have to be sent back for further consideration in accordance with law.

10. We have, therefore, to address ourselves to the alleged requirement of the above notices or either of them in the instant case.

11. So far as Section 586 of the Calcutta Municipal Act is concerned, it is clear that the said Section would prima facie apply as the Corporation as also the Commissioner would come within the scope or purview of the same, so far as sub-section (1) of the said Section is concerned. Mr. Sen, however, relies for his protection on sub-section (4) of the said Section. If the instant suit is one, contemplated under the said sub-section, it would be outside the mischief of the earlier provisions. The question, therefore, is whether the instant suit can be held to be a suit, instituted under Section 54 of the Specific Relief Act (1877), which was in force at the date of institution of this suit. That Section, which corresponds to S. 38 of the new Specific Relief Act, to quote its relevant part, reads as follows:

"54. Perpetual injunctions when granted.— Subject to the other provisions, contained in, or, referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation, existing in favour of the applicant, whether expressly or by implication."

12. The above section is preceded by Section 53 of the old Act, corresponding to Section 37 of the new Act, which, in its relevant part, is in these terms:

"53.
A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff."

13. Reading the two sections together, it is clear that a suit for perpetual injunction, which is contemplated under the above two statutory provisions, or, more accurately, by the first-quoted provision, is a suit for the said relief, to be obtainable in the decree, made at the hearing and upon the merits of the suit. The merits of the suit would, obviously, involve determination of the plaintiff's alleged right or alleged commission of act by the defendant, which would be contrary to or violative of the rights of the plaintiff.

14. Clearly, also, for the grant of a perpetual or permanent injunction, the above

requisites, namely, the existence of a right in the plaintiff and its threatened violation or the threatened commission of an act to injure the plaintiff's right would have to be found.

15. Every suit, therefore, for a perpetual injunction must involve a determination or a declaration to the above effect, or, in other words, such a declaration would be necessarily involved or implied in the case of every decree for perpetual injunction.

16. In the instant case, the invasion of the plaintiff's right or the commission of the act, contemplated above, would, presumably be the passing of the impugned order, which is challenged in the plaint as invalid, illegal and mala fide, and a finding, determination or declaration to that effect would, whether expressly or impliedly, be necessary for the grant of perpetual injunction to the plaintiff. Indeed, in the instant case, there is an express prayer for such a declaration. That however, in our opinion, would not alter the substantive position. That prayer may well be regarded as ancillary to the main relief of perpetual or permanent injunction, — if not unnecessary as a prayer in the prayer portion of the plaint. The necessary allegation in the body of the plaint to enable the Court to come to a determination of the above basic question would be enough for the purpose of supporting the ultimate decree of perpetual injunction. In law, a declaration by implication or in express terms would not make any difference in substance and, regarded from that point of view, it will not affect or alter the nature of the suit and, accordingly, the instant suit may well be regarded, as, in substance, it is, as a suit for perpetual or permanent injunction. In this view, we would hold that the instant suit would satisfy the test of a suit, instituted under Section 54 of the old Specific Relief Act, corresponding to Section 38 of the new Act. In that view, the instant case would be covered by the protective provision of sub-section (4) of Section 586 of the Calcutta Municipal Act and, accordingly, would be outside the mischief of sub-section (1) of the said section. The absence or want of a notice under the said statutory provision cannot, therefore, be fatal to the instant suit and the learned trial Judge's view to the contrary is not correct and must be set aside.

17. So far as the question under Section 80 of the Code of Civil Procedure is concerned, it is clear that, for the application of that section and the requirement of notice under the same, it is necessary that the defendant must be a Public Officer. So far as the present case is concerned, this defence is limited to the case of defendant No. 2, as, obviously, the Corporation of Calcutta would not fulfil the description or definition of a Public Officer. As regards the said defendant No. 2, however, the matter, when judged under the relative statutory pro-

vision in Section 2 (17) of the Code of Civil Procedure, which defines a "public officer" for purposes of the Code, the same can be attracted, if at all, under clause (h) of the said section. That clause reads as follows:

"(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty."

The latter part of this clause would not, obviously, apply in the instant case as the Commissioner of the Corporation of Calcutta is not remunerated by fees or commissions. The question then shortens itself to this: "Is he an officer in the service or pay of the Government?" For this purpose, it is necessary to consider the effect and implication of some of the provisions of the Calcutta Municipal Act. The Commissioner under the said statute, is appointed by the State Government on the recommendation of the State Public Service Commission and upon such terms and conditions as the State Government may determine and he shall not be a member of the Corporation. This is provided in Section 19 (1) of the said Act, sub-section (3) of the said section provides that "Notwithstanding anything contained in sub-section (2) [which fixes the normal tenure of the Commissioner to a term of five years subject to renewal in appropriate cases to another term of the same period], the State Government may, at any time, remove the Commissioner from office and shall do so if, at a special meeting of the Corporation, called for purpose, resolution for the removal of the Commissioner, in favour of which more than one-half of the total number of members of the Corporation give their votes, is carried." Power of appointment and removal therefore, so far as the Commissioner is concerned, undoubtedly, rests with the State Government. Sub-section (4) of the above section, again, provides that "The Commissioner shall not undertake any work unconnected with his office without the sanction of the State Government and of the Corporation."

18. The above statutory provisions indicate some kind of the State's control over the Commissioner but this is limited to his appointment, to the terms and conditions of the same, to his removal and to his functions outside the office of the Commissioner. They do not, in any manner, control or affect the discharge of his duties under his appointment as Commissioner and leaves him free in the matter and free from any interference or control of the State Government. In this state of things, it is difficult to maintain that the Commissioner of the Corporation is in the service of the State.

19. Indeed, this aspect would be clear, if we bear in mind the distinction between "serving under the Government" and "in the service of the Government", as explained by the Supreme Court in the case, reported in Raja Bahadur K. C. Deo Bhanj v. Raghunath

Misra, (1959) 2 SCA 163 = (AIR 1951 SC 559), where, for being in the service of the Government, two essentials of the relationship of the master and servant were held to be necessary. The servant must be under the duty of rendering personal service to the master or to others in his behalf and the master must have a right to control the servant's work, either personally or by another servant or agent. Neither of these two elements would be present in the instant case — in any event, the element of control, envisaged therein, would not be present — the Commissioner qua Commissioner cannot be held to be in the service of the Government. The Commissioner also cannot be said to be in the pay of the Government because as provided in Section 20 of the Calcutta Municipal Act, his salary is to be paid out of the Municipal Fund, which under Section 115 of the said Act, is made up of monies realised or realisable under the said Act (other than the fines levied by Magistrates) and all monies otherwise received by the Corporation. This fund is certainly not any part of the Government or State Exchequer and cannot be said to be belonging to the State.

20. In the premises, the Commissioner would not satisfy either of the requisite tests of a Public Officer under the relevant Cl (h) or Section 2 (17) of the Code of Civil Procedure, namely, of being in the service of the Government or in its pay.

21. Mr Ghose, appearing for the Corporation of Calcutta, also drew our attention to Section 23 of the Calcutta Municipal Act for his contention that in the instant case, the Commissioner, Sri S. B. Roy, was in the service of the Government when he was appointed the Commissioner, or, in other words, that his services, as Government Officer, as aforesaid, were lent to the Corporation for the post of the Commissioner and that, accordingly he continued to be in the service of the Government. The basic assumption for this submission would be that Sri S. B. Roy was in the service of the Government at the time of his appointment as Commissioner and that his services under the Government were lent to the Corporation for filling up the post of the Commissioner. In support of that assumption, however, there are no materials on the present record and no such contention appears to have been raised in the court below, either in the pleading or in the argument there. In the circumstances, we are unable to proceed upon this assumption and accordingly, without expressing any opinion on the merits of the above contention, we would reject this submission of Mr Ghose for upholding the learned trial Judge's order in the instant case.

22. The above view would be in consonance with the opinion, expressed in Messrs Metro General Traders v. Commr., The Corporation of Calcutta 60 Cal WN 554 at pp 557-558 = (AIR 1965 Cal 412 at pp. 443-

444), differing or disagreeing, though tentatively at that stage, with the decision of this Court, reported in Shivadhar Sukla v. Corporation of Calcutta, (1960) 61 Cal WN 60, and the earlier unreported decision, referred to therein. The decision of the Supreme Court however, which has been referred above, appears sufficiently to indicate that the view expressed on the point in the above two decisions, would not be supportable. We have therefore, no hesitation in expressing our respectful disagreement with the same and taking the view, we have indicated above.

23. In the premises, we will allow this appeal set aside the impugned decree of dismissal of the learned trial Judge and send back the case to him for further consideration in accordance with law and in the light of the observations, made in this judgment.

24. There will be no order for costs in this appeal. Let the records go down as quickly as possible.

AMIYA KUMAR MOOKERJI, J.: 25. I agree,

Appeal allowed.

AIR 1970 CALCUTTA 542 (V 57 C 108)

SANKAR PRASAD MITRA AND
SABYASACHI MUKHARJI, JJ.

Sunil Roy Calcutta, Applicant v. Controller of Estate Duty, Calcutta, Respondent.

Matter No 122 of 1969, D/- 23-5-1969.

Estate Duty Act (1953), Section 10 — Gift — Bona fide possession and its retention by donee — Donor's stay at premises for few days prior to his death — No benefit given to donor by contract or otherwise — Section not attracted.

Where the donee had assumed bona fide possession of the house property immediately after the gift, and also retained the possession and enjoyment throughout, without any benefit being conferred upon the donor by a contract or otherwise the mere fact that the donor had stayed at the premises for a few days prior to his death, would not prevent the retention of possession and enjoyment of the property by the donee to the exclusion of the donor as contemplated by Section 10 and that section would not be attracted. AIR 1967 SC 819, Disting.

(Para 12)

Cases Referred: Chronological Paras
(1957) AIR 1967 SC 819 (V 54) =

63 ITR 497, George Da Costa v.

Controller of Estate Duty, Mysore 11

Sambharanda Dis. for Applicant; B. L. Pal with Suhas Sen, for Respondent.

SANKAR PRASAD MITRA, J.:— This is a reference under Section 64 (1) of the Estate Duty Act 1953. On the 1st May, 1955, one Probodh Chandra Roy executed a Deed of

RN/HN/DS16/70/HGP/B

Trust in which he was referred to as a settlor. There were two trustees under this Deed viz., Usharanjan Ghosh and Sunil Roy, the only son of the settlor. The subject-matter of the trust was premises No. 38, Southern Avenue, Calcutta, where the settlor used to reside. The Trustees were directed to pay the rates and taxes and out of the balance of the income of the property they were to pay in any proportion whatsoever to Sm. Jyotirmoyee Ray, the settlor's wife, Sunil Roy, the settlor's son, Uma Mitra, the settlor's daughter, any children of Sunil Roy and any children of Uma Mitra by her existing marriage. None of these beneficiaries had any power of anticipation. At the end of a period of ten years, the trustees were to transfer the property to Sunil Roy or to any major child of Sunil Roy or Uma Mitra or to Uma Mitra's children born of her then existing marriage. In the absence of any of the beneficiaries aforementioned the property was to go to the Sadharan Brahma Samaj. On the 14th August, 1955, the settlor executed another document in respect of a property at Regent Park with which we are not concerned in this reference. The Deed of the 14th August, 1955, is, however, relevant to us to this extent that in this Deed executed a few months after the first Deed the settlor states that he was residing not at premises no. 38, Southern Avenue in Calcutta, but at premises no. 78/1, Sardar Sankar Road, in Calcutta.

2. Even before that only two days after the execution of the first Deed on the 1st of May, 1955, the settlor on the 3rd May, 1955, wrote to the Post-master, Calcutta-19, to redirect his letters to premises no. 78/1, Sardar Sankar Road. Then on the 26th August, 1955, the settlor wrote to the Insurance Company about his change of address. In September, 1955, he wrote to the State Bank of India intimating the change of address. In the same month he asked the Calcutta Electric Supply Corporation Ltd. to refund his security deposit with respect to premises no. 38, Southern Avenue, Calcutta, and to terminate his contract with the said Corporation in view of the change of ownership.

3. The trustees under the Deed of the 1st May, 1955, applied on the 6th September, 1955, to the Municipal Corporation for mutation of ownership. The trustees were also assessed to income-tax on income from premises no. 38, Southern Avenue.

4. A little over four years later, however, on the 8th May, 1959 the settlor executed a document in which he stated that the indenture dated May 1, 1955 created what would appear to be a deed of trust and that he executed the deed "himself knowing and also the persons in whose favour the deed was so executed knowing it to be an out and out benami transaction with the view of avoiding payment of estate duty." He stated in this document of the 8th May, 1959, that

he never divested himself of his proprietary interest and actual physical possession and that he had at all times been and was still living in premises No. 38, Southern Avenue in his own right as the exclusive owner thereof with his wife, daughter and son-in-law. He stated that he cancelled and determined the transfer by way of benami i. e., the trust created by the indenture dated the 1st May, 1955. It was stated further that he had to execute the document of the 8th May, 1959, because the relationship between Sunil Roy and Uma Mitra was not quite happy. The settlor also on the same day viz., the 8th May, 1959, executed a Will under which he bequeathed the property at 38, Southern Avenue to Sunil Roy subject only to the condition that his wife should have the right of residence exclusively in a portion of the said premises. In this Will he also declared that Sunil Roy would have no claim whatsoever to the property no. 10, Regent Park gifted to his daughter. He appointed his son Sunil Roy and his wife Jyotirmoyee Roy as executor and executrix. In the Will the son is stated to be residing at premises no. 38, Southern Avenue, Calcutta. None of these documents of the 8th May, 1959, has been registered. The will has also not been probated.

5. At the hearing before us learned counsel for the Revenue placed considerable reliance on these two documents of the 8th May, 1959, in support of his contention that the property viz., premises no. 38, Southern Avenue, Calcutta, cannot escape the levy of estate duty. These documents may have created complications for the assessee at the initial stages of this case before the tax authorities but, in view of the findings they have arrived at, this Court, dealing with a reference under Section 64 (1) of the Estate Duty Act, 1953, cannot be invited to attach any importance to them. In paragraph 11 at page 43 of his order the Appellate Controller of Estate Duty, Eastern Zone, Calcutta, has stated:—"In my opinion the document dated 8th May, 1959, is only an evidence of the anger displayed by the father as a result of the various family quarrels which culminated in the filing of a complaint by his son Sunil Roy on 4th July, 1958, against the husband of his sister i. e. the son-in-law of the deceased. It is not necessary to recapitulate the entire course of the history of the litigation between the brother and the sister which has taken them to the Alipur Court and the Appellate Court to the District Judge and later on to the Calcutta High Court also. The position as it appears to me is that in his anger the father attempted to execute a document seeking a declaration of the cancellation of the trust. In my opinion this document is of no legal validity and has not served the purpose of cancellation of the trust which in any case was not in his power once he created an irrevocable trust and handed over the property to the trustees." We have gone

through the order of the Appellate Tribunal dated the 25th May, 1968. The Tribunal has not in this order disturbed the findings of the Appellate Controller of Estate Duty so far as this aspect of the case is concerned. On the contrary at page 54 in paragraph 17 the Tribunal says:—"Before closing, we may clear up one aspect. The Departmental Representative appeared to suggest that the deceased was throughout in the premises right from 1-5-1955. The Appellate Controller has accepted the accountable person's case that the deceased soon after executing the document moved out of the premises and we do not find any reason to differ from him as there are no materials to show that the Appellate Controller did not properly come to the said conclusion. Our finding on this aspect is that the deceased moved out of this premises soon after the execution of the document; but subsequently came into it, at any rate, a few days before his death."

6. These observations of the Appellate Controller and the Tribunal have finally set at rest the controversy that was sought to be raised before us on the basis of the two documents of the 8th May, 1959.

7. In the course of the estate duty proceedings, however, the Assistant Controller of Estate Duty held that the property gifted to the son, was enjoyed by the deceased right up to the date of his death inasmuch as he seemed to have lived and died in that place. The Assistant Controller was of opinion that the property had passed under Section 10 of the Estate Duty Act, 1953.

8. The Appellate Controller's verdict was in favour of the applicant. The Tribunal, however, came to the following findings:—

(1) It is not proper to proceed on the assumption that the several provisions in the Estate Duty Act dealt with mutually exclusive situations;

(2) the Appellate Controller is not correct in proceeding on the assumption that S. 10 is excluded from the present case merely because there was a document creating a trust settlement;

(3) Section 10 covers the situation of a gift through the medium of trust or settlement;

(4) the Appellate Controller's inference was that the trustees assumed possession of the property. The only aspect that remained for investigation, therefore, was whether the deceased was entirely excluded from the enjoyment of the property by the trustees;

(5) On the facts of this case, the deceased remained in the premises admittedly for a few days after the document of the 1st May, 1955, and he died in the premises. During the period of his lifetime he was thus not really excluded from the possession and enjoyment of the premises. The provisions of Section 10 are, therefore, attracted to this case; and

(6) the deceased moved out of 38, Southern Avenue soon after the execution

of the document of the 1st May, 1955 but subsequently came into it a few days before his death.

9. The Tribunal has confirmed the assessment based on the application of Section 10. And the following question of law has been referred to this Court:—

"Whether, on the facts and in the circumstances of the case, the provisions of Section 10 were attracted so as to justify the inclusion of the value of 38, Southern Avenue in the assessment."

10. Now, Section 10 of the Estate Duty Act, 1953, as it stood at the material time was, inter alia, as follows:—

"Property taken under any gift, whenever made, shall be deemed to pass on the donor's death to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise"

11. The Supreme Court in *George D. Costa v. Controller of Estate Duty, Mysore* AIR 1967 SC 849 = 63 ITR 497, has construed these provisions. Their Lordships are of the view that the crux of Section 10 lies in two parts: (1) The donee must bona fide have assumed possession and enjoyment of the property, which is the subject-matter of the gift to the exclusion of the donor, immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise. According to their Lordships, as a matter of construction both these conditions are cumulative and unless each of these conditions is satisfied, the property would be liable to estate duty under Section 10 of the Act. The Supreme Court has said further that the second part of the section has two limbs: The deceased must be entirely excluded (i) from the property and (ii) from any benefit by contract or otherwise. In the context of the Section the word 'otherwise' should, in the opinion of their Lordships, be construed ejusdem generis and it must be interpreted to mean some kind of legal obligation or some transactions enforceable at law or in equity, which, though not in the form of a contract, may confer a benefit on the donor. Their Lordships held that as a matter of construction the words 'by contract or otherwise' in the second limb of the Section will not control the words "to the entire exclusion of the donor" in the first limb. The first limb of the section may be infringed if the donor occupies or enjoys property or income even though he has no right to do so which he could legally enforce against the donee; in other words, in order to attract the Section it is not necessary that the possession of the donor of the gift must be referable to some contractual or other arrangement enforceable

in law or in equity; even if the donor is content to rely upon the mere filial affection of the donee with a view to enable him to continue to reside in the house, it cannot be said that he was "entirely excluded from possession and enjoyment" within the meaning of the first limb of the Section, and therefore, the property would be deemed to have passed on the death of the donor and will be subject to levy of estate duty.

12. Learned Counsel for the department submitted to us that this was a fit case for applying the first part of Section 10. We cannot uphold this contention in the face of the overwhelming evidence on record which we have already discussed. In this case the donee had assumed possession of the property immediately after the gift, the donee had also retained possession and enjoyment throughout. No benefit had been conferred on the donor by contract or otherwise, as explained by the Supreme Court in the aforesaid decision. After possession and enjoyment had been bona fide assumed by the donee, and retained by him, mere presence or stay of the donor for a few days prior to his death, on the facts and circumstances of this case, without any benefit being given to the donor by contract or otherwise, would not prevent retention of the possession and enjoyment of the property by the donor (sic) to the exclusion of the donee (sic) as contemplated by the Section. In these premises, we are unable to agree with the Tribunal's view and our answer to the question in this reference is in the negative. The Controller will pay to the applicant the costs of this reference.

SABYASACHI MUKHARJI, J.:— 13. I agree.

Reference answered negatively.

AIR 1970 CALCUTTA 545 (V 57 C 109)

D. BASU AND A. K. BASU, JJ.

The Union of India and others, Appellants v. Sashi Bhushan Biswas, Respondent.

A. F. O. O. No. 546 of 1969, D/- 12-12-1969.

(A) Railway Establishment Code, Vol. I, Rule 1731 (ii) (a) — Appeal against order of punishment to General Manager — Complaint about procedure followed — Appellate order not dealing with question whether procedure under this Rule was followed or such non-compliance resulted in failure of justice — Appellate order is invalid. (Para 1)

(B) Railway Establishment Code, Vol. I, Rule 1731 — Order removing employee from service — Punishing authority not filling date

of giving effect to removal order — Date filled in by other officer — Propriety.

Where the punishing authority passed an order removing employee from service and the date of giving effect to the removal order was however not filled up by him but by somebody who had no authority to punish the employee, the removal order suffered from serious infirmity. It was however held that the defect was not such as to render the punishment order without jurisdiction as the punishing authority wanted to give immediate effect to his order but since he being superior officer could not hand over the order and so handed it down to the immediate superior of the employee who was to fill up the gaps recording the date after delivering the order. (Para 1)

(C) Railway Establishment Code, Vol. I Rule 1713 — Disciplinary authority — Duty of.

Rule 1713 is mandatory. It goes beyond the requirements of Article 311 (2) of the Constitution and requires the punishing authority to apply his mind to the materials on the record over again even where he may agree with the findings of the Inquiry Officer. Where the punishing authority does not examine the findings of the Inquiry Officer upon which the employee was found guilty and does not record his own findings separately on the charges, his order gets vitiated for non-compliance with R. 1713. (Para 1)

(D) Railway Establishment Code, Vol. I, Rule 1713 (2) — Right of delinquent employee to get assistance of defence helper is statutory — Examination of defence-helper as prosecution witness — No substitute given neither employee made aware that he can nominate another person — Punishment order is invalid for non-compliance with R. 1713(2). (Para 1)

S. K. Roy Choudhury and Anil Chandra Sen, for Appellants; Noni Coomar Chakravarti and Madhusudan Banerjee, for Respondent.

D. BASU, J.:— The Union of India has preferred this appeal against an order passed by A. K. Sinha, J., dated the 12th of March, 1969 by which the Rule obtained by the respondent Dr. S. B. Biswas was made absolute and the impugned order of removal which is to be found at page 51 of the Paper-Book was struck down as invalid. Various grounds were taken by the petitioner-respondents but the Court only founded its judgment on two points: firstly, that the order of punishment was defective inasmuch as the material portion of the date, namely, the date from which the order was taken effect was kept blank by the punishing authority and it was subsequently filled in by a clerk at the office of the D. M. O. who delivered

the punishment order to the respondent; secondly, that the appellate order which is at page 53, passed by the General Manager, did not comply with the requirements of Rule 1731 of the Railway Establishment Code, Vol. I which lays down the mode in which the appellate function was to be exercised. The respondent has also filed a cross-objection before us relying upon the grounds which were kept open by the learned judge as unnecessary because he thought that the other two findings were sufficient to dispose of the Rule. We have, therefore, to go through the points urged by the respondent in his petition.

1. So far as the appellate order is concerned, it is quite evident that the requirements of Rule 1731 which have been explained by this Court on numerous occasions previously, have not been complied with by the appellate authority. Even if his orders were read as beneficial to the administration as possible, it did not deal with the requirements of Clause (a) of sub-rule (ii) of Rule 1731, namely, whether the procedure prescribed in this rule has been complied with or if such non-compliance has resulted in any violation of the Constitution or a failure of justice. In his memorandum of appeal to the General Manager, the respondent complained about the procedure but the General Manager did not specifically give his decision on this complaint. The finding of the Court below on this point must therefore stand.

Coming now to the original order of punishment, though we are in agreement with the views taken by the trial court that the order of removal suffers from serious infirmity inasmuch as the date of giving effect to the removal order was not filled up by the punishing authority but by somebody else who had no authority to punish the respondents and though we also agree that such a practice should not be encouraged, we are of the opinion that in the instant case, the defect was not such as to go to the root of the jurisdiction to make the punishment order invalid. From a reading of the entire text of the order it was evident that the punishing authority wanted to give immediate effect to his order but since the order could not be handed over by the punishing authority who was a superior officer, he handed it down to the immediate superior to the petitioner, namely, the D. M. O. who was to fill up the gaps recording the date after delivering the punishment order. In our opinion, this practice should be stopped because, if this is allowed to continue, it is the Railway administration itself which may have to suffer in other cases, if any clerical or other officer fills up the gap and makes any mistake in doing this small job. In the facts of the instant case, as we have already stated, we are not satisfied that the defect goes to render the punishment order without jurisdiction. But even

if our finding on this point is, contrary to that of the trial Court, the punishment order cannot be sustained because of other grounds which have been urged before us.

2. Mr. Chakravarti on behalf of the respondents has drawn our attention to Rule 1713 of the Railway Establishment Code which runs as follows: "The Disciplinary Authority shall, if it is not the Inquiring Authority, consider the record of the Inquiry and record of its findings on each charge." The 'record of the inquiry' is explained in sub-rule 5 of Rule 1712. Mr. Chakravarti is right in contending that both in the punishment order at page 51 of the paper-book as well as in the show cause notice at page 41 of the paper-book, the punishing authority has not examined the contents of the record and the findings of the Inquiry Officer upon which the respondents were found guilty and did not record his own findings separately on the charges, which were three in number. Reading the relevant provisions of the Railway Establishment Code it is quite evident that these rules in the Railway Code palpably go beyond the requirements of Article 311 (2) of the Constitution and require the punishing authority to apply his mind to the materials on the record over again even where he may agree with the findings of the Inquiry Officer. But as Rule 1713 stands, it is a mandatory statutory provision and cannot be ignored by us. We must hold that the orders at annexures H and I of the Paper-book are vitiated for a non-compliance with Rule 1713.

3. It was next urged by Mr. Chakravarti that the respondent was denied the assistance of a defence helper by reason of the administration having chosen to put the defence helper nominated by the respondent to the rule of a witness on behalf of the prosecution. It was contended by Mr. Roy Choudhury that there was no prejudice inasmuch as the same defence helper continued to assist the respondent even subsequent to the date when he was examined as a witness namely, on 15-9-63. But on this point, apart from any prejudice, we have first to see whether there was any violation of sub-rule (2) of Rule 1713 which gives the provision as to a defence helper: "The accused Railway servant may present his case with the assistance of any other Railway servant employed on the same Railway (including a Railway servant on leave preparatory to retirement) on which he is working". It may be mentioned in this context that in the rule as it originally stood, the right of the delinquent to nominate the defence helper was subject to the approval of the authority, but by a subsequent amendment the condition of approval has been eliminated. It has also been held in several decisions of this Court that though the rule is in a permissive form, it gives a statutory

right to the delinquent to get the assistance of a co-employer of his own choice. It cannot be overlooked that in a disciplinary proceeding the delinquent is denied legal advice. To provide a proper defence to the delinquent he is given the help of another co-employee who may be better enlightened and more efficient than the delinquent himself to conduct his own case. The Courts are, accordingly, to see that this vestige of a fair hearing is not interfered with by the administration. There is no procedure prescribed in the Code itself to show that the defence helper, remaining in his status as such, can be examined as a prosecution witness by the Railway. If the Railway sought to do so they might have given a notice to the accused to that effect. What happened in this case is that the choice of the prosecution to examine him was formed during the hearing when some other witness made some reference to the defence helper's knowledge about the affair. The question is raised by Mr. Roy Choudhury that since this was done pending hearing, whether it was for the Respondent to offer to the Railway a choice to nominate another person as the defence helper or for the delinquent to ask of that, having regard to the provision of sub-rule (2) of the Rule 1712 as it has been interpreted in various decisions of this Court, it must be held that it was for the Railway administration to give notice to the delinquent that his defence helper was going to be taken away for examining him as a witness and that if he likes he can get the opportunity to appoint another. It has been rightly pointed out by Mr. Chakravarti that in the counter-affidavit (para 12) at page 59 of the paper-book it was stated that after the said defence helper was examined as a witness it was the petitioner himself, who being a literate man, conducted his own defence and cross-examined the witnesses produced by the department and made comments on the evidence. When we asked the Railway to produce the records of the enquiry, it appeared that on two or three days subsequent to the date of examination of the defence helper as a witness, the cross-examination on behalf of the delinquent was stated to have been made by the 'defence helper'. But this is inconsistent with the pleading in Para 12 of the counter-affidavit. Be that as it may, the procedure of examining the defence helper of the respondent without giving him a substitute or telling him that he had the opportunity to nominate some other defence against him as provided in Rule 1712 (2) and that is an independent man for invalidating the punishment order (sic).

2-6. The other points which have been raised by Mr. Chakravarti do not appear to us to be of sufficient strength to invalidate the punishment order. The first one is that the petitioner-Respondent had been conferred a rank of a gazetted officer and if that

be so, the procedure for enquiry should have been different and the punishing authority should have been different. But having seen the relevant circular which has been produced before us, we have no doubt that the status of a gazetted officer conferred upon the Respondent was only for certain privilege as is evident from the relevant Serial No. 5244, Circular No. E.308/O, dated the 26th April, 1963.

7. The other point raised by Mr. Chakravarti is that it was wrong on the part of the respondents to consider the service record of the petitioner without telling him that this would be considered. From the orders of the punishing authority as well as of the appellate authority, it does not clearly appear whether they were biased by a reference to the previous record of the petitioner. The enquiry officer did not refer to the service records nor did he recommend any punishment but he simply referred to the service records as documents which were relevant to the charges (page 76 of the Paper-book). The question of law which is involved in this case is whether the petitioner has been denied any opportunity to defend his case or did the respondents give any notice to him that they were going to look into his service records. If a copy of the enquiry report were served upon him at the stage of second show cause notice, certainly he had an opportunity to explain the entries in the service records in his explanation to that notice.

8. It does not, therefore, appear to us that there has been any violation of natural justice on this score.

9. In view of our findings on the several grounds at the beginning of this judgment, we are of the opinion, that, the order of the Court below should not be interfered with. The appeal is, accordingly, dismissed though partly on other grounds. We make no order as to costs.

10. The cross-objection is allowed pro tanto.

11. In view of our finding that the enquiry was vitiated because of a non-compliance with the requirement of a defence helper, the appellants may take fresh action according to law only after starting the proceeding from the stage of an examination of witness.

AJOY K. BASU, J.:— 12. I agree.

Appeal dismissed.

AIR 1970 CALCUTTA 548 (V 57 C 110)

A. K. MUKHERJEA AND
SABYASACHI MUKHARJI, JJ.

State of West Bengal, through Addl. Secy. Dept. of Excise and others, Appellants v. Ruttonjee and Company and another, Respondents.

A. F. O. O. No. 223 of 1967, D/- 16-8-1970 against order of D. Basu, J., in C Revn. No. 387 (W) of 1966, D/- 18-7-1966, reported in AIR 1967 Cal 450.

(A) Letters Patent (Calcutta), Clause 15 — Provision of Rule 22 of Order 41 of Civil P. C. is applicable — AIR 1920 Cal 776 held no longer good law in view of AIR 1921 PC 80 — (Civil P. C. (1908), Order 41, Rule 22). (Para 6)

(B) Bengal Excise Act (5 of 1909), Section 8 (1) (As amended in 1965), and Sections 13, 44A, 85, 86 — Rules under Sections 85, 86, Rules 58 (d), 87 — 'Control' contemplated by Section 8 (2) — Control may be exercised by issuing general instruction or direction — It cannot authorise State Government to issue specific instructions about disposal of particular application — (Civil P. C. (1908), Preamble — Interpretation of Statutes) — (Constitution of India, Article 14).

'Control' contemplated by Section 8(1) may be exercised by issuing general instruction or direction but that power cannot authorise the State Government to issue specific instructions about the disposal of a particular application. AIR 1966 SC 1081, Distinguished. (Para 12)

The amendment introduced in 1965 has not introduced any change in the licensing functions of the Collector or the Commissioner, save Section 8, no changes were also made in the rules regulating the licensing function of the Collector either in the rules framed under Sec. 85 or under Sec. 86 of the Act. A harmonious construction, if possible, of the different provisions of the Act and rules, should be striven for: AIR 1942 Bom. 1, Distinguished; AIR 1967 Cal. 450, Affirmed. (Para 13)

Giving the State Government the authority to issue orders in particular cases would amount to giving the State Government unrestrained and unguided power. A provision which leaves an unbridled power to an authority is liable to be struck down as ultra vires under our Constitution. AIR 1967 SC 829 & AIR 1967 SC 1427, Relied on; AIR 1970 SC 1896, Distinguished.

It is a well-known principle of construction that where two constructions are possible, one which would make the statute valid

should be preferred rather than the one which would make it invalid. AIR 1961 SC 1230, Rel. on. (Para 13)

If, over and above power given in sub-sections (2) and (3) of Section 8, the State Government is given an authority, to direct the Collector or the Commissioner and thereupon the same State Government is given the authority to revise such order and/or to dispose of appeals therefrom, it would lead to certain amount of anomaly. But in a matter like the licensing unless the clear language and the intentment of the Act compel such a construction, it should be avoided. (Para 15)

(C) Bengal Excise Act (5 of 1909), Section 44-A — Applicability — It cannot be said that section has no application at all to brewing licence. 1963 Cal LJ 30, Distinguished. (Para 17)

(D) Bengal Excise Act (5 of 1909), Sections 85 (2) (e), 86 (3) — Rules under Sections 85, 86, Rules 58, 87, 207, 208, 209 — Brewing licence is of more permanent nature than vending licence. (Para 17)

(E) Bengal Excise Act (5 of 1909), Sections 85, 86 — Rules under Section 85, Section 86, Rule 87 (3) — Renewal of brewing licence — Applicant is entitled to have application dealt with in accordance with law if conditions are similar to conditions when original grant was made, in material respects. (Obiter). (Para 17)

(F) Bengal Excise Act (5 of 1909), Section 86 — Rule 87 (as amended on 23-2-1967) — Amendments made to Rule 87 do not affect application for renewal for the year 1966-67. (Para 17)

(G) Constitution of India, Article 226 — Relief under — Government passing certain order without jurisdiction — Reliance cannot be placed on undertaking given by petitioner to abide by decision of Government — Petitioner is not thereby disentitled to relief under Article 226. (Para 18)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 1896 (V 57) =	
1969-1 SCC 308, Purbapore Co. Ltd. v. Cane Commr. of Bihar	14
(1967) AIR 1967 SC 1427 (V 54) =	
1967-2 SCR 703, Jaisinghani v. Union of India	13
(1967) AIR 1967 SC 829 (V 54) =	
1967-1 SCR 1012, Hari Chand Sarda v. Miro District Council	13
(1966) AIR 1966 SC 1081 (V 53) =	
1966-2 SCR 982, State of Punjab v. Hari Kishan	12
(1964) AIR 1964 SC 1230 (V 51) =	
1964-6 SCR 784, R. L. Arora v. State of U. P.	13

- (1963) 1963 Cal LJ 30, Ashok Chandra Banerjee v. B. N. Sen 7, 17
- (1942) AIR 1942 Bom 1 (V 29) = ILR (1942) Bom 259, Ratanshaw Nusserwanji Todiwala v. Geoffrey William McElhinny 13
- (1921) AIR 1921 PC 80 (V 8) = 48 Ind App 76, Sabitri Thakurain v. Savi 6
- (1920) AIR 1920 Cal 776 (V 7) = 24 Cal WN 1016, Brojendra Chandra Sarma v. Prosanna Kumar Dhar 6

P. K. Sen Gupta and B. S. Bagchi, for Appellants; A. K. Sen, T. P. Das and Bibhu Choudhury, for Respondent No. 1 (First set of appearance); Somnath Chatterjee and Sudhir Bose, for Respondent No. 1 (second set of appearance); R. C. Deb and Chandan Banerjee, for Respondent No. 2.

SABYASACHI MUKHARJI, J.— This is an appeal over right to brew intoxicants in a brewery at Kalyani. There is a registered firm hereinafter referred to as the firm carrying on business under the name and style of Ruttonjee and Company. Its partners are Hirjoo Ruttonjee Bhesania and Feroze Manchershaw Bhesania. There is also a limited Company bearing the name Ruttonjee & Company Ltd., hereinafter referred to as the limited Company. The company was incorporated in 1960 including two partners of the firm in its Board of Directors. It appears that the firm whose original business was sale of liquors, applied in 1957 to the appropriate authority for permission to start a brewery in West Bengal and obtained such permission from the State of West Bengal and also obtained the permission of the Government of India for the establishment of a new industrial undertaking for the manufacture of beer. In 1959 the brewery was established and the partners of the firm decided to promote a limited company. The brewery licence under the Rules framed under the Bengal Excise Act, 1909, hereinafter referred to as the Act, was granted for the period from the 2nd August, 1965 to the 31st March, 1966, jointly in favour of the company and the firm, subject to certain conditions mentioned in the letter of the Government of West Bengal dated 24th July, 1965. For the next year, commencing from the 1st April, 1966, an application for renewal of the licence was submitted to the Collector on the 25th of February, 1966, jointly by the firm and the company for the renewal of the licence granted for the previous period. The firm further alleged that on the 5th of April, 1966, the firm received a copy of the letter which is Annexure 'I' and appearing at page 1 of the Supplementary Paper Book, and which is dated 30th March, 1966, written by the Assistant Secretary, Excise Department, Government of West Bengal, to the Excise Commissioner by which

the Government expressed its approval for the grant of the brewery licence in respect of the said company alone, to the exclusion of the firm for the year 1966-67 commencing on the 1st of April, 1966. The firm thereafter made an application to this Court under Article 226 of the Constitution challenging the decision to issue Excise Licence for the brewery at Kalyani for the year 1966-67 in the sole name of the Company, on the ground, inter alia, that the application for renewal jointly made has not been dealt with by the Collector or the Commissioner of Excise who is alone entitled to deal with the application according to law and the State Government has no jurisdiction to pass the impugned order or direction. It was stated in the petition that no licence had then been granted pursuant to the impugned order, the petitioner therefore prayed for appropriate writs to quash the impugned order and command the respondents, the State Government, the Commissioner of Excise, West Bengal and the Collector of Excise to cancel or not to give effect to the impugned order and then to deal with the joint application for renewal according to law.

2. There was dispute among the Directors of the Company and there were certain proceedings under the Companies Act, 1956. The company was separately represented in respect of two contending groups before the learned trial Judge and they have been so represented before this Court. There is one group represented by the Bhesania Group of Directors and Mr. R. C. Deb, learned Advocate, appeared for them before us, another group representing Mr. A. K. Thakur and others was represented by Mr. Somnath Chatterjee. It appears that the proceeding under Companies Act has come to an end. We were however told that further proceedings have started challenging the internal management of the Company. Be that as it may, it is not necessary for adjudication of the disputes between the parties in this appeal to advert to the same any more.

3. After the application under Article 226 of the Constitution was moved before this Court, a rule nisi was issued. It was contended in the petition that after the joint application filed by the firm and the company for the renewal of the licence for the aforesaid period 1966-67, a separate application on behalf of the company was also made. Thereafter it appears the then Minister for Excise, Mr. I. D. Jalan considered the matter and recorded certain decisions and directions, which are appearing at pages 150-155 of the Paper Book. It was further contended that on the 12th May, 1965, there was a letter which is at page 101 of the Paper Book written by the firm, inviting the Minister and the Government to arrive at a decision regarding the renewal of the licence. By that letter the firm undertook, it has been

asserted, to abide by whatever decision that is arrived at by the Minister or the Government regarding the renewal, i.e., whether it is decided to renew the licence in favour of the Company alone or in favour of the Company and the firm jointly. It was further asserted on behalf of the Government as well as on behalf of one group of directors representing the company that the lease of the premises in which the brewery is carried on as well as the industrial licence stand in the name of the limited company. Therefore, it was asserted that the limited company is alone entitled to grant or renewal of the licence. It was further asserted that in view of the amendments made to the Bengal Excise Act by the Act of 1955 the State Government has jurisdiction and authority to issue directions of the type that it has done in this case. On the other hand, on behalf of the company represented by the Bhesania group of Directors, and the firm, it was contended that the application for grant of licence or renewal of licence solely in the name of the company said to have been made by Mr. A. K. Thakur on behalf of the Company was without authority. It was asserted that the letter of the 12th May, 1965, was given for a specific purpose and in view of the facts and circumstances of the case it cannot be relied on by the government. The circumstances and the purposes for which the undertaking was given have been sought to be explained in paragraph 13 of the affidavit of Hujoo Ruttonjee Bhesania affirmed on 14th May, 1966, appearing at p. 263 of the Paper Book. It was asserted that the State Government has no authority to direct the Collector as to how a particular application should be dealt with and it was submitted that from its very nature brewery licence is of permanent nature, than vending licence and when conditions are similar when the grantee of a previous licence apply for renewal, it is entitled to such renewal. It was further submitted that the State Government has no authority to direct the renewal in the manner it has done.

4. The matter came up for hearing before D. Basu, J. and by a judgment delivered and order passed on the 18th July 1966, D. Basu, J. has made the rule nisi absolute and directed an order in the nature of mandamus to issue restraining the respondents, State Government, Commissioner and the Collector of Excise from giving effect to the impugned order dated 30th March, 1966 and commanding respondents, the Commissioner as well as the Collector to determine, according to law, the application for renewal of the licence jointly made by the firm and the company on 26th February, 1966. The learned Judge came to the conclusion that the expression "control" under sub-section (1) of Section 8, introduced by the Bengal Excise (Amendment) Act, 1965 cannot authorise the State Government to interfere with the

licensing power vested by the statute and the rules made thereunder by the Collector and the Excise Commissioner. The State Government could only exercise the power of revision under sub-section (3) of Sec. 8. The learned Judge further came to the conclusion that the specific provisions of Sections 13 and 15 (2) read with Rule 87 framed in exercise of the power under Section 86, which deal with the matter of a grant or renewal of a brewery licence, expressly vest the discretionary power in the two authorities, Collector and Excise Commissioner without interference by such other persons or authority and as such the State Government has no power or authority to issue the impugned order. Discussing the nature of the brewery licence the learned trial Judge came to the conclusion that this is of a more permanent nature than vending licence. The learned Judge came to the conclusion that by reason of Section 44A of the Act there can be no legal right in favour of a holder of an existing licence to obtain a renewal, but where the government does not think fit to refuse it the renewal will be in favour of the holder or holders of the existing licence and on the same terms and conditions as in the existing licence as indicated by sub-rule (3) of Rule 87. Regarding the undertaking contained in the letter dated 12th of May, 1965, the learned trial Judge came to the conclusion that though mandamus is a discretionary remedy, but acquiescence is not applied to refuse mandamus in a case of want of jurisdiction, in the same way as it may be done to refuse Quo Warranto. As he held, the State Government has no jurisdiction to issue the impugned order, the learned trial Judge came to the conclusion that the letter of the 12th May, 1965 is no impediment to grant reliefs asked for in this case.

5. Being aggrieved by the said judgment and order of D. Basu, J., the State of West Bengal as well as the company, represented by Mr. A. K. Thakur, preferred appeals to this Court. This is the appeal of the State of West Bengal, challenging the said order of D. Basu, J. Several contentions in support of this appeal were urged by Mr. P. K. Sen Gupta, learned Advocate for the appellant. Mr. Somnath Chatterjee, learned Advocate for the Company represented by Mr. A. K. Thakur, contended that the appeal has become infructuous inasmuch as the period for which the application for renewal had been made has elapsed and during the pendency of the appeal pursuant to the orders made by this Court, Receiver has been granted licence for the said period. He therefore, submitted that the appeal has become infructuous. On behalf of the State Government it was however urged before us that in view of the fact that several points regarding the grant of licence under Bengal Excise Act,

1909 being involved in this appeal it would invite a decision for future guidance of the Department. Mr. Chatterjee made certain submissions supplementing the submissions made on behalf of the State of West Bengal by Mr. P. K. Sengupta.

6. Before we deal with the several contentions urged on behalf of the State of West Bengal as well as on behalf of the Company represented by Mr. A. K. Thakur as well as the contentions on behalf of the respondents, we have to deal with a point of procedure raised by Mr. Deb, learned advocate for the Company, representing Bhesania Group of Directors. It was contended by Mr. Deb, that Mr. Chatterjee cannot support the appellant in view of the fact that his client has preferred no cross objections and further in view of the fact that the appeal preferred by his client has been withdrawn. Mr. Deb, drew our attention to the provisions of sub-rule (1) of Rule 22 of Order 41 of the Code of Civil Procedure. The said sub-rule is in the following terms:—

“(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.” Mr. Deb contended that Mr. Chatterjee’s client is a respondent, he can support the decision of the Court below on any ground decided against him but he cannot challenge the decision on any grounds in view of the fact that his client has not filed any cross-objection and further in view of the fact his client has withdrawn the appeal filed by it. It appears that at one stage it was the view of this High Court that the provision of Rule 22 of Order 41 is not applicable to appeals under Clause 15 of the Letters Patent. Reference may be made to the decision of Mookherjee, C. J. and Fletcher, J., in the case of Brojendra Chandra Sarma v. Prosanna Kumar Dhar, 24 Cal WN 1016 = (AIR 1920 Cal 776). In view however of the subsequent decision of the Privy Council in the case of Sabitri Thakurain v. Savi, 48 Ind App 76 = (AIR 1921 PC 80) it must be held that Order 41, applies to the appeals under Letters Patent. Therefore on a matter of procedure Mr. Deb is right in his submission that without filing any cross-objection Mr. Chatterjee’s client cannot support the appellant. The question however is of little practical importance in this case because we have the advantage of Mr. Chatterjee’s arguments and in considering this appeal, it is of little consequence whe-

ther we treat his argument as separate argument or as additional points in support of the appellant, the State of West Bengal.

7. In support of this appeal it was urged that the application to this Court under Article 226 of the Constitution was premature. It was submitted that what is contained in Annexure I was merely a direction by the State Government and if the direction is given effect to the Collector will issue a licence and then any party aggrieved may move either in revision or in appeal as provided in sub-sections (2) and (3) of Section 8 of the Act. It was urged that then a party may have a right to move this Court. It was, therefore, submitted that the decision of the State Government as contained in the communication dated 30th of March, 1960 is not an order or direction against which the firm could move this Court under Article 226 of the Constitution. The petitioner cannot be aggrieved by such communication. It was then submitted that the amendment of Section 8, sub-section (1) gives the State Government the right to control the Collector apart from the right of appeal and right of revision. It was emphasised that the provision of Section 8, sub-section (1) has not been challenged in this proceeding as being ultra vires or beyond the competence of the legislature. It was therefore submitted that the State Government has the authority to issue the impugned communication dated 30th March, 1966. It was then submitted that the firm has no right to get a renewal in view of the provisions of the Act. Our attention was drawn to the several provisions of the Act and the rules framed thereunder for the argument that the firm has no right to get a renewal. Our attention was also drawn to the amendment of Rule 87 framed under Section 86 of the Bengal Excise Act, 1909 by the Notification published on the 23rd February, 1967. We shall deal with this argument and the amendment later on. Reliance was placed on the decision of this Court in the case of Asoke Chandra Banerjee v. B. N. Sen, 1963 Cal LJ 30.

8. On behalf of the firm Mr. A. K. Sen, learned Advocate, contended that the State Government has no such authority under the expression “control” in sub-section (1) of Section 8 of the Act to issue the impugned direction or to interfere with the discretion of the Collector, who according to him, is the sole statutory authority, who must exercise the discretion unhampered by the directions from any other authority. Mr. Sen further urged that the brewery licence was of a different nature than the vending licence and must be treated to be of a more permanent nature and unless there have been changes of the material conditions the parties are entitled to have a prior licence renewed. Mr. Sen drew our attention to the

several provisions of the Act and the Rules framed thereunder. It was also urged, that as the points involved in the appeal would arise in respect of the application for subsequent period, we should pronounce our views as to how the future applications for renewal should be dealt with by the appropriate authorities. Several decisions were also referred to us. Mr. R. C. Deb, learned advocate for the company representing Bhesania Group of Directors, supported Mr. Sen's contentions. He also referred us to certain provisions of the Acts and the Rules and to certain decisions.

9. The main point that requires consideration in this case is whether under Section 8, sub-section (1) as amended by the Act of 1965 the State Government has the authority to issue the impugned direction. Prior to the amendment of 1965, Section 8 was in the following terms—

"8 (1) The Collector shall, in all proceedings under this Act, be subject to the control of the Excise Commissioner, and shall, in such matters as the State Government may direct, be subject also to the control of the Commissioner of the Division.

(2) Orders passed under this Act or under any rule made hereunder shall be appealable in such cases, to such authorities and under such procedure as may be prescribed by rule made under Section 85, Clause (c).

(3) The State Government may revise any order passed by the Collector, the Excise Commissioner or the Commissioner of a Division or by any officer exercising the powers of an appellate authority under any rule made under Section 85, Clause (c)." After the amendment by the Bengal Excise (Amendment) Act, 1965, the said section was amended as hereunder:—

"8 (1). In doing anything or taking any action under this Act—

(a) the Collector shall be subject to the control of the Excise Commissioner and of the State Government and, in such matters as the State Government may direct, also of the Commissioner of the Division; and

(b) the Excise Commissioner shall be subject to the control of the State Government.

(2) Orders passed under this Act or under any rule made hereunder shall be appealable in such cases, to such authorities and under such procedure as may be prescribed by rules made under Section 85, sub-sec. (2), clause (c).

(3) The State Government may revise any order passed by the Collector, the Excise Commissioner or the Commissioner of a

Division or by any officer exercising the powers of an appellate authority under any rule made under Section 85, sub-section (2) clause (c)."

10. The question is, what is meant by this expression 'control'? Can the State Government by the process of control direct the Collector as to how a particular application should be dealt with? Before the said question is answered, it would be necessary to discuss the relevant provisions of the Bengal Excise Act of 1909. Section 13 of the Act provides, inter alia, that no intoxicant shall be manufactured and no distillery or brewery shall be worked except under authority and subject to the terms and conditions of the licence granted in that behalf by the Collector. The working of a brewery without a licence or any breach of the terms thereof has been made an offence under Section 46 of the Act. Sections 42 and 43 of the Act give the authority powers under certain circumstances specified to cancel, suspend and withdraw the licence. Inasmuch as certain arguments were advanced about the right of the petitioner to get a renewal, it is necessary to set out Sec. 41A of the Act, which is: "No person to whom licence has been granted under the Act shall have any claim to the renewal of such licence or save as provided in Section 43, any claim to compensation on the determination thereafter." Under the Act the State Government has the rule-making powers by Secs. 85 and 86. It appears that the vending licence, that is to say, a licence for the sale of an intoxicant is controlled by sub-secs. (1) and (2) of sec. 85 while the brewery licence is controlled by S. 86. Pursuant to this authority rules have been framed both under secs. 85 and 86. It would be relevant to consider in this context R. 58 framed under S. 85 of the Act. The marginal notes state under R. 58 (d) that it deals with the period for which licence may be granted for wholesale and retail vend of intoxicants. The said R. 58 provides that licences for the wholesale or retail vend of intoxicant may be granted for one year from 1st April to 31st March or for any shorter period subject to certain conditions mentioned therein. Rule 87 framed under S. 86 of the Act deals with licensing and regulation of breweries. It may be relevant to set out the rules as hereunder:—

"87 (1) Every brewer for sale and every brewer of beer for private consumption shall, before he begins to brew, deliver to the Commissioner through the District Officer a description, in writing, signed by himself, of all premises, rooms, places and vessels intended to be used in his business, specifying the purpose for which each is to be used, and the distinguishing mark of each. On the outside of the door of every room and any place in which the business is carried on, and on some conspicuous part of each

of the aforesaid vessels, there shall be legibly painted in oil colour the name of the vessel, utensils, room or place according to the purpose for which it is intended to be used. If more than one vessel is used for the same purpose, each shall be distinguished by a progressive number.

(2) Before the license to brew is granted, an Excise Officer authorized by the Commissioner shall inspect the premises, etc., compare the same with the particulars stated in the aforesaid written description and certify accordingly. The license shall be granted by the Collector with the sanction of the Commissioner if the description be found satisfactory and the applicant be considered a fit person to receive a license.

(3) The license for a brewery must be renewed annually. Such renewal will be granted by the Collector, subject to the approval of the Commissioner."

11. It has to be mentioned further that by notification published in the Gazette on the 22nd February, 1967 there were certain alterations of this Rule 87.

12. On a consideration of the whole scheme of the Act and the language of the section as amended by the Act of 1965, we have come to the conclusion that the learned trial Judge was right on the construction of the expression 'control'. We are of the opinion it does not authorise the State Government to make the impugned decision or direction. We will state the reasons for our conclusion. But before we do so, it would be relevant to refer to the decision of the Supreme Court in the case of State of Punjab v. Hari Kishan, AIR 1966 SC 1081 upon which reliance was placed by both sides. There the Supreme Court had occasion to consider similar provision under Section 5 (2) of the Punjab Cinemas (Regulation) Act (11 of 1952). Sub-section (1) of Section 5 provided that the licensing authority should not grant a licence under this Act unless he was satisfied about certain matters mentioned in Clauses (a) and (b) of that sub-section. It was thereafter provided by sub-section (2) of Section 5 that subject to the foregoing provisions of this section and to the control of the Government, the licensing authority might grant licences under this Act to such persons as it thought fit, on such terms and conditions as it might determine. Sub-section (3) authorised any person aggrieved by the decision of the licensing authority refusing to grant a licence under this Act, might within such time as may be prescribed, appeal to the Government or to such other person as the Government might specify in this behalf. Sub-section (4) of Section 5 authorised the Government to issue directions to licencees. What had happened was that the State

of Punjab had issued instruction to the licensing authority stating that all requests for the grant of permission for opening all new permanent cinemas should be referred to the State of Punjab. The questions that came up for consideration were whether, the State Government had power or jurisdiction to issue such instructions in respect of a license, and the ambit and authority of the State Government under the relevant provisions of the Act. The Supreme Court came to the conclusion that the State Government was not justified in assuming jurisdiction which had been conferred on the licensing authority by Section 5 (1) and (2) of the Punjab Cinemas (Regulation) Act. If, therefore, the State Government required that all applications for the licences to be forwarded to it for disposal, it really converted itself into the original authority itself because section 5 (3) clearly allowed an appeal to the State Government to be preferred by a person who is aggrieved by the rejection of his application for a license by the licensing authority, the Supreme Court observed. The Supreme Court further held that though the language used in Section 5 (1) was very wide, but however wide this control might be, it did not justify the State Government to completely oust the licensing authority and itself usurp his functions. Section 5 (3), the Supreme Court pointed out, provided for an appeal at the instance of the party which was aggrieved by the rejection of its publication for the grant of a licence. No appeal was provided for against an order granting the licence; but when it appeared to the Government that an application had been granted erroneously or unfairly, it could exercise its power of control specified by Section 5 (2) and set aside such an erroneous order and that would make the provision as to appeal or revision self-contained and satisfactory. The Supreme Court further observed that the expression 'control' as contemplated by Section 5 (2) might justify the issuance of general instruction. It was contended in support of this appeal that the facts of the instant case are different, inasmuch as, that by the passing of the impugned order there has not been any divestiture of the authority of the Collector or the licensing authority. It was suggested that it was not the fact that the authority was deprived of his power by the instruction of the State Government. On a careful consideration of the decision of the Supreme Court, however, we are of the opinion that it is not possible to accept this submission on behalf of the appellant. There the language used by the statute was "subject to the foregoing provisions of the section and to the control of the Government". Even then the Supreme Court held that the licensing authority is solely given the power to deal with the said applications in the first instance and this position cannot be changed by the Government by issuing an executive order or by making

rules. At p. 1085 of the report the Supreme Court observed "To hold that the control of the Government contemplated by Sec. 5 (2) would justify their taking away the entire jurisdiction and authority from the licensing authority, is to permit by means of its executive power to change the statutory provision in a substantial manner; and that position is not clearly sustainable." There sub-sec. (3) of Section 5 of the Act provided for an appeal but there was no provision for revision while in the instant case before us revisional power has been given in express terms by sub-section (3) of Section 8. Therefore in view of the whole scheme of the present section 8 (1) read with the entire scheme of the Act and the rules, we are of the opinion that the "control" may be exercised by issuing general instruction or direction but that power cannot authorise the State Government to issue specific instructions about the disposal of a particular application.

13. It was suggested that the learned Judge has considered the provisions of the Act as amended in 1965 with reference to the rules framed under Sections 85 and 86. It was argued that such a method of construction was unwarranted. We are not impressed by this criticism of the judgment. What the learned Judge has done is not to construe the Act with reference to the rules but the learned Judge has tried to make a harmonious construction of the provisions of the Act and rules. The Amendment introduced in 1965 has not introduced any relevant or material change in the licensing functions of the Collector or the Commissioner, save Section 8, no changes were also made in the rules regulating the licensing function of the Collector either in the rules framed under Section 85 and Section 86 of the Act. A harmonious construction, if possible, of the different provisions of the Act and Rules, should be striven for. It was then contended that the decision in the case of *Ratanshaw Nusservanji Todiwalla v. Geoffrey William McEllunney*, AIR 1942 Bom 1, is incorrect and secondly it was contended that the facts of that case were entirely different. That case was dealing with the provisions of Bombay Abkari Act. We are of the opinion that the provisions of that statute and the facts of that case were entirely different from the facts before us and the provisions of the present Act. We, therefore, do not think it necessary to discuss the question whether that case was correctly decided or not. We are further of the opinion, that giving the State Government the authority to issue the impugned order in view of the expression "control" under Section 8 (1) of the Act, would mean giving an uncontrolled authority to the State Government without any guiding principle. If the argument of the appellant is accepted on this point it would amount to giving the State Government unrestrained and unguided

power. A provision which leaves an unbridled power to an authority cannot be said to be reasonable. Reliance may be made for this proposition on the decision of the Supreme Court in the case of *Hari Chand Sardar v. Mizo District Council*, AIR 1967 SC 829 at p. 834. Such a provision is liable to be struck down as ultra vires our Constitution. In the case of *Jaisinchani v. Union of India*, AIR 1967 SC 1427 at p. 1434 it has been observed by the Supreme Court "In the context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based

..... If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law

In the scheme of the Act it was the Collector or the Commissioner, as the case may be, who was constituted as the licensing authority. Such licensing authority must act in accordance with the principles and policies laid down under the Act in the matter of granting, renewal of licence and the other functions that have to be discharged under the Act. If, over and above that the State Government, independently of its power of revision and appeal, is given an authority to control and direct the decision of the licensing authority, without indicating the occasions on which the State Government may decide to exercise its decision and control and without indicating the principles upon which such direction or control may be exercised by the State Government in particular cases, that would make the provision of Section 8 vulnerable to be struck down as ultra vires. That construction, if possible, should be avoided. It is a well-known principle of construction that where two constructions are possible, one which would make the statute valid should be preferred rather than the one which would make it invalid. Reliance may be placed for this on the decision of the Supreme Court in the case of *R. L. Arora v. State of Uttar Pradesh* AIR 1964 SC 1230. At page 1238 of the report the Supreme Court has observed as follows:—

"Thus there are two possible constructions of this clause, one a mere mechanical and literal construction based on rules of grammar and the other which emerges from the setting in which the clause appears and the circumstances in which it came to be enacted and also from the words used therein, namely, acquisition being for a company which has a public purpose behind it, and therefore the building or work which is to be constructed and for which land is required must also have the same public purpose behind it, that animates the company making the construction. We are, therefore, clearly of opinion that two constructions are possible of this clause of which the second construction which is other than literal is the better

one. It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction."

14. Reliance was placed on the decision in the case of *The Purtabpore Co. Ltd. v. Cane Commr. of Bihar*, 1969-1 SCC 308 = (AIR 1970 SC 1896). In that case the Supreme Court was concerned with an order passed under the "Sugar Cane" (Control) Order of 1966. It was held by the Supreme Court, in the facts and circumstances of that case, that the impugned orders in that case though purported to have been made by the Cane Commissioner were in fact made by the Chief Minister and they were invalid. The Supreme Court observed that the power exercisable by the Cane Commissioner under Clause 6 (1) of the Order was a statutory power which could be exercised only by him. It must however be observed that in that case the Supreme Court had no occasion to consider a provision of a statute similar to Section 8 (1) of the present Act as amended by the Act of 1965. Therefore, for the purpose of disposing of this case it will not be proper for us to rely on the aforesaid decision of the Supreme Court.

15. There is another aspect of this matter. By sub-section (3) of Section 8 the State Government has been given the authority to revise the orders passed by the Collector, by sub-s. (2) the State Govt. has been given the authority to hear appeal from the decision of the Collector or the Commissioner. If over and above this, the State government is given the authority, to direct the Collector, or the Commissioner and thereupon the same State government is given the authority to revise such order and/or to dispose of appeals therefrom, it would lead to certain amount of anomaly. The power of determining appeal and the revisional power must be exercised quasi-judicially. It is true that there are instances where an authority has been given the jurisdiction to decide administratively certain matters and the same authority has been given the authority to revise its order quasi-judicially. But in a matter like the licensing unless the clear language and the intentment of the Act compel such a construction, in our opinion, it should be avoided. We are further of the opinion, that the clear language and the intentment of the Act do not lead to the construction sought for by the appellant. We have, therefore, come to the conclusion that the expression "control" in sub-section (1) of Section 8 does not authorise the State government to issue the impugned communication or direction dated 30th March, 1966.

16. The next argument that requires consideration in this case is, whether the

petitioner has any right to ask for renewal and whether if there is any claim which has to be acceded in favour of the grantee of a brewing licence for renewal if the conditions are similar to those prevailing at the time of the original grant of the licence.

17. Before this aspect of the matter is discussed in detail it is important to reiterate that it is not the case of the petitioner that it has not been granted the renewal of the brewing licence. This is not an application for directing the respondents to renew the licence in favour of the petitioner. The petitioner's case was and is that the application for renewal has not been dealt with in accordance with law. The petitioner further contends that the State government has no authority to issue the impugned direction dated 30th of March, 1966. We have considered the question of the authority of the State government to issue the impugned direction. It was contended on behalf of the respondents that the Chapter VI of the Act, which deals with the licences, permits and passes, and which contains Sections 30 to 44A, deal with vending licence or licence for the retail sale. Therefore, it was urged, Section 44A which in express terms states that no person to whom a licence has been granted under this Act shall have any claim to the renewal of such licence, or, save as provided in S. 43, any claim to compensation on the determination thereof, really do not affect a brewing licence. Even though there is a good deal of force in this argument as it appears that most of the sections in Ch. VI from the very terms thereof must relate to vending licence and not to brewing licence, in view of the clear language used in Section 44A and in view of the heading of the Chapter, we are of the opinion that it cannot be said that Section 44A of the Act has no application at all to a brewing licence. In this connection we may refer to a decision upon which some reliance was placed by the appellant, namely the case of 1963 Cal LJ 30. However, in view of the fact that that was a case dealing with the licence to run a country spirit shop, we do not think that in considering the nature of a brewing licence this case is of any assistance to the appellant. Section 85 of the Act empowers the State Government as mentioned hereinbefore to make rules. Clause (e) of sub-section (2) of Section 85 in specific terms empowers the government to make rule for regulating the periods for which licences for the wholesale or retail vend of any intoxicant may be granted. Section 86 deals with brewing licence. Rule 58 framed under Section 85 provides that licences for the wholesale or retail vend of intoxicants may be granted for one year, upon the terms and conditions mentioned in that rule, while Rule 87 which deals with the application of brewing licence framed under Section 86,

does not specify any period for which licence may be granted. Sub-section (3) of the said rule provides that it must be renewed annually. It was argued that the provision to renew licence annually is for revenue purpose and it casts an obligation upon the authorities and not upon the grantee of the licence. It is further to be borne in mind that setting up of a brewery involves large sums of moneys and it is unlikely that any body would invest such a large amount of money if it was only for one year. In this context reference may be made to Rules 207 to 209 made under Section 86 of the Act. These rules, indicate that they relate to brewing licences, and they contain detail provisions for the "transfer of licence" by act of the parties, by death and by reason of change in the partnership subsequent to the grant of licence. Having therefore, considered all these aspects, we are of the opinion, that a brewing licence is of a more permanent nature than a vending licence. Even though we do not hold, for the purpose of this application, that there is any legally enforceable right in favour of the grantee of a brewing licence to have it renewed, if the conditions are similar to the conditions when the original grant was made, in material respects, if an application is made for renewal, the applicant is entitled to have that application dealt with in accordance with law. It was then urged that there have been certain amendments to Rule 87 by the Gazette Notification published on the 23rd February, 1967. We are of the opinion that the said amendments do not affect the application for renewal for the year 1966-67. Therefore it is not necessary for us to consider the effect thereof.

18. It is now necessary to consider the argument of Mr. Sengupta that the application was premature. Mr. Sengupta argued that no order has yet been passed by the Collector pursuant to the direction or decision of the Minister. We are, however, unable to accept this contention. The order of the government or the direction of the government dated 30th March 1966 was communicated to the petitioner. Further we find that on the 7th April 1966 a formal order was passed regarding the approval of the government to the grant of a fresh brewery licence in the name of a public limited company. The same appears at page 10 of the Supplementary Paper Book. It is inconceivable that under these circumstances the brewery licence would not be given in accordance with the direction, more so, when the respondents Nos. 1, 2 and 3 are all contending that the government has the authority to give the impugned direction. In that view of the matter, we are unable to accept this contention of Mr. Sengupta. Lastly, it was contended that in view of the undertaking referred to hereinbefore dated 12th of May 1965, the petitioner was not entitled

to any relief in this application under article 226 of the Constitution. In our opinion, the learned Judge was right in holding that where the government has acted without jurisdiction the undertaking would not disentitle the petitioner to have the order made without jurisdiction quashed. Government cannot and do not acquire jurisdiction by virtue of the undertaking given by the petitioner. Furthermore in the facts and circumstances of this case it is highly doubtful whether any reliance can be placed upon such undertaking by the petitioner, in view of the fact that the undertaking was given under certain specific circumstances as referred to hereinbefore.

19. For the above reasons we are of the opinion that the learned trial Judge was right in his judgment and the order. The learned trial Judge has quashed the impugned order, being Annexure I, dated 30th of March, 1966. The said order of the learned trial Judge is hereby confirmed. The learned trial Judge has further directed respondent Nos. 2 and 3 in the petition to determine according to law, the application for licence which is annexure 'F' to the petition. That was the application dated 25th February 1966 for the licence for the year 1966-67. After the order of the learned trial Judge the Court of Appeal had appointed Receiver and had directed the government to grant brewery licence for the aforesaid period to the Receiver appointed by this Court. As a matter of fact the Receiver appointed by this Court has been granted brewery licence and the Receiver had this licence renewed in the year 1969-70 ending 31st March, 1970. Therefore, in view of the fact that the period for which the application for renewal in respect of which application under article 226 of the Constitution was made has elapsed, and in view of the fact for the said period Receiver has been granted licence, we vacate that portion of the order of the learned trial Judge. We, however, make it clear in future if any application is jointly made for renewal of the brewing licence this must be dealt with in accordance with law and in accordance with the observations made in this judgment. Subject to the aforesaid variation the appeal is dismissed. The parties will pay and bear their own costs of this appeal. We however do not vary the order for costs as directed by the learned trial Judge.

20. There is an application for the discharge of the Receiver and for certain consequential directions. We shall pass separate orders in respect of the same.

ARUN K. MUKHERJEA, J.:— 21. I agree.

Order accordingly.

AIR 1970 CALCUTTA 557 (V 57 C 111)

R. N. DUTT AND SARMA SARKAR, JJ.

Shanti Ranjan Bhattacharya, Petitioner v. The State, Opposite Party.

Criminal Revn. Case No. 977 of 1969, D/- 81-7-1970.

(A) Penal Code (1860), S. 21 — Secretary of a Co-operative Society is not a public servant either under Clause (10) or under Clause (12) or Clause (11) of S. 21.

Secretary of a co-operative society is not a public servant under tenth clause of Section 21. AIR 1935 Bom 36 and 1935 Mad WN 1337 (1) & AIR 1958 Mys 82, Foll.

(Paras 2, 9)

Section 19, Bengal Co-operative Societies Act, 1940 (21 of 1940) makes a registered co-operative society a body corporate only for purposes enumerated in that section. Such society however cannot be classed as a corporation established by or under any Central, Provincial or State Act. A registered co-operative society is also not a corporation established under the Co-operative Societies Act. So a Secretary of such society cannot be a "public servant" within Sec. 21 Clause (12). (Per Dutt, J.) AIR 1969 Pat 173, Rel. on.

(Para 3A)

A secretary of a co-operative society discharges his functions with regard to that particular co-operative society and has no connection with the general or common purpose of any village, town or district and as such he is not a "public servant" within Section 21, Clause (11) (Per Sarma Sarkar, J.)

(Para 8)

(B) Companies Act (1956), Sections 2 (7), 6 — A co-operative society is specifically excluded from definition under Section 2 (7) — Companies Act under Section 6 not being applicable to co-operative societies, co-operative society cannot be classed as a corporation.

(Para 3A)

(C) West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949). S. 4 — Offences triable by Special Courts—Secretary of co-operative society not being a public servant cannot be tried under S. 409, Penal Code by special court.

(Para 9)

Cases Referred: Chronological Paras

(1969) AIR 1969 Pat 173 (V 56) =
1969 Cri LJ 780, State of Bihar v.
Amulya Ratan Pathak

8A

(1958) AIR 1958 Mys 82 (V 45) =
1958 Cri LJ 784, Karnam Siddappa
v. State of Mysore

3A, 9

IN/IN/E83/70/BDB/T.

(1935) AIR 1935 Bom 36 (V 22) =

36 Cri LJ 532, Shridhar Mahadeo

v. Emperor

(1935) 1935 Mad WN 1337 (1), Sombari-
Behara v. Emperor

8A

8A

Chittaranjan Das and Amal Kumar Ghoshal, for Petitioner; J. M. Banerjee, for State.

R. N. DUTT, J.: The petitioner is on his trial before a Special Court at Alipore for an alleged offence under Section 409 of the Indian Penal Code.

2. The instant case was allotted to the Special Court by a notification of the State Government and the Special Court took cognizance on a petition of complaint filed before it by the Public Prosecutor. The petitioner raised an objection before the Special Court that the Special Court had no jurisdiction to try the instant case. But the Judge presiding over the Special Court has found that he has jurisdiction. The petitioner has thereafter obtained this Rule for quashing the proceeding pending before the Special Court against him.

3. The allegations are in short as follows:—

3-A. The petitioner was the Secretary of Mahasakti Samabaya Samiti, a registered Co-operative Society. While working as such Secretary the petitioner is said to have committed criminal breach of trust in respect of Rs. 14,432.92p. The Special Court will have jurisdiction to try this case if the petitioner can be said to be a public servant within the meaning of Section 21 of the Indian Penal Code. The learned Judge has found that the petitioner is a Public Servant within the meaning of the twelfth clause of Section 21 of the Indian Penal Code. The question if the Secretary of a Co-operative society would be a Public Servant under the tenth clause of Section 21 often arose and the Bombay, Madras and Mysore High Courts have held that the Secretary of a Co-operative Society was not a Public Servant under the tenth clause of S. 21. AIR 1935 Bom 36, 1935 Mad WN 1337(1) and AIR 1958 Mys 82. With respects we agree with the decision of the aforesaid High Courts and we think that the secretary of a Co-operative Society is not a Public Servant under the tenth clause of Section 21. We have then to see if the Secretary of a Co-operative Society is a Public Servant under the twelfth clause of S. 21 of the Indian Penal Code. The period during which the alleged criminal breach of trust is said to have taken place is between July 14, 1965 and June 24, 1966. The twelfth clause of Section 21 was first amended in 1958 and again amended in 1964. The amendment of 1964 became effective before July, 1965 and so we have to consider if

a Secretary Co-operative Society is a Public Servant under the twelfth clause of S. 21 as it now stands. The relevant portion of the twelfth clause is that every person in the service or pay of a local authority, "a corporation established by or under a Central, Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act, 1956 is a Public Servant Mr. Banerjee who appears for the State has submitted that a registered co-operative Society is 'a corporation established by or under a State Act' and as such the Secretary of a registered Co-operative Society is a Public Servant. Mr. Banerjee has argued that a Co-operative Society formed under the Bengal Co-operative Societies Act, 1940 becomes a body corporate as soon as it is registered and as such the Mahasakti Samabaya Stores Ltd., being a registered Co-operative Society is a body corporate. Mr. Banerjee has further argued that being a body corporate it is 'a corporation' and becomes 'a corporation established under the Co-operative Societies Act'. This argument cannot be accepted. True under Section 19 of the Co-operative Societies Act the registration of a Co-operative Society renders it a body corporate but that is for the purposes enumerated in Section 19. The heading of the Chapter under which Section 19 comes is "Status and Management of Co-operative Societies". Under Section 19, a Co-operative Society when registered becomes a body corporate with perpetual succession and a common seal and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted. Thus, as a body corporate the Society has its rights and liabilities and becomes a juristic person. But the language in Section 21, twelfth clause, is 'in the service or pay of a corporation established by or under the Central, Provincial or State Act'. A registered Co-operative Society is not a 'corporation' established by or under the Co-operative Societies Act. The clause, "corporation established by or under" has reference to some Public Corporations established either by or under some statutes. Take for instance the Life Insurance Corporation which was established by the Life Insurance Corporation Act. Similarly, take the instance of the State Transport Corporation, Calcutta, which was established by the State Government under a Central Act, Bond Transport Corporations Act, 1950. Under Section 19 of the Co-operative Societies Act a registered Co-operative Society is a body corporate for the purposes enumerated in Section 19 but it does not become a corporation established by or under the Co-operative Societies Act. Mr. Banerjee refers to the definition of a body corporate or corporation contained in Clause (7) of Section 2 of the Companies Act. It will however appear that the definition of "body corporate" or "corporation" excludes a Co-operative Society.

Furthermore, Section 6 of the Co-operative Societies Act states that the Companies Act shall not apply to Co-operative Societies. There is, therefore, no doubt that a Co-operative Society though registered under the Co-operative Societies Act does not become because of Section 19 of the Act, a Corporation established by or under the Co-operative Societies Act and in that view of the matter the Secretary of a Co-operative Society is not a Public Servant under the Twelfth clause of Section 21 of the Indian Penal Code. We may in this connection refer to the observation of the Patna High Court in *State of Bihar v. Amulya Ratan Pathak*, AIR 1969 Pat 173 at p. 180.

"The trial Court has found that the respondent while acting as the Secretary of the Society was a public servant, as mentioned in the charge. It is doubtful, however, whether an office bearer of a Co-operative Society is a public servant, while discharging his duties as such."

It was not necessary for the Patna High Court to decide this question in that case but from what we have said we have no doubt that the Secretary of a Co-operative Society is not a Public Servant within the meaning of Section 21 of the Indian Penal Code. Since the petitioner is not a Public servant the Special Court has no jurisdiction to try the instant case against him.

4. In the result, the Rule is made absolute. The proceeding now pending against the petitioner before the Second Special Court, Alipore, is quashed but the State will be free to proceed against him in accordance with law and in an appropriate Court.

SARMA SARKAR, J.—5. I agree with my Lord to the proposed order but I would like to add a few words.

6. The sole point pressed for consideration in this Rule is whether the petitioner, the Secretary of Mahasakti Samabaya Samiti, a registered Co-operative Society can be tried under Section 409 of the Indian Penal Code in the Court of a Special Judge under West Bengal Criminal Law Amendment (Special Courts) Act, XXI of 1919, (hereinafter called the Act) on the allegation that he misappropriated the funds of the Society amounting to Rs. 14,432.92 P. only during the period 1965-66. It was held by the trial Judge that the petitioner is a Public Servant and Mr. Banerjee appearing for the State supports it. Mr. Das however, appearing for the petitioner contends that the petitioner is not a Public Servant under Section 21 of the Indian Penal Code.

7. Mr. Banerjee has contended that in view of the amendment of Section 21, twelfth clause, in 1964 the petitioner is a Public Ser-

vant after that date. The twelfth clause of Section 21 as amended in 1964 reads thus:

“Every person—

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;

(b) In the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act, 1956 (1 of 1956).”

The learned Judge by reference to Section 19 of the Co-operative Societies Act has held that every Co-operative Society, after its registration under the Co-operative Societies Act as a corporate body for certain purposes and because it acts as a corporate body it is a corporation established under the State Act and as such the sub-clause (b) of twelfth clause after amendment is attracted. This argument is based on the assumption that whenever there is a corporate body there is a corporation. This assumption is not correct. A corporation is an entity by itself and can be established only by a statute passed by the Central or the State Government in India. The word ‘corporation’ has been defined thus in Stroud’s Judicial Dictionary, Third Edition, at page 643:

“‘Corporation’ is that which the civilians call *universitatem*, or *collegium* and is a body politic authorised to take and grant, having a common seal &c. These are constituted either by Prescription, by Letters Patent, or by Act of Parliament.”

It is thus clear that a corporation so far as India is concerned has to be set up or established by an Act passed by the Central or the State Government in order that any person serving in such a corporation may be a Public Servant. It is clear that a Co-operative Society was established under the Co-operative Societies Act and not as a corporation. There are corporate bodies in a corporation strictly so called and there may be corporate bodies in other associations which are not corporations. From that it does not follow that wherever there is a corporate body there is a corporation. So far as the Co-operative Society is concerned the purpose for which the Society is constituted is to discharge certain functions under the Co-operative Societies Act. It does not by itself establish any corporation strictly so called though after the Society is set up and it is registered under the Co-operative Societies Act the fact of such registration may grant certain rights of corporate bodies to the Co-operative Society itself. But from that it does not necessarily follow that a corporation and a Co-operative Society registered under the Co-operative Societies Act are synonymous terms. In this view of the matter it appears

to me that a Co-operative Society does not become a corporation because for some specific purposes it functions as a corporate body. It will appear from Section 19 of the Co-operative Societies Act that this power of a corporate body is given to the Co-operative Society for certain specific and limited purposes as provided under the Act. In this connection, we may refer to several Acts by which Corporations were established by the Central or the State Government. The Life Insurance Corporation, for example, is a Corporation established by a Central Act directly by a particular statute but there may be corporations which are not directly established by any specific statute but they may be established under a general law passed by the Central or the State Government and these corporations are covered by sub-clause (b) of clause twelfth under Section 21 of the Indian Penal Code. Under Section 3 of the Road Transport Corporations Act 1950 passed by the Central Government, State Government may by Notification in the Official Gazette establish a Road Transport Corporation for the whole or any part of the State. Only such corporations are meant and referred to in Section 21 Clause 12 sub-clause (b).

8. Secondly, we may also refer to the various clauses of Section 21 to show the distinction that is sought to be made between a private servant and a public servant. All the clauses except the tenth and the eleventh give indication that the public servant is connected directly or indirectly with some functions of the Government. In the tenth clause there is no direct mention of the Government but even in that clause the particular officer must perform certain functions ‘for any secular common purpose of any village, town or district.’ But in the instant case the Secretary is to discharge his functions with regard to that particular Co-operative Society only and has no connection with the general or common purpose of any village, town or district. On analysing Section 21 also it will appear that both from the language of the twelfth clause and from the scheme of Section 21 of the Indian Penal Code that the Legislature did not intend to cover those cases where a person holds office for any particular private company or society for the benefit of that company or society only. It is significant that in Section 21 clause 12(b), the Government Company under Section 617 has been included thereby excluding by necessary implications other private companies though they function as body corporate. In this view of the matter twelfth clause cannot be attracted to the instant case.

9. Thirdly, we may also consider whether the petitioner accused come under the tenth clause as it is clear that the other clauses of Section 21 are not attracted to the instant case. Even with regard to the tenth clause there is some difficulty, namely, the

petitioner is working only in the interest and for the benefit of a particular society and not for the common secular interest of any particular village or town or district. This view was also taken in several cases of which mention may be made to the case of AIR 1958 Mys 82, where it was held that the President of a Co-operative Society is

not a public servant under the tenth clause of Section 21 of the Indian Penal Code. In my view, therefore, the petitioner cannot be held to be a Public Servant and as such he cannot be tried before a Special Court.

Petition allowed.

E N D

(B) Punjab Police Rules (1934), Rule 16.2 (2) — Dismissal from service on account of conviction — Competent authority has to act in quasi-judicial capacity — Even if executive or administrative orders are to be passed, reasonable opportunity of being heard must be given. C. W. P. No. 1166/69, D/- 3-2-1970 (Delhi) and AIR 1970 SC 150, Referred. (Para 18)

(C) Constitution of India, Article 311 — Dismissal order by junior officer in same rank as the Appointing Authority is not bad — Juniority and seniority in same rank cause no disparity. (Para 13)

(D) Constitution of India, Article 311 — Suspension from service during prosecution of civil servant on criminal charge — Conviction but benefit of Section 4, Probation of Offenders Act, 1958, given — Reinstatement with effect from date of conviction — Reinstatement would result in restoration of status quo ante suspension — It would render conviction unactionable — No order of dismissal could be based on conviction. (Para 19)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 122 (V 57) = 1969 Ser LR 356, Union of India v. Jagjit Singh 13

(1970) AIR 1970 SC 150 (V 57) = 1969 Ser LR 445, A. K. Kraipak v. Union of India 18

(1970) C. W. P. No. 1166 of 1969, D/- 3-2-1970 (Delhi), M/s. K. G. Khosla and Co. v. Union of India 17

(1969) LPA No. 86-D of 1965, D/- 3-5-1969 (FB) (Delhi), Union of India v. Suraj Bhan 13

M. L. Bhargava and R. L. Tandon, for Petitioner; O. P. Malhotra, A. B. Saharya and V. S. Bhatnagar, for Respondents.

P. S. SAFEER, J.:— This petition challenges the order dated 15-11-1968 by which the petitioner was dismissed from service.

2. The petitioner was appointed as a Constable by the Commandant, Delhi Armed Police, on 6-4-1953. He was promoted as Head Constable on 27-2-1957 by the Senior Superintendent of Police and was confirmed as such on 7-3-1963 by the Assistant Inspector-General of Police.

3. The petitioner's case is that in August 1966, he had gone on leave to his village where the occurrence which resulted in his trial under Sections 336/337 of the Indian Penal Code took place. He was convicted only under Section 337 of the Indian Penal Code on 28-2-1967 but was given the benefit of the provisions of Section 4 of the Probation of Offenders Act, 1958 (hereinafter referred as "the Act"). While releasing him on probation, the petitioner was ordered to pay the amount of Rs. 500/- to the injured persons by way of compensation. The payment of the amount was to be made within a month from the date of the said order.

4. The petitioner's appeal to the Sessions Judge, Gurdaspur, was dismissed on 7-9-1967

and the revision filed by him under Section 439 of the Code of Criminal Procedure was dismissed by the High Court of Punjab and Haryana on 2-2-1968.

5. The petitioner, upon his prosecution, was suspended from service on 30-9-1966. He was, however, reinstated by an order dated 6-9-1967, which is in these terms:—

"Head Constable Iqbal Singh No. 287/L, who was suspended vide this office order No. PRO. 14113-119/AC-IV dated 30-9-1966 is hereby reinstated from suspension with effect from 28-2-1967, the date of order of the Court of Judicial Magistrate, Class I, Gurdaspur."

6. While still under suspension, he was permitted in July-August, 1967, to appear in the test for admission to the training in Intermediate School Course at Police Training College, Phillaur, but his name did not appear in the list of successful candidates. The petitioner, thereupon, submitted an application to the Deputy Inspector-General of Police (A) stating certain facts and circumstances on the basis of which he urged that his eligibility for joining the above-mentioned training course be reconsidered. That application was rejected vide Memo No. 61/CB dated 3-1-1968. Against that order he made a representation dated 23-1-1968 to the Inspector-General of Police, Kashmere Gate, Delhi (Respondent No. 1) and in response to the same he received a call for appearing before the Deputy Inspector-General (A) for an interview on 30-4-1968. As a result an order dated 11-6-1968 was passed selecting him for the said course. He joined the course at Phillaur and it was there that he received the impugned order dated 15-11-1968 dismissing him from service. That order is as follows:—

"On having been convicted in Case F. I. R. No. 186 dated 26-8-1966 under Sec. 336/337 Indian Penal Code, P. S. Shri Hargovind Pur, District Gurdaspur, Head Constable Iqbal Singh No. 287/L (now under training at P. T. C. Phillaur) is hereby dismissed from the Force with effect from 15-11-1968." It may be emphasized that the order of dismissal was passed after the order of reinstatement and the ground of dismissal stated was the conviction of the petitioner under Sections 336/337, Indian Penal Code while, in fact the petitioner had not been convicted under Section 336, Indian Penal Code. The order of dismissal does not show that the consequences of the release of the petitioner on probation under Section 4 of the Act were considered by the dismissing authority, i.e., the Superintendent of Police, Old Police Lines, Delhi.

7. The respondents have placed reliance on sub-rule (2) of Rule 16.2 of the Punjab Police Rules, 1934. The submission is that the dismissal under that rule is valid and unassailable. The petitioner had filed an appeal under Rule 16.29 of the aforementioned

ed Rules against the order of dismissal. The appellate order rejecting the said appeal relies upon the amended sub-rule (2) of Rule 16.2 of the said Rules. The unamended sub-rule (2) is as under:—

"(2) An enrolled officer sentenced judicially to rigorous imprisonment exceeding one month or to any other punishment not less severe, shall, if such sentence is not quashed on appeal or revision be dismissed. An enrolled police officer sentenced by a criminal Court to a punishment of fine or simple imprisonment or both, or to rigorous imprisonment not exceeding one month, or which having been proclaimed under Section 87 of the Code of Criminal Procedure fails to appear within the statutory period of thirty days may be dismissed or otherwise dealt with at the discretion of the officer empowered to appoint him. Final departmental orders in such cases shall be postponed until the appeal or revision proceedings have been decided, or until the period allowed for filing an appeal has lapsed without appellate or revisionary proceedings have been instituted. Departmental punishments under this rule shall be awarded in accordance with the powers conferred by Rule 16.1." The amended sub-rule (2) is as under:—

"(b) When a report is received from an official source, e.g., a Court or the prosecuting agency, that an enrolled police officer has been convicted of an offence in a Criminal Court, the authority competent under Rule 16.1 to award the punishment of dismissal (hereinafter referred to in this rule as "disciplinary authority") shall consider the nature and gravity of the offence and if it is of the view that the offence is such as to render further retention of the convicted police officer in service prima facie undesirable it shall make an order in form 16.2 (2) dismissing him from service after the period for filing the appeal has elapsed or, if an appeal has been filed as soon as the first appeal is decided against him and before the second appeal is filed.

Provided that where the dismissal of the convicted police officer is not considered necessary, the disciplinary authority shall call for and examine a copy of the judgment and take such departmental action as it may deem proper.

8. The learned Counsel for the petitioner has urged three points.

9. In the first instance he submits that having been given the benefit of the provisions of Section 4 of the Act, the disqualification attaching to his conviction could not be made the basis of his dismissal. It is an admitted case between the parties that the petitioner's conviction was dealt with by the Court convicting him in terms of the provisions of Section 4 of the Act. That having been done, it is pleaded that the benefit of Section 12 of the Act immediately became available to him. The controversy cen-

tres around the interpretation of the provisions of Section 12 of the Act which provides a statutory protection to the convict against his suffering any disqualification attached to his conviction. It is submitted that on account of his conviction the petitioner could not suffer the disqualification of incurring dismissal under the Punjab Police Rules. Opposing that submission the learned counsel for the respondents contends that the impugned dismissal order has no connection with any disqualification attached to the conviction of the petitioner.

10. Section 12 of the Act is as under:

"12. Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:

Provided that nothing in this section shall apply to a person who after his release under Section 4, is subsequently sentenced for the original offence.

*Note:— Person against whom action is taken either under Section 3 or Section 4, is not disqualified by reason of such action, from standing for election to any of the Houses of Parliament or to any State Legislature."

11. The second submission made by the learned counsel for the petitioner is that having once been reinstated in service after the conviction the impugned order of dismissal could not have been based upon it. It is also urged that no action by way of dismissal could have been taken against the petitioner without affording to him an adequate opportunity of showing cause and that he has been condemned unheard. The principles of natural justice are invoked without reference to Article 311 of the Constitution.

12. The third submission is that the order of dismissal is by an authority lower in rank to the appointing authority.

13. The last submission has no merit because it was a Senior Superintendent of Police who had promoted the petitioner to the rank of Head Constable by the order dated 27-2-1957 and the order of dismissal is by an officer holding the rank of Superintendent of Police. We cannot accept the contention that the dismissing authority was below the rank of the appointing authority. In both cases the authority was a Superintendent of Police. Seniority in service did not cause any disparity in rank. We find support from the observations contained in a Full Bench judgment of this Court in *Union of India v. Surajbhan*, dated the 23rd of May 1969 by which LPA No. 86-D

* The note quoted here is not a part of the section—Ed.

of 1965 (FB) (Delhi) was disposed of. It was noticed in that judgment that in terms of Rule 16.1(2) of the Punjab Police Rules, 1934, a Superintendent of Police was expressly empowered to dismiss even an Assistant Sub-Inspector. The Full Bench had relied upon a decision of the Supreme Court in *Union of India v. Jagjit Singh*, 1969 Ser LR 356 = (AIR 1970 SC 122). In our view, the Superintendent of Police was competent to pass the impugned order of dismissal because he was not subordinate to the authority, namely, the Senior Superintendent of Police, by whom the petitioner had been appointed.

14. Returning to the first contention, it is clear from the order of dismissal that it is based upon the conviction of the petitioner. Placing reliance upon the provisions of the unamended sub-rule (2) of Rule 16.2 the authorities concerned considered that the petitioner had become disqualified for being retained in service because of his having suffered the conviction mentioned in the impugned order. In that view of the matter it is not possible to hold that in terms of the unamended Rule 16.2 the order of dismissal will not be against the provisions of Section 12 of the Act.

15. The learned Central Government counsel did not confine himself to the unamended rule. He argued in the alternative that the dismissal was sustainable in terms of the amended sub-rule and it was not the conviction of the petitioner which gave rise to the disqualification resulting in his dismissal. The argument was that on being informed of the conviction the authority competent to award the punishment was not to dismiss the employee concerned straight off and was under an obligation to consider the nature and gravity of the offence and was to take action only if it formed the view that the offence was such as to render further retention of the convicted police officer in service prima facie undesirable. It was submitted that it was open to the competent authority to form the view that the convicted police officer was a person who could be retained in service. Our attention was also drawn to the proviso which is to the effect that in case dismissal is not considered necessary the disciplinary authority could call for and examine a copy of the judgment (affecting the concerned police officer) and take such departmental action as it may deem proper. We are of the view that reliance on the amended sub-rule is without merit. The order of dismissal does not show that it was not based merely on the conviction and that the competent authority had ever by itself considered the nature and gravity of the offence and had recorded its own conclusion that the retention of the petitioner in service was prima facie

undesirable. In view of the clear language of the impugned order of dismissal the respondents cannot place any reliance on the amended sub-rule (2) of Rule 16.2.

16. Section 12 of the Act uses the word "disqualification" and the meaning given to this word in Webster's Third New International Dictionary is:—

- (i) the act of disqualifying or the state of being disqualified" (protesting his disqualification from office under the new law);
- (ii) "something that disqualifies or incapacitates"

(A crime conviction is automatically a disqualification for that public office)."

The word "disqualify" is also stated to mean — making someone unfit for something. The further meaning given is that the person may be deprived within the meaning of the word "disqualify" of any right or privilege. We are of the view that the words "disqualification, if any, attaching to a conviction of an offence" as used in Section 12 of the Act would include a person's losing his right or qualification to remain or to be retained in service. Section 12 of the Act, clearly saves the convict from suffering such disqualification attaching to his conviction. In respect of his conviction, the petitioner had the protection of Section 12 and he was saved from suffering any disqualification such as the one which resulted in his dismissal.

17. Without a conviction neither the amended nor the unamended sub-rule (2) would be attracted. It is the conviction to which attaches the disqualification of attracting the provisions of sub-rule (2). In our view the dismissal of the petitioner is unsustainable even in terms of the amended sub-rule (2) of rule 16.2 of the Punjab Police Rules because of the express immunity which is provided by the provisions of Section 12 of the Act.

18. It may be stated that the amended sub-rule (2) of rule 16.2 provides that the competent authority to award the punishment of dismissal shall consider the nature and gravity of the offence and if it is of the view that the offence is such as to render further retention of the convicted police officer in service prima facie undesirable it shall make an order in form 16.2(2) dismissing him from service after the period for filing an appeal has elapsed or as soon as the first appeal filed has been decided against the said officer. The competent authority would be acting in terms of the said rule in a quasi-judicial capacity. Even if an executive order were to be passed it would still be incumbent upon the competent authority to act in accordance with the principles of natural justice. No determi-

nation could be made that the nature and gravity of the offence was such as to render the further retention of the convicted police officer *prima facie* undesirable without affording him a reasonable opportunity of being heard.

In *M/s K. G. Khosla and Co. v. Union of India*, CWP No. 1166 of 1969, D/- 3-2-1970 (Delhi) we have held that the phrase "equal protection of laws" occurring in Article 14 of the Constitution is not restricted into legislated law and that it imbibes within itself the protection which is available because of certain principles of natural justice which are necessarily to be complied with before the rights of any person are sought to be adversely affected. The learned counsel for the petitioner has relied upon the observations of the Supreme Court made in *A. K. Kraipak v Union of India*, 1969 Ser LR 445 = (AIR 1970 SC 150). The observations made in that case support our view. The orders which may be passed, while exercising quasi-judicial authority and even executive or administrative orders which adversely affect persons can be passed only after complying with the principles of natural justice. In our view the petitioner has not been given any such opportunity. The order of dismissal deserves to be quashed on this ground as well.

19. The only contention which remains to be dealt with is that the petitioner having been reinstated after the conviction the same could not become available to the respondents for dismissing him subsequently. The order reinstating the petitioner contains no reservation of any kind. It is dated 6-9-1967 and reinstates the petitioner with effect from 28-2-1967 and expressly mentions that date as the date of the order of the Magistrate, I Class, Gurdaspur, by which the petitioner had been convicted. The order of reinstatement was passed in full awareness of the conviction.

20. In Stroud's Judicial Dictionary, under the heading "reinstate", it is stated: "The natural and primary meaning of 'to reinstate', as applied to a man who has been dismissed, is to replace him in the position from which he was dismissed and so restore the status quo ante dismissal."

The learned counsel for the respondents urged that during the period of suspension the relationship of master and servant continued and that the reinstatement merely removed the suspension. The argument really goes against the respondents because, in such a case, reinstatement would result in restoration of status quo ante suspension, i.e., that the petitioner would be placed back in his post in the same way in which he held it before suspension. The result of the order of reinstatement would be to render the conviction unactionable and

the impugned order of dismissal could not be based on the very same conviction.

21. In the result this writ petition is allowed with costs and the impugned order dated 15-11-1968 dismissing the petitioner from service is hereby quashed. Counsel's fee is fixed at Rs. 250/-.

Writ petition allowed

AIR 1970 DELHI 244 (V 57 C 53)

FULL BENCH

HARDAYAL HARDY, S N. ANDLEY
AND JAGJIT SINGH. JJ.

Municipal Corporation of Delhi, Petitioner v. Laxmi Narain Tandon and another, Defendants.

Criminal Appeal Nos. 11, 63 and 64 of 1968, D/- 7-1-1970 from order of 1st Class Magistrate, Delhi, D/- 30-9-1967

(A) Prevention of Food Adulteration Act (1954), S. 2(xiii) — Sale — Supply of food by hotelier to resident guest on consolidated charge — There is no sale.

Supply of food by a hotelier to a resident guest from whom only a consolidated charge is made for the room and the other amenities and who is not entitled to rebate for any meal which may not be taken by him is not covered by any portion of the definition of "sale". The property in the food supplied as part of service does not pass to the guest except in that which is actually consumed by him. As the consolidated charge is for the service as a whole no portion of it can be regarded notionally as price of food even though the hotelier must have also taken into account the cost of food to be supplied by him in fixing the consolidated charge to be made from guests staying in the hotel. There is no sale of food in such a case. Case law discussed. (Paras 20, 21)

(B) Prevention of Food Adulteration Act (1954), Ss. 7, 16 — Store — Meaning of — Means storing for sale — Criminal Appeal No. 100D of 1964, D/- 13-6-1969 (Delhi), Overruled. AIR 1967 Cal 110 & AIR 1966 Cal 51 & AIR 1963 Assam 28, Dissented from.

The juxtaposition in which the expression "or store" occurs in Sections 7 and 16 and the scheme of the Act do not leave any doubt that the intention of the storing being "for sale" was implicit in the word "store" as used in those sections. Thus the word means storing for sale. Case law discussed. Criminal Appeal No. 100D of 1964, D/- 13-6-1969 (Delhi), Overruled; AIR 1967 Cal 110 & AIR 1966 Cal 51 & AIR 1963 Assam 28, Dissented from. (Paras 30, 32)

(C) Prevention of Food Adulteration Act (1954), Section 13 — Report signed by Public Analyst after issue of noti-

fication regarding his appointment — Sample of food received in office before issue of notification — Evidentiary value of report.

A report signed by a Public Analyst after issue of notification regarding his appointment as such when the sample of food for analysis was received in the office of the Public Analyst and was caused to be analysed before the issue of the notification regarding his appointment as Public Analyst can be used as evidence of the facts stated therein in any proceedings under the Act. But the evidentiary value of the report would be seriously affected. (Para 32)

Cases Referred: Chronological Paras

- (1969) Criminal Appeal No. 16-D of 1965, D/-27-2-1969 (Delhi,) Municipal Corpn. of Delhi v. Prahlad Singh 26
- (1969) Criminal Appeal No. 100-D of 1964, D/-13-6-1969 (Delhi), Municipal Corpn. of Delhi v. Jethanand 26
- (1967) AIR 1967 Cal 110 (V 54) = 1967 Cri LJ 329, Shipping and Clearing (Agents) Pvt. Ltd. v. Corpn. of Calcutta 26
- (1967) AIR 1967 Punj 132 (V 54) = 1967 Cri LJ 513, Rameshwar Dass Radhey Lal v. State 27
- (1967) 20 STC 1 (Punj), State of Punjab v. Associated Hotels of India Ltd. 15
- (1966) AIR 1966 Cal 51 (V 53) = 1966 Cri LJ 135, Gopalpur Tea Co. Ltd. v. Corpn. of Calcutta 26
- (1966) AIR 1966 SC 128 (V 53) = 1966 Cri LJ 106, Mangal Das Raghavji Ruperal v. State of Maharashtra 31
- (1966) AIR 1966 Punj 449 (V 53) = 68 Pun LR 319, Associated Hotels of India, Simla v. Excise and Taxation Officer 15, 22
- (1965) AIR 1965 SC 951 (V 52) = 1965-1 SCR 220, Dy. Custodian Evacuee Property, New Delhi v. Official Receiver of the Estate of Daulat Ram Surana, Delhi 17, 19
- (1964) AIR 1964 All 199 (V 51) = 1964 (1) Cri LJ 502, Municipal Board, Faizabad v. Lalchand Suraimal 27
- (1963) AIR 1963 Assam 28 (V 55) = 1963 (1) Cri LJ 349, Bherudhan Charadia v. State 26
- (1962) AIR 1962 All 82 (V 49) = 1962 (1) Cri LJ 120, Narain Das v. State 27, 29
- (1959) AIR 1959 Ker 190 (V 46) = 1959 Cri LJ 712, Food Inspector, Kozhikode v. Punsai Desai 27
- (1958) AIR 1958 SC 560 (V 45) = 1959 SCR 379, State of Madras v. Ganon Dunkerley and Co. 21

- (1957) AIR 1957 SC 309 (V 44) = 1957 SCR 20, Karnani Properties Ltd. v. Miss Augustine 17, 19
- (1956) 1956-1 Mad LJ 481, Public Prosecutor v. Narayana Swami Reddy 17, 18
- (1941) AIR 1941 Mad 320 (V 28) = 42 Cri LJ 330, In re, Anantanarayana Iyer 17, 18
- (1669-1732) 12 Mod 254 = 88 ER 1303, Parker v. Flint 16
- 130 NJL 464, Nisky et al v. Childs Co. No. 49 16
- Mr. T. C. B. M. Lal with R. N. Tikku and B. C. Misra, for Petitioner; H. R. Gokhale, with Lalit Bhasin, for Defendant No. 1; Dalip K. Kapur, with Lalit Bhasin, and M. K. Gupta, for Defendant No. 2.

JAGJIT SINGH, J.:— The following three questions which had arisen during the hearing of four appeals (Criminal Appeals Nos. 11, 36, 63 and 64 of 1968) were referred to a Full Bench:—

- “(i) Whether for purposes of the Act there is no sale of food which is provided by a hotelier to a guest when a consolidated charge is made for room and the other amenities, including food, and when no rebate is allowed for any meal which may not be taken by the guest?
- (ii) Whether the expression “store”, as used in S. 7 and S. 16 of the Act, means storage simpliciter or storing for sale?
- (iii) Whether a report signed by a Public Analyst after issue of notification regarding his appointment as such when the sample of food for analysis was received in the office of the Public Analyst and was caused to be analysed before the issue of the notification regarding his appointment as Public Analyst can be used as evidence of the facts stated therein in any proceedings under the Act?”

2. Detailed facts are given in the order of reference, dated September 22, 1969. This much may, however, be mentioned that on July 25, 1966, four food inspectors took samples of ice-cream, butter, milk and curd from the kitchen and stores of the Oberoi Maidens Hotel, 7 Alipore Road, Delhi. On the same day one sample of each of these articles of food was sent for analysis to the office of the Public Analyst for the Delhi Municipal Corporation area. On being analysed all the samples were found to be adulterated. On the basis of the reports of the Public Analyst four separate complaints were filed against Shri Laxmi Narain Tandon, Manager of the hotel and Messrs Associated Hotels of India Limited through the Managing Director Shri M. S. Oberoi. Admittedly the said hotel is owned by Messrs. Associated Hotels of India Limited.

3. The samples sent to the Public Analyst were received in his office on July 25, 1966. The samples of curd and Milk were analysed on the 26th July and that of butter on the 29th July. The sample of ice-cream was analysed on the 30th of that month. The reports showing the results of analysis were signed by Shri Sudhamoy Roy, as Public Analyst, in the first week of August 1966.

4. During the trial of the complaint relating to the ice-cream, the sample which had been retained by Shri P. P. Singha, Food Inspector, was sent, at the instance of the accused, to the Director Central Food Laboratory, Calcutta, for analysis. The Director as well found the sample sent to him to be adulterated.

5. As provided by Section 13 (3) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "the Act") the certificate issued by the Director of the Central Food Laboratory supersedes the report given by the Public Analyst. The report of the Public Analyst regarding sample of the ice-cream was, therefore, superseded by the certificate issued by the Director of the Central Food Laboratory. Consequently it became immaterial whether or not the report of the Public Analyst regarding the ice-cream sample could be used as evidence of the facts stated therein.

6. So far as the reports of the Public Analyst in respect of samples of curd, butter and milk are concerned, a contention was raised that the said reports could not be used as evidence of the facts stated therein as Shri Sudhamoy Roy was not a Public Analyst on the date the samples were received by him or were caused to be analysed by him as he was appointed a Public Analyst on July 30, 1966 through a notification of that date issued by the Chief Commissioner, Delhi. It was further submitted that though the appointment was notified to be effective from July 20, 1966 yet the notification could only take effect prospectively and not retrospectively.

7. It appears the third question is not capable of a simple reply in the affirmative or negative. It would make all the difference if the appointment of Shri Sudhamoy Roy, through the Chief Commissioner's notification dated July 30, 1966 was a new one. It was, however, submitted by the learned counsel for the Municipal Corporation that Shri Roy was a Public Analyst from December 1964 and after availing of some leave had rejoined his duties on July 20, 1966.

8. Evidently if Shri Sudhamoy Roy was not a Public Analyst for the Delhi Municipal Corporation area on July 25, 1966, he had no authority to receive the samples sent to the Public Analyst on that date or to cause them to be analysed before his appointment as Public Analyst.

In that event even if the reports signed by him after his appointment as a Public Analyst are used as evidence of the fact stated therein, yet their evidentiary value would be seriously affected.

9. Even the counsel for the Municipal Corporation did not urge that the appointment of a Public Analyst can be made with retrospective effect. The stand taken by the learned counsel was that Shri Sudhamoy Roy was appointed Public Analyst for the Municipal Corporation area on December 30, 1964 and had proceeded on leave with effect from May 5, 1966 when Shri Prem Parkash Bhatnagar was appointed Public Analyst for that area for the period of leave in addition to his own duties as a Public Analyst for the New Delhi Municipal Committee area and Delhi Cantt. area. Shri Sudhamoy Roy was stated to have returned from leave and re-joined his duties as Public Analyst with effect from July 20, 1966 and for that reason his appointment as Public Analyst was notified by the Chief Commissioner, Delhi, with effect from July 20, 1966. It was, therefore, urged that though the notification was issued on the 30th of that month it did not amount to making the appointment of Shri Sudhamoy Roy as Public Analyst with retrospective effect but what was intended was to merely notify the fact that Shri Roy had re-joined as Public Analyst from a particular date.

10. Three notifications, as published in the extraordinary issues of the Delhi Gazette, were brought to our notice. One of these notifications, dated December 30, 1964 is about appointment of Shri Sudhamoy Roy as Public Analyst for the Delhi Municipal Corporation area in place of Dr. Kanan. The other notification is dated May 3, 1966 regarding appointment of Shri Prem Parkash Bhatnagar as Public Analyst for the Delhi Municipal Corporation area in addition to his own duties with effect from the 5th May, 1966. The third notification of July 30, 1966 is in the following terms—

**"Delhi Administration, Delhi
Notification**

Delhi, the 30th July 1966 No. F.32 (2)/66-M & PH— In exercise of the powers conferred by Section 8 of the Prevention of Food Adulteration Act, 1954 (37 of 1954) read with the Government of India, Ministry of Health Notification No. F. 14-46/57-P.H., dated 24th April, 1957, the Chief Commissioner, Delhi, is pleased to appoint Shri Sudhamoy Roy to be Public Analyst for the Delhi Municipal Corporation area in place of Shri Prem Parkash Bhatnagar with effect from 20th July, 1966.

By Order,
D. S. Faujdar, Under Secy."

11. Though in the notifications of the 3rd May and the 30th July, 1966 there was no mention of Shri Sudhamoy Roy pro-

ceeding on leave yet from the fact that Shri Prem Parkash Bhatnagar was appointed Public Analyst for the Municipal Corporation area in addition to his own duties it seems to follow that his appointment was a stop-gap arrangement. Moreover as Shri Sudhamoy Roy received the samples on July 25, 1966 he must have re-joined his duties earlier to that date. Under these circumstances the submission made on behalf of the appellant that Shri Sudhamoy Roy was already a Public Analyst and had re-joined his duties on July 20, 1966 appears to be correct. It seems that in substance the notification of July 30, 1966, to which reference was made in the Public Analyst's report, merely notified the fact of Shri Sudhamoy Roy having resumed the functions of the Public Analyst from July 20, 1966 and as such he was properly mentioned to have been appointed from that date. It cannot, therefore, be said that Shri Sudhamoy Roy was not competent to receive samples on July 25, 1966 or to get the analysis caused. The reports purporting to bear his signatures as a Public Analyst and which relate to analysis of curd, milk and butter can be used as evidence of the facts stated therein as provided by sub-sec. (5) of S. 13 of the Act.

12. We next advert to question No. 1. It will be noticed that the matter requiring consideration is as to whether there is a sale for purposes of the Act when food is provided by a hotelier to a guest from whom a consolidated charge is made for room and other amenities, and when no rebate is allowed for any meal which may not be taken by the guest.

13. The term "sale" is defined in Section 2(xiii) of the Act to mean:—

"*"sale"* with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article."

14. When a guest takes a room in a residential hotel and a consolidated charge is made from him for all the amenities provided, including food, it is difficult to say that in terms of the definition of sale as given in the Act there has been sale to him of any article of food. As is made clear in the question the guest is not entitled to any rebate if any meal is not taken by him. If providing food by such a hotelier was to constitute sale then it would follow that the property in the food served would be transferred to the guest. It was stated before us that a guest who does not take any meal cannot ask for the food not consumed by him to be served

to a friend or any other person. Even the food which remains un-eaten cannot be carried away by him. There is thus no transfer of the property in the food to the guest unless it is actually consumed by him.

15. The matter came up before the Punjab High Court in the case of *M/s. Associated Hotels of India Ltd., Simla v. Excise & Taxation Officer*, AIR 1966 Punjab 449, though in connection with liability to tax under the Punjab General Sales Tax Act, 1948. The problem posed was whether the approximate cost of food included in the consolidated charge made by a hotelier from a resident client during his stay in the hotel is liable to tax under the said Act. Narula, J. held that such supply of food did not amount to sale but service, the transaction being indivisible contract of multiple service and did not involve any sale of food. The learned Judge also referred to a judgment of the Court of Errors and Appeals of New Jersey, *Nisky et. al v. Childs Co.* (No. 49) cited in 130 NJL 464, and considered that case to be nearest to the point and most helpful. The decision of Narula, J. was upheld by a Bench consisting of Kapoor and Jindra Lal JJ., on a Letters Patent Appeal being filed, *State of Punjab v. Associated Hotels of India Ltd.*, (1967) 20 STC 1 (Punjab). The learned Judges comprising the Bench while dismissing the appeal observed that the view taken by the Single Judge appeared to be "unexceptionable and fully supported by authorities".

16. In the judgment in the case of *Nisky et. al*, 130 NJL 464 referred to above, the observation made in *Parker v. Flint*, (1669-1732) 12 Mod 254 that an innkeeper does not sell but utters his provisions was referred to with approval and the following passage from Beale's treatise on Innkeepers, S. 169, was quoted:—

"As innkeeper does not lease his room he does not sell the food he supplies to his guests. It is his duty to supply such food as the guest needs, and the corresponding right of the guest to consume the food he needs and to take no more. Having finished his meal he has no right to take food from the table, even the uneaten portion of the food supplied to him. Nor can he claim a certain portion of the food as his own to be handed over to another in case he chooses not to consume it himself."

17. The learned counsel for the appellant contended that the case of *Nisky* could not be of much help in view of the wide definition of sale, as given in the Act. Reliance was also placed on two cases of the Madras High Court, *In re T. S. Ananthanarayana Iyer*, AIR 1941 Mad 320 and the Public Prosecutor v. R. Narayanaswami Reddy, (1956) 1 Mad LJ 481. *Karnani Properties Ltd. v. Miss Augustine*

AIR 1957 SC 309 and Dy. Custodian, Evacuee Property, New Delhi v. Official Receiver of the estate of Daluat Ram Surana, Delhi, AIR 1965 SC 951 were as well cited.

18. Lakshmana Rao, J. in the case of Ananthanarayana Iyer, AIR 1941 Mad 320 did not give any reasons and it appears that storing of ghee for sale in the hotel concerned was not a disputed fact. The case of Narayanaswami Reddy, 1956-1 Mad LJ 481 was not regarding a residential hotel. That case related to Modern Cafe in Tiruvuvannamali. Out of the ghee prepared for sale along with the meals samples were taken by a Sanitary Inspector. The sample of ghee sent to the Government Analyst was found to be adulterated. The hotel keeper was acquitted by the trial court on the ground that he was not present in the cafe on the day the samples were taken. Appeal against the order of acquittal was accepted by Ramaswamy, J. as on the facts of the case the master was held to be liable for the acts of his servant. Thus the cases of Ananthanarayana Iyer, AIR 1941 Mad 320 and Narayanaswami Reddy, 1956-1 Mad LJ 481 can be of no help.

19. No assistance can even be derived from the Supreme Court cases on which reliance was sought to be placed by the learned counsel for the appellant. In the case of Karnani Properties Ltd., AIR 1957 SC 309 it was held that the definition of premises set out in the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, was in very wide terms and included not only gardens, grounds and outhouses, if any, appurtenant to a building or a part of a building, but also furniture supplied by the landlord for the tenant's use and any fittings affixed to the building. That case, therefore, depended upon interpretation of the definition of a particular expression as given in the particular enactment which was applicable to the case. The case of Dy. Custodian, Evacuee Property, New Delhi, AIR 1965 SC 951 pertained to certain transfers by intending evacuees before migrating from India, which were held by the Supreme Court to come within the definition of evacuee property. Obviously no advantage can be taken by the appellant from that case as well.

20. It is true that the meaning of the expression "sale" as defined in Section 2(xiii) of the Act was considerably widened by including within its ambit an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale. Supply of food by a hotelier to a resident guest from whom only a consolidated charge is made for the room and the other amenities and who is not entitled to rebate for any meal which may not be taken by him is, however, not covered by any portion of the definition of "sale".

21. In determining whether there is a sale of food which is provided by a hotelier under the circumstances enumerated in the first question it is relevant to consider if the hotelier agrees to transfer the property in the food to be supplied to the guest for a price. It was not disputed that there is no separate agreement regarding the supply of food, which is supplied only as part of the service for which a consolidated charge is made. The property in the food supplied as part of service also does not pass to the guest except in that which is actually consumed by him. The food to be supplied is not even specified in advance. What the guest pays is for the service as a whole and it is not possible to split up the charges made from him by saying that a particular portion of it represents the price of food. Moreover as the consolidated charge is for the service as a whole no portion of it can be regarded notionally as price of food even though the hotelier must have also taken into account the cost of food to be supplied by him in fixing the consolidated charge to be made from guests staying in the hotel. In the case of State of Madras v. M/s. Ganon Dunkerley & Co., AIR 1958 SC 560, the Supreme Court held that in a building contract which was "one, entire and indivisible" there was no sale of the material used in such contract.

22. The view taken by Narula, J. in the case of Messrs. Associated Hotels of India Ltd., Simla, AIR 1966 Punj 449 appears to be correct. It may, however, be added that if a residential hotel permits non-residents to have meals against payment or undertakes catering for outsiders, it would not be possible to say which particular portion of any article of food is meant for the use of residents and which is meant for outsiders. In that case the articles of food kept in the hotel may be regarded for sale.

23. For answering the second question it would be necessary to refer to certain provisions of the Act and the rules made thereunder. Section 7 which inter alia prohibits manufacturing for sale, or storing, selling or distributing any adulterated food reads as follows:—

"7. No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

- (i) any adulterated food;
- (ii) any misbranded food;
- (iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;
- (iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health; or

(v) any article of food in contravention of any other provision of this Act or of any rules made thereunder."

24. Section 16 provides penalties and the relevant portion thereof is as under:

"16. Penalties.— (1) if any person —

(a) whether by himself or by any other person on his behalf imports into India or manufactures for sale, or stores, sells or distributes any article of food—

(i) which is adulterated or misbranded or the sale of which is prohibited by the Food (Health) authority in the interests of public health;

* * * * *

he shall, in addition to the penalty to which he may be liable under the provisions of Section 6, be punishable with imprisonment.
* * *

25. In Section 2 (xi) of the Act the expression "premises" has been defined to include any shop, stall, or place where any article of food is sold or manufactured or stored for sale. Section 10 deals with powers of Food Inspectors and authorises them to take samples of any article of food from (i) any person selling such article, (ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee, and (iii) a consignee after delivery of any such article to him. By Section 12 a purchaser of any article of food other than a Food Inspector has been given power of having such article analysed by the Public Analyst. Under Rule 9(c) of the Prevention of Food Adulteration Rules, 1955, one of duties of Food Inspector is to procure and send for analysis, if necessary, samples of any articles of food which he has reason to suspect are being manufactured, stocked or sold or exhibited for sale in contravention of the provisions of the Act or the rules thereunder.

26. There has been some conflict of opinion as to the implications of the expression "store", as used in Sections 7 and 16 of the Act. By differing from the view taken in Municipal Corpn. of Delhi v. Prahlad Singh, Criminal Appeal No. 16-D of 1965, D/- 27-2-1969 (Delhi) another Bench of this Court held in Municipal Corpn. of Delhi v. Jetha Nand, Criminal Appeal No. 100-D of 1964, D/- 13-6-1969 (Delhi) that the absence of the words "for sale" after the word "store" was deliberate and that storing was an offence by itself whether it was for sale or not. Reliance was mainly placed on the judgment of P. B. Mukharji, J. in Shipping & Clearing (Agents) Pvt. Ltd. v. Corpn. of Calcutta, AIR 1967 Cal 110 in which the learned Judge held that storing of an adulterated article of food is by itself an offence and it is not necessary that

such storing ought to be for sale before the offence can be said to have been committed. It was further remarked that importing the words such as "for sale" in Sections 7 and 16 after the word "store" would be unjustified legislation on the part of the Court. The same learned Judge in an earlier case, Gopalpur Tea Co., Ltd. v. Corpn. of Calcutta, AIR 1966 Cal 51 had also expressed an opinion that the language of Section 7 prohibited "even storing". In Bherudhan Charadia v. State, AIR 1963 Assam 28 as well Chief Justice G. Mehrotra considered that in Sections 7 and 16 the word "store" is not qualified and mere storing of adulterated ghee was an offence.

27. Food Inspector, Kozhikode v. Punsu Desai, AIR 1959 Ker 190, Narain Das v. State, AIR 1962 All 82, Municipal Board, Faizabad v. Lal Chand Surajmal, AIR 1964 All 199 and Rameshwar Dass Radhey Lal v. State, AIR 1967 Punj 132 are some of the cases in which it was held that the word "store" in Sections 7 and 16 means storing for sale.

28. While interpreting the word "store" as appearing in Sections 7 and 16 the scheme of the Act cannot be lost sight of and a harmonious construction has to be put on it. If storing simpliciter was to attract Sections 7 and 16 then Food Inspectors would have been not only authorised to take samples of any article of food from any person selling such article but also from persons not selling it. If storing simpliciter of the prohibited articles of food was to be an offence under the Act even persons buying such articles from market without knowing that these are adulterated or misbranded would incur liability.

29. In the case of Narain Das, AIR 1962 All 82 V. G. Oak and Kailash Prasad, JJ. took the view that under Section 7 of the Act manufacture of adulterated food is not prohibited and what is prohibited is its manufacture for sale. The learned Judges considered that there appeared no reason why manufacture of adulterated food should be treated differently from its storage. It was further remarked that the expression "or store" is preceded by the words "manufacture for sale" and is followed by "sale" and, therefore, the context in which the word "store" is used indicates that it means storing for sale; the word "store" having taken colour from the expression "manufacture for sale" and "sale" with which it is associated in the section.

30. Maxwell in his book on the Interpretation of Statutes (Twelfth 1969 Edition at page 228) while dealing with the topic of modification of the language to meet the intention stated as under:—

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contra-

diction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of language used."

Except Sections 7 and 16 wherever the Act refers to storing it is storing for sale. It seems to us that the juxtaposition in which the expression "or store" occurs in Sections 7 and 16 of the Act and the scheme of the Act do not leave any doubt that the intention of the storing being "for sale" was implicit in the word "store" as used in those Sections.

31. Mangal Das Raghavji Ruperal v. State of Maharashtra, AIR 1966 SC 128 was also cited at the bar, in which their Lordships of the Supreme Court held that a sale for analysis to a Food Inspector must be regarded as sale within the meaning of the Act. In that case, however, their Lordships of the Supreme Court were not considering the scope of the word "store" as used in Sections 7 and 16 of the Act.

32. We, therefore, answer the questions referred to the Full Bench as follows:—

- (i) There is no sale of food.
- (ii) The word "store" used in Sections 7 and 16 of the Act means storing for sale.
- (iii) "Yes, but the evidentiary value of the report would be seriously affected if the Public Analyst before his appointment as such had received the sample of food and had caused it to be analysed.

33. The case shall now be laid before the Division Bench for disposal of the appeals.

Answers accordingly.

AIR 1970 DELHI 250 (V 57 C 54)

HARDAYAL HARDY AND
V. S. DESHPANDE, JJ.

D. S. Sharma, Petitioner v. Union of India etc., Respondents.

Civil Writ No. 560 of 1968, Decided on April 1970 (Sic).

FN/FN/C445/70/BDB/D

(A) Civil Services — Indian Audit and Accounts Department (Accountant General, Posts and Telegraphs) Transfer of Officers and other Staff Rules 1968, R. 6 — Rules relate to conditions of service — Rules do not confer unfettered discretion in their implementation. (Para 7)

(B) Constitution of India, Art. 309 — Rule-making powers — President and the Legislatures can respectively make rules and statutes to validate retrospectively invalid administrative actions and invalid statutes. (Para 6)

(C) Civil Services — Indian Audit and Accounts Department (Accountant General, Posts and Telegraphs) Transfer of Officers and other Staff Rules (1968) R. 6 — Validation of invalid promotion made under previous Rules — Validation is legal and so not mala fide. (Para 8)

(D) Constitution of India, Art. 309 — Rule-making powers not restricted to rules which are administrative in nature — Authentication of statutory instruments can also be done under Art. 77(2).

Executive power or the executive action of the President in Chapter I of Part V of the Constitution is not restricted to the exercise of powers which are entirely administrative in nature but is broad enough to include rule-making as distinguished from the power to issue ordinances which are Sovereign Legislation and not subordinate legislation like rule-making. So, the authentication of a statutory instrument made by the President under Art. 309, Proviso, has to be done in the same way as an administrative order is authenticated. (Para 13)

(E) Constitution of India, Art. 77(2) — Authentication — Authorities empowered to authenticate, duties of.

All that the authorities empowered to authenticate under Art. 77 (2) is to see that the order to be authenticated is made by the Executive as distinguished from the Legislature or the Judiciary. They have no powers to scrutinize the order or to refuse authentication on the ground that the contents of the order are not administrative but are legislative in character. (Para 12)

(F) Constitution of India, Art. 77(2) — Authentication — Every type of Order of President has to be authenticated.

All orders made by the President whether acting as the head of the Central Government or otherwise have to be authenticated under Art. 77(2). There is no other provision in the Constitution for authentication of orders made by the President in his personal capacity. (Para 13)

When an order is established to have been made by the President it is neither necessary nor permissible to enquire whether the President was acting as the head of the Union Government or Presi-

dent as such. AIR 1967 SC 1145, Rel. on. (Para 16)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 192 (V 57) =
1970-1 SCR 388, Shri Prithvi
Cotton Mills v. Broach Borough
Municipality 8

(1969) AIR 1969 SC 118 (V 56) =
1969 Lab IC 100, B. S. Vadera v.
Union of India 7

(1968) AIR 1968 SC 1138 (V 55) =
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v. Union of India 8

(1967) AIR 1967 SC 1145 (V 54) =
1967-2 SCR 406, M/s. Bijoya
Lakshmi Cotton Mills Ltd. v.
State of W. B. 15

(1967) 1967 Ser LR 753 (SC), State
of Mysore v. G. N. Purohit 17

(1966) AIR 1966 SC 602 (V 53) =
1966-1 SCR 994, State of Mysore
v. Padmanabhacharya 17

(1966) AIR 1966 SC 1547 (V 53) =
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(1966) AIR 1966 SC 1593 (V 53) =
1966-2 SCJ 231, State of M. P. v.
Vishnu Prasad Sharma 8

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lal Shodhan v. F. N. Rana 9

(1959) AIR 1959 Mad 1 (V 46) =
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v. State of Madras 17

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72 Ind App 241, Emperor v.
Sibnath Banerjee 15

P. Parameswara Rao with K. C. Dua,
for Petitioner; Dipak Chaudhri, Sr. Adv-
ocate with S. P. Aggarwal, for Respon-
dents.

V. S. DESHPANDE, J.:— A constitu-
tional question of first impression as to
the nature and meaning of executive
power of the President under the Consti-
tution has arisen among other questions
in this case.

2. The accounts work of the main
Department of Posts and Telegraphs used
to be done by the petitioners designated
as Senior Accountants governed by the
Posts and Telegraphs Accountants' Ser-
vice (Recruitment) Rules, 1958 at Anne-
xure R-2 of the written statement as
amended on 29th March 1963 at Anne-
xure R-3. The accounts work in the
Tele-communications Branch of the De-
partment of Posts and Telegraphs was, on
the other hand, done by the personnel of
the Audit department called the SAS

Accountants. The recruitment to the
grade of Accounts Officers used to be
made under the General Central Service
Class II (Accounts/Administrative Offi-
cers) Recruitment Rules, 1968, dated 15th
February 1968 at Annexure R-5 to the
written statement. Under these rules,
the Senior Accountants of the Posts and
Telegraphs Department with five years'
approved service in the grade were alone
eligible for promotion as Accounts Offi-
cers.

3. On 27th March 1968, as per letter
at Annexure C to the writ petition, the
Government decided that the accounts
work of the Tele-communications Branch
of the Posts and Telegraphs Department
should be transferred to the Accounts
Department of the Posts and Telegraphs
Board. Along with this work, the SAS
Accountants belonging to the Audit de-
partment were also to be transferred to
the Posts and Telegraphs Department.
The terms and conditions of the transfer
were settled by the Government on 16th
May 1968 as per letter at Annexure D to
the writ petition. The SAS Accountants
formerly of the Audit Department were
equated with the Senior Accountants of
the Posts and Telegraphs Department
and were to be designated as Senior Ac-
countants. As per para (11) of Annexure
D the inter se seniority of the SAS Ac-
countants formerly of the Audit Depart-
ment vis-a-vis the Senior Accountants of
the Posts and Telegraphs Department
was to be fixed according to the length
of the approved continuous service in the
corresponding grades. Acting on this
basis, on 6th July 1968, as per Annexure
H, the Posts and Telegraphs Department
appointed Sarvashri S. Jayaraman and
V. S. Srinivasan who were formerly SAS
Accountants in the Audit Department
but who were since then transferred to
the Posts and Telegraphs Department
along with the accounts work of the
Tele-communications Branch of the Posts
and Telegraphs Department were on pro-
motion as Accounts Officers.

4. The petitioners who have been
Senior Accountants of the Posts and Tele-
graphs Department from before the inte-
gration have filed these writ petitions
(Civil Writ Petitions 560 and 561 of 1968)
challenging the promotion of Sarvashri
S. Jayaraman and V. S. Srinivasan as
Accounts Officers on the following
grounds, namely:—

(1) The promotion was contrary to the
statutory rules, namely, General
Central Service Class II (Accounts/
Administrative Officers) Recruit-
ment Rules, 1968, dated 15-2-1968
at Annexure R-5 which provided
for the promotion of only the
Senior Accountants of the Posts

and Telegraphs Department to the grade of Accounts Officers;

- (2) The promotion could not be retrospectively validated by the two sets of statutory rules subsequently made by the Government, namely, (a) the Indian Audit and Accounts Department (Accountant General, Posts and Telegraphs) Transfer of Officers and other Staff Rules, 1968 dated 30-8-1968 at Annexure R-6 and (b) the Indian Posts and Telegraphs Accounts and Finance Service Class II (Recruitment) Rules, 1968, dated 23-11-1968 at Annexure R-7.

and

- (3) The equation of the SAS Accountants formerly of the Audit department with the Senior Accountants of the Posts and Telegraphs department for the purpose of promotion to the grade of Accounts Officers is discriminatory against the petitioners contrary to Arts. 14 and 16 of the Constitution.

5. Let us consider the above contentions in the order in which they have been set out.

6. On 6th July 1968, the Posts and Telegraphs Accounts Officers (Recruitment) Rules, 1968 at Annexure R-5 were in force. The Government could not therefore legally appoint Sarvashri Jayaraman and Srinivasan as Accounts Officers inasmuch as their transfer to the Posts and Telegraphs department, their designation as Senior Accountants and the fixation of their seniority vis-a-vis the pre-existing Senior Accountants of the Posts and Telegraphs Department was all done by administrative orders at Annexures C and D to the writ petition. These administrative orders were strictly speaking inconsistent with the statutory rules at Annexure R-5. They could not have the effect of amending the statutory rules. They could not, therefore, prevail against the statutory rules. The result was that strictly speaking the promotion of Sarvashri Jayaraman and Srinivasan being contrary to the statutory rules, was illegal and, therefore, initially invalid.

7. The Government had however made the promotion only on a purely ad hoc temporary basis. Apparently the Government did not have time to amend the existing statutory rules before actually making the promotion. But the Government soon put the administrative orders at Annexures C and D to the writ petition on statutory footing by promulgating the Indian Audit and Accounts Department (Accountant General, Posts and Telegraphs) Transfer of Officers and other Staff Rules, 1968, on 30-8-1968 as per Annexure R-6 to the written statement. Under Rule 1(2) thereof, these rules shall

be deemed to have come into force on the first day of March 1968. It is now settled by the Supreme Court decision in *B. S. Vadera v. Union of India*, AIR 1969 SC 118 that the President acting under the proviso to Art. 309 can give retrospective operation to the rules relating to the conditions of service. Shri P. P. Rao, learned counsel for the petitioners, relied upon the Supreme Court decision in *State v. Padmanabhacharya*, (1966) 1 SCR 994 = (AIR 1966 SC 602) to urge that the rule at Annexure R-6 are not rules relating to the conditions of service at all but were made only to validate the promotion made on 6th July 1968 which was ab initio void. A look at the content of the rules at Annexure R-6 however shows that they genuinely related to conditions of service. Rule 2 authorises the transfer to the Posts and Telegraphs department of all persons who had been previously engaged in the accounting work relating to the Telecommunications Branch. The selection of persons for such a transfer was to be made by the Comptroller and Auditor General of India.

Shri P. P. Rao attacked this rule as giving unfettered discretion to the Comptroller and Auditor General. But the discretion is subject to the guidelines contained in Rule 2 itself. The transfer is to be effected according to the decision of the Government contained in the letter dated 1st March 1968. Secondly the transfer is to be of such officers and staff which shall, as far as possible, be persons who at the time of the transfer were engaged in the accounting work relating to the Telecommunications Branch which work itself was being transferred to the Posts and Telegraphs Department. Thus only those persons who were actually doing the work of the Telecommunications Branch were transferred along with the work itself. The Comptroller and Auditor General had thus little or no discretion left in choosing the persons to be transferred.

Further, the terms and the conditions of the transfer were to be agreed upon by the Comptroller and Auditor General of India on the one hand and the Secretary to the Government of India in the Department of Communications (Posts and Telegraphs) on the other hand, these being two departmental heads representing the two sets of employees to be integrated by the transfer. Rule 3 says that the transfers effected from 1st March 1968 onwards before the date of the publication of these rules (30-8-1968) shall be deemed to have been made in pursuance of these rules. The decision in *Padmanabhacharya's case*, 1966-1 SCR 994 is, therefore, inapplicable to the present case just as it was held inapplicable to the rules framed in *Vadera's case* in para 26 of the report in AIR 1969 SC 118.

8. Shri P. P. Rao, however, strongly attacked the transfer rules dated 30-8-1968 at Annexure R-6 as being mala fide. He argued that the sole purpose of these was to defeat the writ petitions which had already been filed. He argued that the Government should have first cancelled the promotion made on 6th July, 1968 and passed fresh orders of promotion after the promulgation of the transfer rules dated 30-8-1968. We are unable to agree. The course of action suggested by Shri P. P. Rao was certainly open to the Government. But it would have been inconvenient and roundabout. The officers promoted would have been reverted for no fault of theirs and the action of the Government in promoting them would have had to be admitted to be illegal. The Government, therefore, chose an alternative method of achieving the same result by making the transfer rules retrospective.

In *State of Madhya Pradesh v. Vishnu Prasad Sharma*, AIR 1966 SC 1593, the administrative action of the Government in acquiring certain lands was struck down as being contrary to the provisions of the Land Acquisition Act, 1894. Thereupon the Land Acquisition Act was amended and the administrative action consisting of acquisition of land was retrospectively validated. The legality of such retrospective validation was upheld by the Supreme Court in *Udai Ram Sharma v. Union of India*, (1968) 3 SCR 41 at pp. 62 to 67 = (AIR 1968 SC 1138 at pp. 1150 to 1152) after a review of the case law. Mitter J. speaking for the majority of the Court pointed out that the Legislature may adopt either of the following two methods to validate an invalid administrative action, namely, (1) to give retrospective effect to the legislation under which the administrative action would have been valid and (2) to declare that invalid action shall be deemed to have been validly taken. We see no reason why the same principle should not apply to the making of rules by the President to validate an invalid administrative action retrospectively. In the present case, the Government has adopted the first method, namely, of giving retrospective effect to the rules at Annexure R-6. The learned Chief Justice of India speaking for the Court in *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, AIR 1970 SC 192 para 4, made the following observations about validating statutes in general:

"When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively."

The validation can, therefore, be not only of invalid administrative action but also of an invalid statute and both can be done retrospectively.

The Government was, therefore, justified in validating its invalid administrative action by giving retrospective effect to the rules at Annexure R-6. The question of mala fides simply does not arise. It would not be proper to insist that the Government should not exercise the power of giving retrospective effect to the rules though the Government undoubtedly possessed such power. The obvious reason for giving retrospective effect to the rules was to validate the promotions made by the Government in anticipation of the promulgation of the rules. It cannot be doubted that the legal Advisers of the Government must have advised the Government that statutory rules must be amended soon to regularise the ad hoc and temporary promotions made on 6th July, 1968. They must have also pointed out to the Government that in the absence of such new statutory rules, the promotions were invalid in the eye of law. The application by the petitioners that the respondents be asked to produce the files containing the deliberations and decisions to promulgate the new rules on 30-8-1968 was intended to expose the mistake committed by the Government and the admissions which may have been contained in the files that the action of the Government was legally wrong and had therefore to be validated. But we are prepared to assume all this to be true. The mere exposure of the mistake made by the Government would not help the petitioners because the Government subsequently validated their action retrospectively. We therefore disallow the application made by the petitioners for the production of these documents as they are not relevant for our purpose. We also hold that the retrospective validation of their action by the Government does not in any way amount to bad faith.

9. Shri Rao then advanced a novel argument against the validity of the transfer rules at Annexure R-6 as also the subsequent rules dated 23-11-1968 at Annexure R-7 which formally superseded the rules dated 15th February 1968 and provided for the promotion of both the transferred personnel as well as the pre-existing personnel as Accounts Officers. These rules were framed by the President under the proviso to Article 309 of the Constitution. In *Jayantilal Amrit Lal Shodhan v. F. N. Rana*, (1964) 5 SCR 294 = (AIR 1964 SC 648), Shah J. speaking for the majority of the Court at pp. 307 and 308 (of SCR) = (at p. 656 of AIR), drew a distinction between two kinds of powers exercised by the President, namely, (1) powers of the Central Government which may be entrusted to a State Government or an officer of the State or to other officers; and (2) powers which are not powers of the Union Government but are vested in the President

and which are incapable of being delegated or entrusted to any other body or authority. The power to make rules under the proviso to Article 309 was placed in the second category to be exercised by the President and not to be entrusted or delegated to any other body or authority.

Shri P. P. Rao points out that the rules at Annexures R-6 and R-7 are not signed by the President himself. They are expressed to be made by the President but purport to be authenticated by officers of the Central Government apparently under Article 77(2) of the Constitution. But, says Mr. Rao, Article 77 like the preceding Articles 53(1) and 73(1) applies only to exercise of executive power of the Government of India. These articles do not authorise the authentication of the rules at Annexures R-6 and R-7 firstly because the rules are not made by the President as the head of the Union of India but as the President and secondly because the authentication under Article 77(2) can be made only of executive orders and instruments but not of rules which are legislative in character.

10. The rules at R-6 and R-7 are undoubtedly an exercise of legislative power i.e. rule-making or subordinate legislation by the President. These rules govern the "conditions of service of persons appointed to public services and posts in connection with the affairs of the Union" within the meaning of Article 309. Article 309 itself is a part of Chapter XIV of the Constitution which deals with "Services under the Union and the State". These services are therefore of the Central Government and not of the President as such. It would appear therefore, with respect, that the point emphasised by Shah J. is that this power of the President was not such as could be entrusted or delegated by him to some other authority. His Lordship did not say that the services for whom the rules under the proviso to Article 309 are made do not belong to the Union and belong to the President as such. It would appear, therefore, that these rules are made by the President as the head of the Union of India for the services of the Union of India though on principle this function of the President, being legislative in character, could not be entrusted or delegated by him to any other authority except in so far as the proviso to Article 309 expressly provides that the President may direct some other person to make such rules.

11. The legal position may be considered from two points of view, namely, (1) that the President acts as the head of the Union Government in making these rules or (2) that he does so as a *persona designata*. If he acts as the

head of the Central Government in making these rules, then the provisions of Chapter I Part V of the Constitution would be applicable to the exercise of this function by the President. Shri Rao however, argues against this on the ground that the rule-making is a legislative function and therefore these provisions do not apply to the exercise of this function by the President. We appreciate this argument. It is necessary to consider the scheme of Part V of the Constitution. The title of Part V is "The Union" namely, the Union of India. It is divided into four chapters. Chapter I deals with the "Executive", Chapter II with the "Parliament" and Chapter IV with the "Union Judiciary". The legislative powers proper i.e., the sovereign power to make ordinances equal in status to parliamentary statutes is dealt with separately in Chapter III. The power of the President to make rules either under the Constitution or under a parliamentary legislation is not covered by Chapter III. It is an administrative power though given by a statute. This is why rules are called by some authors "administrative quasi legislation" or "subordinate legislation". The power to make such rules is not covered by Chapter III. This power is covered by Chapter I as it is analogous to administrative power in the sense that it is a power exercised by the executive. The division of the Union of India is made into three departments or branches of the State, namely, the executive department, the legislative department and the judicial department — all three constituting the State or the Union of India. Such a division is different from the separation of powers exercised by the different branches of the State, namely, executive power, legislative power and judicial power. This latter division rests on the nature or quality of the function performed by the Government or the department concerned.

The distinction between legislative, administrative, judicial and quasi-judicial powers may be relevant in a totally different context, such as judicial review, etc. But Part V is not concerned with the nature or the quality of the powers exercised by the Executive, the Parliament and the Union Judiciary as observed by the Supreme Court at page 306 (of SCR) = (at p. 655 of AIR) of *Jayantilal's* case referred to above as follows:—"it cannot however be assumed that the legislative functions are exclusively performed by the Legislature and executive functions by the Executive and Judicial functions by the Judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the State. To the Executive exercise of functions legislative or judicial are often entrusted."

12. Under Article 53(1) the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 73(1) "subject to the provisions of this Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws". Under Article 77(1) "all executive action of the Government of India shall be expressed to be taken in the name of the President."

What is the meaning of the expressions "executive power" and "executive action" in the above provisions of the Constitution? They can mean only one of the following two things, namely:—

- (1) the power or the action exercised or taken by the executive department of the State, or
- (2) only such power as is administrative in nature as distinguished from legislative or judicial power exercised by the Executive.

The latter meaning could be placed on these provisions only if Chapter I of Part V of the Constitution were concerned with the distinction between different kinds of powers such as judicial, legislative and executive according to the quality or the content of the power. But such a distinction has no relevance to Chapter I of Part V of the Constitution inasmuch as the only division contemplated by Part V is between the three great departments of the State, namely, the Executive, the Legislature and the Judiciary, irrespective of the kinds of powers which may be exercised by each of them. It would follow, therefore, that the expressions "executive power" and "executive action" in this context mean the power or the action of the Executive. The adjective "executive" denotes that part of the State which is exercising the power. It is the source of the power which is designated thereby and not the nature or the quality of it. Therefore, so long as the source or the author of the power is the Executive, the provisions of Chapter I of Part V of the Constitution would apply whether the nature of the power is strictly administrative or not. Therefore, when Article 77(2) says that "orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President", all orders and instruments made by the President are contemplated.

It is immaterial if a particular order or instrument is administrative or rule-making, that is, subordinate legislation in character. The very purpose of Article 77(2) is to enable certain authorised officers to authenticate the orders and

instruments on the sole ground that they are made in exercise of the executive power of the Government of India. All that the officers have to see is that the order is made by the Executive as distinguished from the Legislature or the Judiciary. They do not have to scrutinize the nature or the contents of the order. In fact, they would not have the power to sit in judgment over such orders of the Government. It is not open to these authorised officers to refuse to authenticate an order of the Government on the ground that the contents of the order are not administrative but are legislative in character. Article 77 would be unworkable if every order and instrument would have to be scrutinized by the authorised officers with a view to determine if it is administrative in nature. In fact, some orders would be partly administrative and partly legislative and it would be impossible for anyone to decide whether it should be regarded as executive or legislative only.

The provisions of Article 77(2) are fundamental and have to be broadly construed. To construe them narrowly would be to defeat their very purpose and to subject action taken thereunder to the uncertainty of challenges and litigation. This is why Article 77(2) further enacts that "the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President." We are, therefore, of the view that the executive power or the executive action of the President in Chapter I of Part V of the Constitution is not restricted to the exercise of powers which are entirely administrative in nature but is broad enough to include rule-making as distinguished from the power to issue ordinances which are Sovereign Legislation and not subordinate legislation like rule-making. Therefore, the authentication of a statutory instrument made by the President in exercise of the powers conferred on him by the proviso to Article 309 has to be authenticated under Article 77(2) of the Constitution in the same way as an administrative order made by him has to be authenticated thereunder.

13. Let us now assume that the rules made under the proviso to Article 309 are made by the President not as the head of the Central Government but as a *persona designata*. There is no provision either in the Constitution or outside as to how orders made by the President as such are to be authenticated. The only provision is Article 77(2). It would be reasonable to conclude, therefore, that all orders made by the President whether acting as the head of the Central Government or otherwise have to be authen-

ificated under Article 77(2) of the Constitution.

14. Shri Rao says that, except according to the proviso to Article 309, the power of the President to make rules thereunder cannot be delegated by him to any person or authority. As the President has not delegated this power to any other authority, the rules at R-6 and R-7 could not be issued under the signatures of the officers inasmuch as these officers have not been delegated the power to make these rules by the President. This argument proceeds on a misconception. There is a basic distinction between authentication of the order made in the name of the President by an authorised officer and action taken by a person or an authority to whom the President has delegated any of his powers.

Article 77(2) deals with authentication of the powers of the President and not with orders made by the delegates of the President. This is why the orders are expressed to be made by the President. Instead of being signed by the President personally they are authenticated by officers who are also a part of the Government of India to show that they are executed by the President himself. This is the significance of the provision in Article 77(2) that "the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President."

15. In *Emperor v. Sibnath Banerji*, AIR 1945 PC 156, the Judicial Committee of the Privy Council had to consider Section 49(1) of the Government of India Act, 1935, which in the sphere of Provinces (now States under the Constitution) corresponded with Article 154(1) of the Constitution. In the Union field, it corresponds to Article 53(1) of the Constitution. In connection with this provision, their Lordships observed at page 162 column 2 of the report as follows:—

"Their Lordships would also add, on this contention, that sub-section (5) of Section 2 (of the Defence of India Act) provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under Section 49(1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name".

The implication is that there is no delegation when the Governor remains responsible for the action of his subordinates taken in his name. In *M/s. Bijoya Lakshmi Cotton Mills Ltd. v. State of West Bengal*, AIR 1967 SC 1145 it was held by the Supreme Court that unless

Rules of business required the Minister to deal with a matter himself, an Assistant Secretary could deal with it on behalf of the Government. The personal satisfaction of the Governor was not needed.

16. To sum up, therefore, when we have an order or an instrument before us which is expressed to be made in the name of the President and which is duly authenticated then, in our view, the order or instrument "shall not be called in question on the ground that it is not an order or instrument made or executed by the President" in view of Article 77(2) of the Constitution. Since the order is thus established to have been made by the President, it is neither necessary nor permissible to enquire whether the President was acting as the head of the Union Government or as President as such.

17. The terms and conditions on which the Audit personnel doing the accounts work of the Tele-communications Branch has been integrated with the pre-existing Posts and Telegraphs Department's Senior Accountants are eminently just and fair. The basis for the fixation of the seniority between the SAS Accountants and the pre-existing P. & T. Senior Accountants is simple, namely, the length of approved continuous service in the corresponding grades which carried the same pay scales. Shri Rao pointed out to the representation made by the P. & T. Senior Accountants at Annexure I to the writ petition. In our view, it would not be relevant to look into the previous history of the personnel belonging to these two different services. The only relevant consideration is the position occupied by the SAS Accountants vis-a-vis the P. & T. Senior Accountants at the time of the integration. At that time, they were both enjoying the same pay-scale. The SAS Accountants were actually doing the accounts work of the Tele-communications Branch. This work has been transferred to the Posts and Telegraphs department. Necessarily therefore the SAS Accountants doing that work had to be transferred to the Posts and Telegraphs department along with the work. They have also to be equated with the P. & T. Senior Accountants who are doing equivalent work in the Posts and Telegraphs department. It is because the SAS Accountants were doing the work now transferred to the Posts and Telegraphs department that the SAS Accountants are entitled to promotion as Accounts Officers in the same way that the P. & T. Senior Accountants are so entitled.

Therefore, the same criteria have been applied to both these sets of employees for promotion, namely, five years of approved service in the grades which have had the same pay-scale. It is not per-

missible to enquire any further into the history of the two services. The SAS Accountants themselves may have a grievance against their transfer to the Posts and Telegraphs department as their prospects in the Indian Audit and Accounts department may have been better and we understood during the argument that some of them had actually filed a writ petition in the Punjab and Haryana High Court complaining against their transfer to the Posts and Telegraphs department. But that writ petition failed. The present writ petitions by the P. & T. Senior Accountants would also fail inasmuch as the past history of the Services is not material at all. Whatever may be the previous history and whatever may be the reasons by which the SAS Accountants and the P. & T. Senior Accountants came to occupy their present position at the time of the integration, once they occupied the posts of SAS Accountants and the P. & T. Senior Accountants which had the same scales of pay and which had the same work, they are bound to be equated by the integration.

If the integration in any way affected their chances of promotion or even resulted in the reversion of some of them, the chances of promotion are not conditions of service and the reversion is not a reduction in rank. *State of Mysore v. G. N. Purohit*, 1967 SLR 753 (SC); *State of Orissa v. Durga Charan Das*, (1966) 2 SCR 907 = (AIR 1966 SC 1547); and *State of Punjab v. Jagdip Singh*, AIR 1964 SC 521 approving the decision in *Devasahayam's* case reported in AIR 1958 Mad 53 and AIR 1959 Mad 1. We therefore find that the integration did not involve any discrimination against the petitioners.

18. During the course of argument, the rules promulgated by the Government on 23rd November 1968 were produced by the learned counsel for the respondents. We took judicial notice of the same and exhibited them as Annexure R-7 to the written statement. Even in the absence of these rules, the decision of these writ petitions would have been the same. For the sake of completeness of the record, however, we have taken them on record as we are convinced that no prejudice is caused to the petitioners thereby.

19. The writ petitions are therefore dismissed but in the circumstances of the case we make no order as to costs.

Petitions dismissed.

AIR 1970 DELHI 257 (V 57 C 55)

HARDAYAL HARDY AND
JAGJIT SINGH, JJ.

The Saraswati Industrial Syndicate Ltd. and another, Petitioners v. Union of India, Respondent.

Civil Writ Petns. Nos. 699 and 709 of 1969, D/-8-10-1969.

Essential Commodities Act (1955), S. 3, Sub-s. (3C) (as inserted by Act 36 of 1967) — Orders for sale of sugar issued by Central Government under Cl. (f) of sub-s. (2) — Producer is entitled to price which stands determined on date an order is made.

The date of delivery is of no consequence and if before the supplies or part of the supplies are delivered a different price is determined, the newly determined price only affects supplies to be made with reference to allotment orders issued after the re-determination of price. It does not affect the supplies made or to be made in pursuance of previous orders. Civil Writ No. 1218 of 1967, D/- 10-10-1967 (Delhi), Relied on. (Paras 12, 13)

Cases Referred: Chronological Paras
Civil Writ No. 1218 of 1967, D/-
10-10-1967 (Delhi), *Saraswati Industrial Syndicate Ltd. v. Union of India* 18

M. C. Chagla, Sr. Advocate with Bishamber Lal, M. K. Garg and S. P. Vij, for Petitioners; Jagdish Swarup, Solicitor General with Devinder K. Kapur, for Respondent.

JAGJIT SINGH, J.: Writ Petns. Nos. 699 and 709 were heard together as the facts relating to those cases are nearly the same and the points involved are exactly identical.

2. The petitioner company in writ No. 699 is the Saraswati Industrial Syndicate Ltd., Yamunanagar District Ambala in Haryana State. That company owns Saraswati Sugar Mills and is engaged in the manufacture of sugar. The petitioner company in writ No. 709 is the Delhi Cloth & General Mills Co., Ltd., Bara Hindu Rao, Delhi, which is also a public limited company having two sugar factories in the District of Meerut, known as Daurala Sugar Works and Mowana Sugar Works.

3. Both the petitioner-companies manufactured sugar, an essential commodity for purposes of the Essential Commodities Act, 1955 (hereinafter referred to for facility of reference as "the Act"), during the sugar season of the year 1968-69. The factories of the companies are situate in what was demarcated as Zone III.

4. On December 12, 1968 the Ministry of Food, Agriculture, Community Development and Co-operation (Department

DN/EN/B702/70/GDR/C

of Food) issued Notification No. G.S.R. 2181/Ess.Com./Sugar under sub-section (3C) of Section 3 of the Act. By that Notification the Central Government determined the ex-factory price payable for I.S.S. grade of sugar produced in the year 1968-69 by all vacuum pan sugar factories situate in Zone III and required to be sold by the Government under clause (f) of sub-section (2) of Section 3 at Rs. 164.22 per quintal. The price so determined was revised and raised to Rs. 169.21 to meet incidence of increased excise duty by a subsequent Notification, No. G.S.R. 764/Ess.Com./Sugar dated March 5, 1969. Again there was re-determination of price for sugar produced by factories in Zone III at Rs. 177.74 by Notification No. G.S.R. 1835/Ess. Com./Sugar, dated July 29, 1969.

5. A further Notification No. G.S.R. 1839/Ess. Com./Sugar, dated August 1, 1969, was issued by the Ministry of Food, Agriculture, Community Development and Co-operation (Department of Food), which provided for insertion of the following paragraph in the above-referred to Notification of July 29, 1969:—

"2. Notwithstanding the supersession of the notification of the Government of India in the Ministry of Food, Agriculture, Community Development and Co-operation (Department of Food) No. G.S.R. 764/Ess. Com./Sugar, dated the 5th March, 1969 (hereinafter referred to as the said notification) by this notification, any sugar required to be supplied under an order issued under clause (f) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955) at the price determined in the said notification shall be supplied in accordance with the terms and conditions including terms and conditions as to price specified in such Order as if the said notification had continued in force and this notification had not been issued."

The Notification of August 1, 1969 was forwarded to the various Associations of Sugar Mills with a circular letter, dated August 6, 1969, in which also it was mentioned: "the revised prices of levy sugar notified on 29th July, 1969 will not be applicable to sugar despatched or to be despatched against allotment orders issued by the Directorate of Sugar and Vanaspati prior to 29th July, 1969 and the prices applicable in such cases will continue to be those fixed under Notification No. G.S.R. 764/Ess. Com./Sugar, dated the 5th March, 1969". The said Notification of August 1, 1969 and the circular letter were stated to have come to the notice of the Delhi Cloth & General Mills Co., Ltd. on the 11th of that month.

6. On July 1, 1969, the petitioner-companies had already been required by the Government of India, under clause (f) of sub-section (2) of Section 3 of the Act

to sell certain quantities of sugar to the Governments of Haryana and Uttar Pradesh or their nominees, subject to the conditions which were specified in the orders issued for the purpose. The delivery of sugar was to commence immediately and was to be completed within forty-five days from the date of the orders. The price to which the producers were entitled was to be as provided in the above referred Notification of March 5, 1969.

7. Part of the supplies were made by the petitioner-companies in pursuance of the orders of July 1, 1969 before the Notification of July 29, 1969 was issued determining the price at Rs. 177.74 per quintal instead of Rs. 169.21 per quintal as provided in the Notification of March 5, 1969.

8. It was averred in the petitions that the price determined by the Notification of July 29, 1969, was the final price after the close of the sugar season on the basis of the actual recovery and duration of the season without any adjustment for the lower price fixed previously on estimated basis. After the fixation of the final price the Central Government was stated to be not competent to revise the price for sugar to be supplied after the date of such determination. It was as well mentioned that the Notification of March 5, 1969 having been superseded by the new Notification of July 29, 1969 could not be revived under the provisions of sub-section (3C) of Section 3 of the Act by issuing another Notification dated August 1, 1969.

The Notification of August 1, 1969 and the directions contained in the circular letter of August 6, 1969, requiring the petitioner-companies to supply sugar at the price determined by the earlier Notification of March 5, 1969 were dubbed as arbitrary, without jurisdiction and authority of law and to be violative of Article 31 of the Constitution in so far as these required the petitioner-companies to part with their property without the authority of law. The petitioner-companies, therefore, desired issue of a writ, order or direction in the nature of certiorari for quashing the Notification dated August 1, 1969 and the directions contained in the circular letter dated August 6, 1969 and also issue of mandamus directing the Union of India, the respondent in the case to cancel or withdraw the said Notification and the circular letter.

9. Some of the relevant provisions of the Act may be noticed at this stage. "Essential commodity" is defined in Section 2(a). Sugar being one of the food-stuffs is covered by that definition. Section 3 relates to powers of the Central Government to control production, supply and distribution etc. of essential commodities. Sub-section (1) provides that if

the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

Sub-section (2), which is without prejudice to the generality of the powers conferred by sub-section (1), specifies certain matters which may be provided by order to be made. Clause (f) of sub-section (2) enables an order to be made requiring any person holding any stock in essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to an officer or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order. Sub-section (3C) reads as under:—

"(3C). Where any producer is required by an order made with reference to clause (f) of sub-section (2) to sell any kind of sugar (whether to the Central Government or a State Government or to an officer or agent of such Government or to any other person or class of persons) and either no notification in respect of such sugar has been issued under sub-section (3A) or any such notification, having been issued, has ceased to remain in force by efflux of time, then, notwithstanding anything contained in sub-section (3), there shall be paid to that producer an amount therefor which shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to—

- (a) the minimum price, if any, fixed for sugarcane by the Central Government under this section;
 - (b) the manufacturing cost of sugar;
 - (c) the duty or tax, if any, paid or payable thereon; and
 - (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar,
- and different prices may be determined from time to time for different areas or for different factories or for different kinds of sugar.

Explanation:— For the purposes of this sub-section, producer means a person carrying on the business of manufacturing sugar."

10. Mr. Chagla, learned counsel for the petitioner-companies, submitted that the material date for payment of price to the producer is the date of delivery and not the date of allotment orders. It was, therefore, contended that for deliveries made after July 29, 1969, the producer was entitled to price as determined by the Notification of that date. There could not be two prices, it was urged, for deli-

veries of sugar made after July 29, 1969. According to the learned counsel the crushing season having come to an end in June the determination of price by the Notification of July 29, 1969 was final and no change could be made in the price so determined by the subsequent Notification of August 1, 1969, more particularly when the change was given retrospective effect.

11. It will, however, be seen that the Notification of August 1, 1969 did not change the price as notified on July 29, 1969 with retrospective effect or even otherwise. It sought to clarify, by addition of a paragraph in the order of July 29, 1969, that any sugar required to be supplied, under an order issued under clause (f) of sub-section (2) of Section 3 of the Act before supersession of the Notification of March 5, 1969, shall be supplied in accordance with the terms and conditions including terms and conditions as to price specified in such order. In other words it merely meant that after the issue of Notification dated March 5, 1969 and before the issue of Notification dated July 29, 1969, any orders made by the Central Government, under clause (f) of sub-section (2) of Section 3, to producers for selling stocks of sugar had to be executed on the terms mentioned in those orders including the price specified therein. As in the allotment orders made on July 1, 1969 it was specifically mentioned that the producer shall be entitled to price as determined by Notification of March 5, 1969, the Notification of August 1, 1969 did not in any way affect the price to be paid for supplies of sugar required to be made with reference to allotment orders issued before July 29, 1969.

12. We are unable to agree with the learned counsel for the petitioner-companies that the price to be paid was the price prevalent on the date of making delivery. Orders for sale of sugar are issued by the Central Government keeping in view actual stocks with producers. These supplies are to be made on the terms specified in the orders. The price to be paid is that which stands determined on the date an order is made under clause (f) of sub-section (2) of Section 3 of the Act. Any re-determination of price subsequent to the making of such an order can only affect supplies to be made with reference to allotment orders issued after the re-determination of price.

13. The above view follows from the provisions of sub-section (3C) of Section 3 of the Act. That sub-section clearly provides that where any producer is required by an order made with reference to clause (f) of sub-section (2) to sell any kind of sugar then "there shall be paid to that producer an amount therefor which shall be calculated with reference to such price of sugar as the Central Government

may, by order determine". A producer is, therefore, only entitled to the price which stands determined on the date on which he is required by an order made with reference to Cl. (f) of sub-section (2) to sell any kind of sugar. The date of delivery is of no consequence and if before the supplies or part of the supplies are delivered a different price is determined, the newly determined price does not affect the supplies made or to be made in pursuance of previous orders.

14. The learned Solicitor General urged on behalf of the respondent, and it seems to us quite justifiably, that the Notification of August 1, 1969, did not make any material modification or change in the Notification of July 29, 1969 and was issued to clarify the existing position. It was stated that even if the Notification of August 1, 1969 had not been issued and had not been circulated through a letter of August 6, 1969 the liability of the petitioner-companies to complete delivery of sugar of the required kind at the price determined by Notification of March 5, 1969, pursuant to allotment orders of July 1, 1969 made under Cl. (f) of sub-section (2) of S. 3 of the Act, would have remained unaffected.

15. By Notification of August 1, 1969 different prices were not determined in respect of sugar required to be sold by producers with reference to orders made after July 29, 1969, under Cl. (f) of sub-section (2) of S. 3 of the Act. For all such allotment orders price was to be paid as determined by the Notification of July 29, 1969. It was only in respect of orders made under Cl. (f) of sub-section (2) of Section 3 before July 29, 1969 that price was to be paid at the rate which stood determined when the allotment orders were issued.

16. We are, therefore, of opinion that the Notification of August 1, 1969 and the circular letter of August 6, 1969 did not materially modify or affect the determination of price made by Notification of July 29, 1969 as the said determination of price was with reference to orders to be made thereafter under Cl. (f) of sub-section (2) of S. 3 of the Act, for selling any kind of sugar whether to the Central Government or a State Govt. or to an officer or agent of such Government or any other person or class of persons. The impugned Notification and the circular letter appear to have been issued by way of abundant caution and even if these had not been issued supplies made in pursuance of allotment orders of July 1, 1969 were to be paid for at the price determined by Notification of March 5, 1969.

The Notification of August 1, 1969 and the circular letter dated August 6, 1969 cannot therefore, be regarded to have been issued arbitrarily or without jurisdiction. At least these did not in any way affect

the existing liabilities or rights of the petitioner-companies regarding the allotment orders of July 1, 1969. Thus the grievance of the petitioner-companies that they were made to part with sugar at a somewhat lower price without the authority of law or that there was any contravention of Art. 31 of the Constitution is without any real basis. For Zone IV price was determined by the Notification of July 29, 1969 at the rate of Rs. 153.75 per quintal instead of Rs. 158.20 per quintal as was determined by the Notification of March 5, 1969. If the price determined by Notification of July 29, 1969 for Zone III, in which sugar mills of the petitioner-companies are situate, had been lower than the price determined by Notification of March 5, 1969 the petitioner-companies, obviously, would have been entitled to be paid the higher price on the ground that the supplies were to be paid for at the price which stood determined when allotment orders were issued to them.

17. Another contention raised on behalf of the petitioner-companies was that sale of sugar could only be completed on delivery being made and the sale price must, therefore, have reference to the date of delivery and not the date of making an order under Cl. (f) of sub-section (2) of Section 3 of the Act.

18. The above submission is part of the general argument that the price which stands determined on the date of supply of sugar has to be paid to the producer rather than the price prevalent on the date of making an order under Cl. (f) of sub-section (2) of S. 3 of the Act and which price is specifically mentioned in the order as the price to which the producer is entitled. As already discussed the date of delivery is not the material date. As the Central Government has the power to require any producer holding any stock of sugar to sell the whole or a specified part of the stock and to determine the price to be paid to the producer therefor the date on which sale is completed or delivery of sugar is made is not the relevant date. For supplies made in pursuance of an order under Cl. (f) of sub-s. (2) of S. 3 of the Act the producer is only entitled to the price already determined, at which he is required to make the supplies. A Bench of this Court had also held in *Saraswati Industrial Syndicate Ltd. v. Union of India*, Civil Writ No. 1218 of 1967, D/- 10-10-1967 (Delhi) that the price determined from time to time is not liable to adjustment on the basis of price determined at the end of the crushing season.

19. There being no merit in the writ petitions the same are dismissed with costs. The counsel fee for each case shall be assessed at Rs. 300/-.

HARDY, J.: 20. I agree.

Petitions dismissed.

AIR 1970 DELHI 261 (V 57 C 56)

(HIMACHAL BENCH)

OM PARKASH, J.

Shiv Saran Dass, Petitioner v. Union of India, Defendant.

Civil Revn. No. 19 of 1968, D/- 31-3-1970.

(A) Railways Act (1890) (as amended in 1961), S. 73 (new) — Effect of amendment — Liability of railway for loss of goods — When onus of proof shifts on railway.

Prior to the amendment in 1961 the responsibility of the Railway Administration, with respect to loss, non-delivery etc. of the goods entrusted for carriage by railway was that of a bailee only. The amendment made the liability as of a common carrier. (Para 11)

Even when the railway administration can claim exemption from liability under any of the clauses of S. 73 (new) the burden is cast on the railway administration to prove further that it had exercised reasonable foresight and care in the carriage of goods. (Para 12)

(B) Railways Act (1890) (as amended in 1961), S. 77-C — Section does not refer to loss or non-delivery — Railway administration when can be absolved of its liability for short delivery.

Section 77-C does not refer to loss or non-delivery of goods. It refers to damage, deterioration, leakage or wastage. To get itself absolved from liability for damage etc. the railway administration must prove (1) that the goods were defectively packed (2) that the defective packing was recorded by the sender or his agent in the forwarding note (3) that the defective packing was not brought to the notice of the railway administration at the time of the delivery of the goods for carriage. S. 77-C does not absolve railway of its responsibility for short delivery. AIR 1960 Pat 571, Dist. (as decided prior to 1961 amendment). (Para 14)

So, once loss, non-delivery or damage is proved, it is not for the claimant to establish negligence or misconduct on the part of the Railway. (Para 12)

Cases Referred: Chronological Paras (1960) AIR 1960 Pat 571 (V 47),

Sarjug Prasad v. Union of India 15

Chhabil Dass, for Petitioner; R. S. Phul, for Defendant.

ORDER:— This revision petition is directed against an order of the learned Judge, Small Cause Court, Simla whereby he dismissed a suit of the petitioner for the recovery of Rs 347-56 paise. The allegations of the petitioner, in the plaint, were as under:—

2. The petitioner is the sole proprietor of the firm known as Messrs. Dewan Chand Atma Ram, 47, the Mall, Simla. The

firm is dealing in wool and other goods. A consignment, containing one case of wool was sent to the petitioner by Bengal National Textile Mills Limited, Calcutta from Howrah, vide R. R. No. 052528 dated 2-11-1964. Due to the misconduct and negligence of the Railway Administration, the above consignment reached Simla in a damaged condition. The petitioner had taken open delivery of the goods and it was found that 29 packets of Raj Hans knitting wool were short. The shortage certificate was obtained from the Chief Goods Clerk on 15-12-1964. The certificate was sent to the Chief Commercial Superintendent (Claims Branch), Kashmere Gate, Delhi along with the letter of the petitioner dated 22-12-1964 in which claim for shortage was made against the Railway Administration. On account of the misconduct and negligence of the Railway Administration, the petitioner suffered loss amounting to Rs. 347-56 paise. The petitioner prayed that a decree for the recovery of Rs. 347-56 paise be passed against the respondent, Union of India.

3. The suit was contested on behalf of the respondent. The respondent did not admit that the petitioner was the sole proprietor of the firm known as Messrs. Dewan Chand Atma Ram. The respondent did not deny that the consignment was booked at Howrah on the basis of R. R. No. 052528 dated 2-11-1964. The respondent did not specifically deny the shortage in the consignment. However, it pleaded that the shortage, if any, was not due to any negligence or misconduct on the part of the Railway Administration or its employees. The plea of the respondent was that the shortage, if any, was due to defective packing of the consignment at the time of booking. The respondent did not admit that the value of the goods, delivered short, was Rs. 347-56 paise. The respondent also challenged the validity of the notice under Section 78-B Indian Railways Act. The respondent pleaded that no notice under Section 80, Civil P. C., appeared to have been served.

4. On the pleadings of the parties, the learned Judge, Small Cause Court formulated the following points for determination:—

1. Whether the plaintiff is the sole proprietor of the concern known as Messrs. Dewan Chand Atma Ram?
2. Whether there was a short delivery of 29 packets of wool to the plaintiff?
3. What was the value of the goods delivered short?
4. Whether short delivery was the result of misconduct or negligence on the part of the Railway Administration?
5. Whether such short delivery was on account of defective packing of the consignment at the time of booking?

6. Whether the plaintiff served the requisite notices under S. 78-B of the Indian Railways Act and S. 80, Civil P. C. before filing the suit?

7. To what relief, if any, the plaintiff is entitled?

5. The learned Judge. Small Cause Court found points 1, 2, 3, 5 and 6 in favour of the petitioner, points Nos. 4 and 7 were decided against the petitioner and his suit was dismissed.

6. Aggrieved by the dismissal of his suit, the petitioner has come up in revision.

7. The learned counsel for the petitioner contended that the finding of the trial Court on point No. 4 was erroneous. The learned counsel argued that the trial Court had wrongly held that it was for the petitioner to prove negligence or misconduct of the Railway Administration. According to the learned counsel, the burden lay on the Railway Administration to furnish an explanation about short delivery.

8. The learned counsel for the respondent controverted the contentions of the learned counsel for the petitioner. He also supported the order of the trial Court on the grounds decided against the respondent.

9. There is un rebutted statement, made on oath, of the petitioner that he was the sole proprietor of the concern, Messrs. Dewan Chand Atrna Ram and that the value of the goods short delivered, including sales tax, was Rs. 347-56 paise. The trial Court had accepted the statement. There is absolutely no valid reason to take a different view. The findings of the trial Court on points Nos. 1 and 3 are upheld.

10. Regarding short delivery, besides the statement of the petitioner, that 29 packets were delivered short, there are letters Ex. P. 1, Ex. P. 5 and Ex. P. 7, showing that there was short delivery. Letter Ex. P. 1 was addressed to the Chief Commercial Superintendent, Claims Branch, requesting for the payment of Rs. 347-56 paise for short delivery of 29 packets. It was stated in the letter that open delivery of the consignment was taken and that shortage certificate was obtained from the Chief Goods Clerk, Simla. That certificate was enclosed with the letter. No reply was received to this letter. The petitioner then sent the letter Ex. P. 5 as a reminder. Ex. P. 7 is the letter received by the petitioner from the office of the Chief Commercial Superintendent Claims Branch. The letter asked the petitioner to submit the original Trade Invoice. This letter did not question that there was short delivery of 29 packets. The respondent did not produce any rebuttal evidence. As already stated, short delivery was not specifically denied by the respondent in the written statement. It

stood established that there was short delivery of 29 packets of wool.

11. So far as point No. 4 is concerned, the trial Court appears to have misunderstood the legal position. The consignment had been booked and there was short delivery in November-December 1964. The Indian Railways (Amendment) Act, 1961, had effected far-reaching changes in the Indian Railways Act, as it stood before. Prior to the Amendment Act, the responsibility of the Railway Administration, with respect to loss, non-delivery etc. of the goods, entrusted for carriage by railway, was that of a bailee only. The amendments, introduced by the Amendment Act, made the liability of the Railway Administration as of a common carrier. The new Section 73 of the Indian Railways Act provides—

"Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage, deterioration or non-delivery, in transit of animals or goods delivered to the administration to be carried by railway, arising from any cause except the following, namely,—

- (a) act of God,
- (b) act of war,
- (c) act of public enemies,
- (d) arrest, restraint or seizure under legal process,
- (e) orders or restrictions imposed by the Central Government or a State Government or by any officer or authority subordinate to the Central Government or a State Government authorised in this behalf,
- (f) act or omission or negligence of the consignor or the consignee or the agent or servant of the consignor or the consignee,
- (g) natural deterioration on or wastage in bulk or weight due to inherent defect, quality or vice of the goods,
- (h) latent defects,
- (i) fire, explosion or any unforeseen risk.

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery unless the administration further proves that it has used reasonable foresight and care in the carriage of the animals or goods."

12. It is clear, from a perusal of the above provisions, that the Railway Administration is responsible for loss, destruction, damage, non-delivery etc. of goods while in transit except in the cases where the cause of damage etc. is act of God, act of war etc. Even when the Railway Administration can claim exemption from liability in any of the aforesaid

causes, the burden is cast upon the Railway Administration to prove further that it had exercised reasonable foresight and care in the carriage of goods. It follows that once loss, damages, non-delivery etc. is proved, the burden shifts on to the Railway Administration to prove that it is not liable. It is not for the claimant to establish negligence or misconduct.

13. In the present case, short delivery of 29 packets was proved. It was for the Railway Administration to prove that it was not responsible for short delivery. The plea of the respondent was that short delivery was due to defective packing and the Railway Administration was not responsible for short delivery under Section 77-C of the Indian Railways Act. That section reads:—

"(1) When any goods tendered to a railway administration to be carried by railway,—

(a) are in a defective condition as a consequence of which they are liable to damage, deterioration, leakage or wastage, or

(b) are either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (4), and as a result of such defective or improper packing are liable to damage, deterioration, leakage or wastage and the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, then notwithstanding anything contained in the foregoing provisions of this Chapter, the railway administration shall not be responsible for any damage, deterioration, leakage or wastage or for the condition in which such goods are available for delivery at destination, except upon proof of negligence or misconduct on the part of the railway administration or any of its servants.

(2) When any goods delivered to a railway administration to be carried by railway are found on arrival at destination to have been damaged or to have suffered deterioration, leakage, or wastage, then, notwithstanding anything contained in the foregoing provisions of this Chapter, the railway administration shall not be responsible for the damage, deterioration, leakage or wastage of the goods on proof by the railway administration,—

(a) that the goods were, at the time of delivery to the railway administration, in a defective condition or were at that time either defectively packed or packed in a manner not in accordance with the general or special order, if any, issued under sub-section (4) and as a consequence of such defective condition or defec-

tive or improper packing were liable to damage, deterioration, leakage or wastage, and

(b) that such defective condition or defective or improper packing was not brought to the notice of the railway administration or of any of its servants at the time of delivery of the goods to the railway administration for carriage by railway:

Provided that the railway administration shall be responsible for any such damage, deterioration, leakage or wastage if negligence or misconduct on the part of the railway administration or any of its servants is proved.

(3) A railway administration shall not be responsible under sub-section (1) or sub-section (2) for any damage, deterioration, leakage or wastage occurring after the expiry of the period of thirty days after the termination of transit as defined in sub-section (5) of S. 77.

(4) The Central Government may, by general or special order, prescribe the manner in which goods delivered to a railway administration to be carried by railway shall be packed."

14. It is to be noted that the aforesaid section does not refer to loss or non-delivery of goods. It refers only to damage, deterioration, leakage or wastage. The present case is a case of short delivery. It is, further, to be noted that the section lays down certain circumstances, to be proved by the Railway Administration, before it can be absolved from its responsibility. The first circumstance to be proved is that the goods were defectively packed. The second circumstance to be proved is that the fact of defective packing was recorded by the sender or his agent in the forwarding note. Under sub-section (2), it is to be proved that defective packing was not brought to the notice of the Railway Administration at the time of the delivery of goods for carriage. Reliance was placed, on behalf of the respondent, on the note made on R. R. No. 052528 dated 2-11-1964. The R. R. is marked as Ex. P. W.1/1. The note referred to is not decipherable on the R. R. The note was quoted in the written statement and was also put to the petitioner when he had appeared as his own witness. The note shows that the packing was defective. But there is no evidence that the fact of defective packing was recorded by the sender in the forwarding note. The note made on Ex. P. W. 1/1 is a clear proof of the fact that defective packing was within the knowledge of the servants of the Railway Administration. In the circumstances of the case the respondent was not absolved from responsibility for short delivery under Section 77-C of the Indian Railways Act.

15. The trial Court had placed reliance on Sarjug Prasad Ishwar Purbey v.

Union of India. AIR 1960 Pat 571. That case is distinguishable from the present case. That case was decided under the Indian Railways Act as it stood before its amendment by the Railways (Amendment) Act, 1961. Further, that was a case where the goods had been booked on owner's risk rate. In the present case, the goods had been booked on railway risk rate.

16. For the reasons stated above, I am of the opinion that the learned Judge, Small Cause Court was in error in holding that the petitioner had failed to prove that short delivery was the result of misconduct or negligence on the part of the Railway Administration. As the petitioner had established short delivery of goods, the burden shifted on to the Railway Administration to prove that it was not responsible for short delivery. The respondent has failed to discharge that burden. It was, therefore, liable to pay Rs. 347.56 paise to the petitioner for short delivery of goods.

17. Point No. 6, formulated by the trial Court, remains to be dealt with. The copy of the claim submitted to the Railway Administration, is Ex. P-1. The copy of the notice under Section 80, Code of Civil Procedure, is Ex. P-3. The learned counsel for the respondent failed to point out any defect in the claim or in the notice. The finding of the trial Court on point No. 6 is upheld.

18. The result is that the decision of the learned Judge, Small Cause Court dismissing the suit of the petitioner is not in accordance with law and is erroneous. It is set aside. The revision petition is allowed and the suit of the petitioner for the recovery of Rs. 347.56 paise with costs of both the Courts is decreed against the respondent.

Petition allowed.

AIR 1970 DELHI 264 (V 57 C 57)

JAGJIT SINGH, J.

Prabhati Chuni and others, Appellants v. State, Respondent.

Criminal Appeals Nos. 99 to 102 of 1969, D/- 13-7-1970 against Order of Asst. S. J. Delhi, D/- 31-7-1969.

(A) Criminal P. C. (1898), S. 339 (1) Proviso — Joint trial of accused forfeiting pardon.

Accused, tendered pardon, refusing to give evidence for prosecution — Refusal results in forfeiture of pardon as it amounts to wilful concealment of facts essential for prosecution — Accused cannot be jointly tried with other accused in the case. AIR 1954 SC 616 & AIR 1960 Madh Pra 63, Relied on; 1906-4 Cri LJ 142 (All) & AIR 1924 Mad 391, Held no longer good law. (Paras 17, 18)

HN/IN/D857/70/MKS/T

(B) Criminal P. C. (1898), S. 537 — Failure of justice.

Accused, forfeiting pardon, jointly tried with other accused in contravention of proviso to S. 339 (1) and his confessional statement used against the others — Other accused are prejudiced thereby — Trial prejudices accused also as it deprives him of opportunity to plead that he has complied with condition of pardon — Conviction of all accused must be set aside. (Para 18)

Cases Referred: Chronological Paras (1960) AIR 1960 Madh Pra 63 (V 47)

= 1960 Cri LJ 238, State of Madhya Pradesh v. Dalchand Hardayal 14A

(1954) AIR 1954 SC 616 (V 41) = 1954 Cri LJ 1638, A. J. Peiris v. State of Madras 14A, 16

(1924) AIR 1924 Mad 391 (V 11) = 25 Cri LJ 210, Basireddi Narappa v. Emperor 15

(1906) 4 Cri LJ 142 = ILR 29 All 24, Emperor v. Budhan 15

Charanjit Talwar, Amicus Curiae, for Appellants.

JUDGMENT:— Hukam Singh, Bal Kishan, Ram Singh, Rattan, Lekhan and Prabhati alias Parshadi were tried by Shri Jagdish Chander, Assistant Sessions Judge, Delhi. They were alleged to have committed dacoity on the night between the 21st and the 22nd October, 1965, while armed with deadly weapons in the house of Neel Kanth in Radhapuri Colony. Hukam Singh, Ram Singh, Rattan and Prabhati alias Parshadi were found guilty under Section 397 of the Indian Penal Code and each one of them was sentenced to seven years rigorous imprisonment. Bal Kishan and Lekhan were given benefit of doubt and were acquitted.

2. Four separate appeals were filed by the convicted persons, which were registered as Nos. 99, 101 and 102 of 1969.

3. It may be mentioned that on the night of the occurrence Neel Kanth was sleeping in a room of his house. His wife and their five children, including Geeta a girl of about 19 years of age, were in an adjoining room. The elder brother of Geeta, Ramesh Chander, was lying in a separate room which had no door shutters.

4. Ramesh Chander (P.W. 3), at about 11-30 in the night, heard the sound of some persons jumping over a wall of the compound. He saw that ten or twelve men were entering the verandah of the house out of whom two persons came to his room and gave lathi blows to him on his left ear due to which he became unconscious. During the trial Hukam Singh and Rattan Singh were identified by him as the persons who had entered his room. He also stated that his marriage had been fixed for November 1965

and, therefore, sarees and jewellery has been purchased. A ring and some sarees purchased by him from his earnings were mentioned to have on them the initials of "RC".

5. The evidence given by Neel Kanth (P.W. 4) was that on hearing the sound of footsteps in the courtyard of his house he peeped out of a window and saw seven or eight persons in the open verandah. He asked them as to who they were to which they replied that they were policemen. Those persons were then stated to have broken open the door of his room and to have given him and his wife, who had in the meantime come there from the adjoining room, lathi blows. According to him he became unconscious and only regained consciousness on the next day in a hospital.

6. The version of Geeta (P.W. 1) was that when the dacoits broke open the outer door of her father's room four or five of them gave lathi blows to her father and two of them took out her mother in the verandah where she was caused injuries. She also stated that on being threatened she removed her Ballis (ear rings) and handed those over to the dacoits who then started removing boxes from a shelf (parchhati) in the room where she and some others had been sleeping. From her father's room a box and an attache case containing ornaments and sarees were removed. It was added by her that the dacoits also gave beating to a chowkidar who was lying outside the house and when they had left she went to Ariun Nagar for help. Someone in that colony telephoned to the police and when the police arrived she made a report (Exhibit P.W. 1A) about what had happened.

7. Lajwanti (P. W. 2), wife of Neel Kanth, supported the prosecution version. According to the above-named witnesses the dacoits had torches with them in the light of which they could be seen.

8. It so happened that in connection with the investigation of some other dacoity case Inspector Bhim Singh, who in the year 1965 was posted as Station House Officer Nangloi, arrested on October 31, 1965 Hukum Singh, Ram Singh, Bal Kishan and one Ram Saran alias Ram Charan from old Delhi main Railway Station. On the same day Hukum Singh was alleged to have made a disclosure statement and then to have taken the police to village Barondi to the houses of Rattan and Lakhani. From the search of their houses certain articles were recovered including sarees. Another disclosure statement dated November 16, 1965 was attributed to Hukum Singh resulting in the recovery of one handkerchief containing certain articles from a corner of the Jhuggi of one Babu Bawaria in village Rabhupura. One of the recovered arti-

cles was the gold ring having the initials of Ramesh on it. On December 12, 1965 Hukum Singh was as well stated to have made a confessional statement before Shri Sat Narain, Sub-Divisional Magistrate, Shahdara Circle.

9. The story of Neel Kanth, Ramesh and Lajwanti receiving injuries at the hands of dacoits is beyond doubt and finds corroboration from medical testimony. The only matter agitated before the trial judge and in appeals was about the identity of the alleged dacoits.

10-11. The appellants not being represented Shri Charanjit Talwar, Advocate, agreed to act as amicus curiae and argued the cases with ability. It was urged by him that Hukum Singh had been tendered pardon under provisions of Section 337 of the Code of Criminal Procedure which was duly accepted by him and he could not be tried jointly with the other accused. The joint trial was stated to have caused prejudice. On merits as well it was submitted the case was not free from doubt.

12. The record of the case shows that on February 24, 1966 the police had produced Hukum Singh before Shri R. Jain, Additional District Magistrate, Delhi, for being tendered pardon. The Additional District Magistrate after recording the statement of Hukum Singh passed an order under Section 337 of the Code of Criminal Procedure, tendering pardon on the condition of his making full and true disclosure of the whole of the circumstances within his knowledge relative to the offence of dacoity and the offenders concerned therein whether as principals or abettors. The Additional District Magistrate had also read over and explained the order tendering pardon to Hukum Singh who accepted the pardon on the conditions contained in the order.

13. On March 1, 1966 Hukum Singh was produced before Shri Sukh Raj Bahadur, Sub-Divisional Magistrate, Sadar Bazar, Delhi, for his statement being recorded. He, however, expressed his unwillingness to make any statement. The Sub-Divisional Magistrate, therefore, directed him to be produced before the Additional District Magistrate for "further orders". The Additional District Magistrate, on March 8, 1966 cancelled the pardon which had been tendered on February 24, 1966 by remarking that Hukum Singh had stated before him that he did not want to be an approver.

14. Section 339 of the Code of Criminal Procedure provides that where a pardon has been tendered under Section 337 and the Public Prosecutor certifies that in his opinion any person who has accepted such tender, has either by wilfully concealing any facts essential or by giv-

ing false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter. A proviso to sub-section (1) of this section, inserted by Act 18 of 1923, enjoin that such person shall not be tried jointly with any of the other accused and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made, in which case it shall be for the prosecution to prove that such conditions have not been complied with.

14A. In *A. J. Peiris v. State of Madras*, AIR 1954 SC 616 Ghulam Hassan, J., while delivering the judgment on behalf of himself and Chief Justice Mahajan and Bose, J. observed that the moment pardon was tendered under Section 337 of the Code of Criminal Procedure the accused must be presumed to have been discharged whereupon he ceases to be an accused and becomes a witness. The Madhya Pradesh High Court in *State of Madhya Pradesh v. Dalchand Hardayal*, AIR 1960 Madh Pra 63 held that though Section 339 does not expressly say as to how the approver is to be treated if he refused to give evidence on behalf of the prosecution impliedly it is obvious that the holding back of his evidence amounts to wilfully concealing the facts which are essential for the prosecution. It was further held that an approver where he gives false evidence or is unwilling to step in the witness box on behalf of the prosecution forfeits his pardon and can be tried for the offence in respect of which he was tendered pardon but according to the proviso to sub-section (1) of Section 339 of the Code of Criminal Procedure the approver cannot be tried jointly with the other accused in the case.

15. The learned counsel for State relied upon *Emperor v. Budhan*, 1906-4 Cr LJ 142 (All) and *Basireddi Narappa v. Emperor*, AIR 1924 Mad 391. In the first of the above mentioned cases an accused who had an opportunity of cross-examining the prosecution witnesses was tendered pardon on condition of his making a true disclosure but after accepting that pardon he refused to make any statement saying that he knew nothing. The Magistrate revoked the pardon and committed him to the Court of Session along with the other accused. A Bench of the Allahabad High Court held that there was no illegality in the Magistrate's procedure. In the other case the Madras High Court took the view that when an accused person rejects the conditional pardon tendered to him and refused to give evidence as an approver before he is put into

the box, his action does not amount to forfeiture of his pardon so as to make his case fall under Section 339 and bar his joint trial with the other accused persons. The acceptance of the pardon, it was considered, should continue in force till the accused actually gives evidence and then if he forfeits the pardon by not making a full and true disclosure of facts within his knowledge he should be separately tried.

16. With great respect, it seems to me, that after the insertion of the proviso to sub-section (1) of Section 339 of the Code of Criminal Procedure the view taken in the cases relied upon by the learned counsel for State can no longer be accepted as laying down the correct law. The dictum laid down by their Lordships of the Supreme Court in the case of *A. J. Peiris*, AIR 1954 SC 616 does not support that view. *A. H. Khan, J.* in the case of *Dalchand*, AIR 1960 Madh Pra 63 referred to above, dissented from the case of *Basireddi Narappa*, AIR 1924 Mad 391 and in that connection made the following observations:—

"The learned Judges of the Madras High Court no doubt have taken a view that when an accused person rejects the conditional pardon tendered to him and refused to give evidence as an approver, his action does not amount to forfeiture of his pardon so as to make his case fall under Section 339, and that in the circumstances there is no bar to his joint trial with the other accused persons. It seems that there was conflict of opinion as to whether an approver, who has broken the condition of pardon could be tried (for the offence for which he was tendered pardon) along with other accused or not. This controversy was resolved by the enactment of Proviso that was added to clause 1 of sub-section (1) of Section 339 of the Criminal Procedure Code in year 1923. Perhaps the attention of the learned Judges of the Madras High Court was not directed towards the proviso, which had been incorporated a few months earlier.

Moreover, in examining the dictum on merits, the view of the learned Judges that while rejecting the pardon, the accused does not forfeit his pardon, requires reconsideration. If the rejection of the pardon by the approver does not amount to forfeiture of his pardon (as stated by the learned Judges of the Madras High Court) then the pardon continues and if the pardon continues, he can be tried neither jointly nor separately for any offence. Anyway, the proviso which was added to Section 339(1) by the Amendment of 1923 sets all doubts at rest and it is now clear that an approver who has resiled from his promise to make a full and true disclosure of facts within his

knowledge, cannot now be tried jointly with other accused in the case."

17. Once the pardon was tendered and was accepted by Hukam Singh he ceased to be an accused and became a witness as observed in the above referred to Supreme Court case. Thereafter he could not be tried jointly with the other accused and could only be tried for the offence in respect of which the pardon was tendered or for any offence of which he may have appeared to have been guilty in connection with the same matter in accordance with the provisions of Section 339 of the Code of Criminal Procedure.

18. Obviously the trial of Hukam Singh jointly with the other accused was against the provisions of the proviso to sub-section (1) of Section 339 of the Code of Criminal Procedure. As an alleged confessional statement made by Hukam Singh was also taken into consideration against the other appellants they were obviously prejudiced. Hukam Singh was also prejudiced by the joint trial as he was deprived of the opportunity of pleading that he had complied with the conditions upon which tender was made. The conviction of the appellants cannot, therefore, be sustained. The appellants having already been in custody for nearly five years even a retrial would not be in the interest of justice.

19. On merits as well the case against the appellants is not altogether free from doubt. The night on which the occurrence took place was admittedly a dark one. The house of Neel Kanth had yet to be provided with electric connection and there were no other lights. The glimpses which the inmates of the houses had in the momentary flashes of torch lights, at a time when they were naturally greatly agitated, could not normally enable them to properly identify the dacoits. It was probably for that reason that in the report made by Geeta only a very general description of the dacoits was given.

20. The confessional statement of Hukam Singh was recorded on December 24, 1965 by Shri Sat Narain, Sub-Divisional Magistrate. On the day Hukam Singh was arrested a disclosure statement was alleged to have been made by him which almost amounted to a full confession. If Hukam Singh was prepared to make a clean breast of everything on October 31, 1965 then it is not clear why he should not have shown his willingness to make a confessional statement before a Magistrate for about two months. At any event the possibility of the confessional statement having been made in view of some promise for tendering pardon to him can also not be eliminated. Considering all the circumstances of the case it is difficult to hold the confessional statement to have been made voluntarily.

So far as identification of Hukam Singh during the trial was concerned that too, in my opinion, was not such on which a conviction may be safely based. The disclosure statement alleged to have been made on November 16, 1965, is also not free from suspicion.

21. Though Parbhathi was identified by Geeta and Lajwanti but there is no other evidence to connect him with the alleged offence. The position of Ram Singh is almost similar. So far as Rattan is concerned he was not identified by any one during the identification parade.

22. The conviction of the appellants for committing dacoity along with others while being armed with deadly weapons is not altogether free from doubt. The joint trial of Hukam Singh and the other accused was also irregular and against the provisions of the proviso to sub-section (1) of Section 339 of the Code of Criminal Procedure and in the circumstances of the case has caused prejudice. The appeals are, therefore, accepted and the conviction and sentence of each of the appellants are set aside.

Appeals allowed.

AIR 1970 DELHI 267 (V 57 C 58)

RAJINDAR SACHAR, J.

Bishan Dass Mehta and others, Petitioners v. Union of India and others, Respondents.

C. W. No. 33-D/ of 1961, D/- 24-4-1970.

(A) Prevention of Food Adulteration Act (1954), Section 2 (v) — 'Food' — Test to determine — Definition wide enough to include Katha (Catechu).

In order that an article should be food within the meaning of the Act it is not essential that it must be an article which is consumed by human being as such. Katha is admittedly used in composition of Pan and, therefore, would be governed by the definition of food given in Section 2(v) of the Act. To constitute food what has to be seen is whether the article in question is usable and enters into the composition or preparation of food which is taken by human beings. The definition is worded in a very wide language and would govern any article which enters into the composition or preparation of human food and would cover any flavouring matter and condiments. AIR 1955 NUC (All) 169 & (1918) 88 LJKB 441, Rel. on. (Paras 15, 16)

(B) Constitution of India, Art. 226 — Who can apply — Person aggrieved — Writ petition by mere dealers in katha challenging validity of Rule prescribing certain standards of quality for manufacture of katha on ground that they were impossible of attainment — Petitioners cannot make such grievance which con-

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cerns only persons engaged in manufacture of katha. (Para 20)

(C) Prevention of Food Adulteration Rules (1955), R. 5, Appendix B, Item A-21 — Standard prescribed for katha cannot be said to be impossible of attainment — Rule is not ultra vires on ground that it is unreasonable and high. (Para 20)

Cases Referred: Chronological Paras (1955) AIR 1955 NUC (All) 169

(V 42) = 1954 All LJ 612, Chitar

Mal v. State 18

(1952) AIR 1952 SC 335 (V 39) =

1952 Cri LJ 1406, State of Bom-

bay v. Virkumar Gulabchand 5

Shah

(1918) 88 LJB 441 = 120 LT 120,

Sainsbury v. Saunders 16

(1894) 1 QB 304 = 63 LJM 41,

James v. Jones 17

N. D. Bali and Roshan Lal, for Petitioners; K. S. Chawla, for Respondents.

ORDER:— The question that arises in this petition is whether Katha is included within the meaning of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) and whether Item A-21 of Appendix B of Rule 5 of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the Rules) is ultra vires of the Act and the Constitution of India.

2. In this petition under Article 226 of the Constitution of India prayer is made for a writ restraining the respondents, Union of India and the Delhi Municipal Corporation, Delhi, from interfering with the petitioners' trade of Katha (Catechu) and from enforcing the restrictions laid down in Item A-21 of Appendix B under Rule 5 of the Rules framed under the Act.

3. The petitioners are members of the Katha Dealers Association, Delhi and they are commission agents and wholesale merchants of the raw material from which Katha of various qualities for different purposes is manufactured. It is alleged that Katha represents two varieties of Catechu derived from the heartwood of the Khair tree and the raw material of Katha is manufactured from those trees. It is also alleged that making Katha fit for edible purposes better qualities of raw material are put into a huge quantity of water and boiled and strained through thin cloth. It is this kind of solution which is applied as a paste along with lime on betel leaves used for chewing. It is alleged that Katha is never eaten or consumed as food. It is stated in the petition that the Central Government by means of Notification dated 14-7-1956 added Item A-21 in Appendix B of Rule 5 of the Rules prescribing the standard laid down for edible Katha. It is stated that the standard prescribed in the said Rules is of the highest possible qua-

lity and it is impossible to conform to the standard. It is stated that the respondents have started checking up the stock of Katha with the wholesale dealers and seizing the same if it is not in accordance with the prescribed standard laid down under the Rules. This is said to be in violation of the Fundamental Rights of the petitioners and it is claimed that the Rules are ultra vires of the Act and sub-articles (5) or (6) of Article 19 of the Constitution of India. It is also stated in the petition that Item A-21 in Appendix B of Rule 5 of the Rules had been framed without previous publication and without laying it before the Houses of Parliament as is required by the Act. It is stated that no Katha in the market conforms to the prescribed standard and the tests made by the Public Analyst on some of the samples of Katha are given in annexures P-1 to P-3 to the petition.

4. This writ petition was admitted on 31-1-1961. Along with the said writ petition a stay application namely C.M. 228-D of 1961 was filed. But apparently it was not pressed at the time the matter came up before the Motion Bench. Later on C.M. 1451-D of 1961 was filed in which it was stated that the respondents have taken samples of Katha and were threatening to seize stocks of Katha and have also started prosecution of the petitioners. It was stated that the next date of hearing of the case was 17-7-1961 and a prayer was made for restraining the respondents from enforcing the impugned restrictions against the Katha dealers of Delhi and from prosecuting the petitioners. Ex parte stay of proceedings was ordered by Gosain J. on 17-7-1961. Harbans Singh J. on 24-1-1962 confirmed the stay given by Gosain J. and ordered that the main petition be expedited and heard, if possible, during February, 1962.

5. Return was filed on behalf of respondent No. 1 i.e., Union of India by Dr. M. S. Chadha, Deputy Director General of Health Services dated 28-11-1961. It was maintained that Katha and Cutch do not represent two varieties of Catechu derived from heartwood of the Khair tree, Katha is crystallised from the heartwood extract whereas Cutch represents the residual product obtained after Katha is separated. It was stated that Katha is not a raw material and is mainly used by panwalas by only mixing water and making a paste out of it or by straining it and then boiling the residue to a paste. It was maintained that Katha is food or at any rate an adjunct to food. It was stated that the minimum standards of quality for catechu have been prescribed by the Central Government in exercise of the power vested in them, vide Clause (b) of sub-section (1) of Section 23 of the Act. It was denied that the draft rules regarding the standards of catechu were not

published or were not placed before the Parliament. It was specifically stated that the rules regarding the standards of quality were published on 14-7-1956 after consultation with the Central Committee of Food Standards. The said copies of notifications were laid on the table of the Lok Sabha and the Rajya Sabha on August 3, 1956 and August 5, 1956. It was maintained that the petitioners had not stated the correct facts before this court and the petition was liable to be dismissed on this ground alone. It is stated that the quality of tree does not materially affect the quality of the product. Katha is usually extracted during the winter season and, therefore, the question of season does not arise. It is strongly maintained that Katha obtained by indigenous process can be as good and pure, if not superior, as the machine made product. It is asserted that the standards prescribed in appendix B of Rule 5 of the Rules are the minimum standards required for Katha which form the major bulk of the good quality products in the country. It was denied that the standard was of highest possible quality. Katha sold by the petitioners was food within the meaning of the Act. It was further stated that large stock of heavily adulterated Katha is lying with the petitioners for sale and does not conform to the prescribed standards and that the Government is entitled to enforce the provisions of the Act and the Rules. It is denied that there is any invasion of the Fundamental Rights of the petitioners or that the Rules were in any case ultra vires. It is also submitted that the Act provides for the cognizance of offence under the Act and the proper remedy for the petitioners is to make a proper defence when the penal action is taken against them.

6. The petitioners also filed C.M. 502-W of 1970 in which certain documents were filed. One of the documents, annexure P-6 was said to have been the report of a sub-committee issued by the Indian Standard Institution. This sub-committee is said to have recommended that there should be three grades of Katha namely grades 1, 2 and 3. It was said that this committee was of the opinion that the standard laid down for Katha in the Rules is highly unreasonable and did not relate to the facts as they exist.

7. A reply was filed on behalf of the respondent by Shri D. S. Chadha, Assistant Secretary (P.F.A.), Directorate General of Health Services and it was maintained that Katha entered into human consumption with Pan which is ordinarily taken by human beings. It was also maintained that the sub-committee mentioned by the petitioners is not a sub-committee of the Central Government for food standards but is a sub-committee of the Indian Standard Institution. It was

denied that the sub-committee has ever opined that the standard laid down for Katha in the Rules is highly unreasonable and did not relate to the facts. It was stated that the method of sampling given in Indian Standard Institution Publication had no relevancy to the case. The method to be adopted for sampling of the food for the purpose of the Act was laid down by the Rules and it is these methods alone which are to be followed.

8. Mr. Bali, the learned counsel for the petitioners raised the following points before me:—

1. that Katha is not a food within the meaning of the Act and hence no prosecution or action can be taken against the petitioners in pursuance of any provisions of the Act and the Rules.

2. that the standards prescribed for Katha are impossible of fulfilment and are unreasonable and, therefore, standard A-21 of Appendix B of Rule 5 of the Rules is ultra vires.

9. It is necessary to mention that though in the petition grievance has been made that the addition of A-21 of Appendix 'B' of Rule 5 of the Rules was bad because it had not been framed after previous publication and after laying it before the Parliament, no arguments were addressed by Mr. Bali on this point, and rightly so because there was categorical assertion in the written statement that the draft rules were duly published and were also laid on the table of the Parliament. In view of that fact Mr. Bali did not challenge the vires of the Rules on this ground.

10. Before I deal with the arguments of Mr. Bali it is necessary to reproduce the relevant provisions of the Act and the Rules. Section 2(v) of the Act defines 'Food' as follows:—

"Food, means any article used as food or drink for human consumption other than drugs and water and includes:—

- (a) any article which ordinarily enters into, or is used in the composition or preparation of human food, and
- (b) any flavouring matter or condiments."

11. Section 7 of the Act reads as follows:—

"No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute:—

- (i)
- (ii)
- (iii)
- (iv)

- (v) any article of food in contravention of any other provision of this Act or of any rule made thereunder."

12. Section 16 provides for penalties if any person sells or manufactures for sale any article of food which is adulte-

rated or which is in contravention of any provision of this Act or any of the Rules made thereunder.

13. In exercise of the power conferred by sub-section (2) of Section 4 and sub-section (1) of Section 23 of the Act, the Central Government has framed the Rules known as the Prevention of Food Adulteration Rules, 1955. Rule 5 of the said Rules reads as under:—

"Standards of quality of the various articles of food specified in Appendix B to these rules are as defined in that appendix."

14. Appendix B, to which a reference is made in Rule 5 provides in A-21 the standard prescribed for Catechu and the standard to which it is to conform and is as follows:—

"A-21. Catechu (Edible) shall be the dried aqueous extract prepared from the heartwood of *Acacia catechu*. It shall be free from infestation, sand, earth or other dirt and shall conform to the following standard:

(a) 5 ml. of 1 per cent. aqueous solution, and 0.1 per cent. solution of ferric ammonium sulphate shall give a dark green colour, which on the addition of sodium hydroxide solution shall change to purple.

(b) when dried to constant weight at 100° C. it shall not lose more than 12 per cent. of its weight.

(c) Water insoluble residue (dried at 100° C) shall not be more than 25 per cent by its weight.

(d) Alcohol insoluble residue in 90 per cent. alcohol dried at 100° C — not more than 30 per cent by weight.

(e) Total ash on dry basis—not more than 8 per cent by weight. (Water insoluble matter shall be determined by boiling water).

(f) Ash insoluble in HCl not more than 0.5 per cent on dry weight basis."

15. It is quite clear from the provisions reproduced above that before the petitioners could be prosecuted under the Act and the Rules they must be held to have violated the provisions of the Act and the Rules. Mr. Bali contends that provision of this Act or any of the Rules Katha is not food and, therefore, the Rule—down any standard for Katha. His con-making authorities should not have laid tention is that if food as defined in the Act does not cover Katha then standard prescribed by A. 21 of Appendix B of Rule 5 of the Rules is ultra vires of the Act and the petitioners, therefore, could not be proceeded with. His main argument, therefore, is that Katha is not food as defined in the Act. Mr. Bali submits that an article of food must be an article which is used as a nutrition for the body and it must be a thing which one eats for the development of body. He submits that Katha is not eaten by human beings either as a nourishment or for the stren-

gth of the body and it is, therefore, not food. According to Mr. Bali, the essential criterion to determine whether any article is food or not is to see whether that article is consumed by the human body for one of the two purposes of nutritions or for the strengthening. He has in this connection referred me to a decision of the Supreme Court in *State of Bombay v. Virkumar Gulabchand Shah*, AIR 1952 SC 335. But that case in my opinion goes against the contention of Mr. Bali.

In that case the question called for determination was whether Turmeric was 'foodstuff' within the meaning of clause 3 of the Spices (Forward Contracts Prohibition) Order, 1944, read with Section 2(a) of the Essential Supplies (Temporary Powers) Act, 1946. Their Lordships held that keeping in view the object of the legislation Turmeric fell within the definition of 'foodstuff'. It has to be remembered that definition of food is not to be taken in the abstract but it will depend on the contexts and the background whether the definition should be narrow or wide. In the context of the Prevention of Food Adulteration Act, the purpose of which is to prevent adulteration of all articles which are used for human consumption, it would be consistent with the object of the Act to give wider meaning to the definition of food in the Act. The definition of food also in the Act specifically means not only an article used as food or drink but includes any article which ordinarily enters into or is used for the composition or preparation of human food. This definition supports the respondents' contention that in order that an article should be food within the meaning of the Act it is not essential that it must be an article which is consumed by human being as such. It would still be food within the meaning of the Act if this article enters into the preparation of human food. *Admittedly Katha by itself* is not an article which is consumed by human being but it cannot be denied that Katha is an extremely important and essential component of Pan. No one can deny that Pan is taken by lakhs of people in our country, and Katha which is an essential component cannot, therefore, be held to be other than food. According to Mr. Bali, simply because Katha is not taken by human being separately it cannot be said to be food within the meaning of the Act, but it is not the correct way of looking at the things, as Supreme Court said in the case referred to above:

"Even in a popular sense, when one asks another, 'Have you had your food?' one means the composite preparations which normally go to constitute a meal—curry and rice, sweetmeats, pudding, cooked vegetables and so forth. One does not usually think separately of the diffe-

rent preparations which enter into their making, of the various condiments and spices and vitamins, any more than one would think of separating in his mind the purely nutritive elements of what is eaten from their non-nutritive adjuncts.

So also, looked at from another point of view, the various adjuncts of what I may term food proper which enter into its preparation for human consumption in order to make it palatable and nutritive can hardly be separated from the purely nutritive elements if the effect of their absence would be to render the particular commodity in its finished state unsavoury and indigestible to a whole class of persons whose stomachs are accustomed to a more spicily prepared product."

16. The definition of food specifically mentions that even those articles which are used in the preparation of articles are to be considered as articles of food. The mere fact, therefore, that Katha by itself is not consumed by human being is not determinative of the matter. Katha is admittedly used in composition of Pan and, therefore, would be governed by the definition of food given in Section 2(v) of the Act. To constitute food what has to be seen is whether the article in question is usable and enters into the composition or preparation of food which is taken by human beings. The definition is worded in a very wide language and would govern any article which enters into the composition or preparation of human food and would cover any flavouring matter and condiments. In *Sainsbury v. Saunders*, (1918) 88 LJKB 441 the question that came up for consideration was whether tea was food. The question was whether tea would be food within the meaning of the expressions used in certain provisions of Defence of the Realm Regulations read with the New Ministries and Secretaries Act of 1916 which empowered the Food Controller to regulate 'the food supply of the country' and the 'supply and consumption and production of food'. Avory J. held that tea comes within the expression of food as used in statute and in regulation. Salter J. also agreed that tea was food within the meaning of the Act of 1916. Now it would be seen that tea by itself is not consumed by human beings. It is not food in the sense that it is not nutritious nor will it add to the amount of tissues in the body of the person who drink it nor can a person live on it. Thus the test which Mr. Bali propounds that an article in order to be food must be one which is nutritious or helps in developing the tissues of the body of human being inapplicable in the case of tea and yet learned Judges Avory and Salter JJ. held that tea was food. I cannot see any distinction in the proposition why on a parity of reasoning Katha should not be held to be food with-

in the meaning of the Act. Mr. Bali also referred to the definition of Katha as given in the Wealth of India, a Dictionary of India Raw Materials and Industrial Products which is as follows:—

"Cutch has long been used in Indian medicine. According to Dymock, Warden and Hooper, (1,557), Sanskrit writers mention two varieties, dark and pale. The latter is katha, the medicinal variety Katha is regarded as astringent, cooling and digestive, useful in relaxed conditions of the throat, mouth and gums also in cough and diarrhoea. Externally it is employed as an astringent and as a cooling application to ulcers, boils and eruptions on the skin. Katha also enters into a number of compound preparations and a few prescriptions are given by Birdwood (50).

It is an indispensable ingredient of pan preparations. In combination with lime, it gives the characteristic red colouration resulting from the chewing of pan. Continued use is said to cause blackening of teeth."

17. This definition also mentions that Katha is an indispensable ingredient of Pan preparation. It is thus obvious that this definition does not advance the argument of Mr. Bali on this point. It cannot, therefore, be accepted that simply because Katha is not taken as an edible article, it cannot amount to food. This way of defining the term food was not accepted in the case reported as *James v. Jones*, (1894) 1 QB 304 where Hawkins J. held as follows:—

"We do not, however, in anything we have said intend to convey it as our opinion that nothing can be deemed to be an article of food unless it be made up into an eatable or drinkable form and fit for immediate use, for we have no doubt that the substantial and requisite materials for making, and which are to form part of the unadulterated article when made, e.g., flour, butter, salt, mustard, pepper & C. are articles of food; for though nobody would ordinarily dream of eating them alone, yet they are articles intended to form substantial components of articles of food, or to be eaten as adjuncts thereto."

18. I may also mention that it has been held in *Chitar Mal v. State*, AIR 1955 NUC (All) 169 that 'Definition of food is wide enough to include Katha as article of food' within the meaning of Section 2 of U. P. Prevention of Adulteration Act (6 of 1912).

19. The first contention of Mr. Bali, therefore, is devoid of merits and is rejected.

20. The second contention of Mr. Bali was that the standards prescribed in A.21 of Appendix B of Rule 5 of the Rules are impossible of attainment and the Rule must be held to be ultra vires. It was

not, however, made clear how the said Rule was said to be impossible of fulfilment. All that was suggested was that Katha is mainly prepared by indigenous method. The standards laid down cannot be attained and if these standards are to be held to apply then many persons who are earning their livelihood by manufacturing Katha by indigenous method will be thrown out. One answer to this contention is that the present writ petition has been brought by persons who are dealers and not by those who are engaged in the manufacture of Katha. They, therefore, cannot make a grievance, if any, which is concerning those persons who are engaged in the manufacture of Katha. That apart it has been specifically denied in the returns that the standard prescribed in the Rules and Appendix by indigenous method does not mean that the prescribed standard cannot be fulfilled. No material has been placed on record by the petitioners in any way to substantiate this bald contention. In the absence of that, therefore it cannot be held that the standard prescribed in A-21 of Appendix B of Rule 5 of the Rules is in any manner unreasonable restriction on the rights of the petitioners to carry on their trade.

In this connection it is well to remember that the petitioners are stated to be prosecuted for violation of the Rules and it will always be open to them in the appropriate proceedings to show by evidence that the standard prescribed is impossible of performance. In the absence of any material on record it is not possible to hold that the standard prescribed is unreasonable or very high. The petitioners had filed along with their petition annexures P-1 to P-3 to show the report that the public analyst had found from some of the tests that he made of Katha obtained from the market that it was adulterated. Those have been filed by the petitioners with a view to show that not only the Katha dealt with by the petitioners but the Katha found in the market was adulterated and this with a view to support their case that the standard prescribed was unreasonable. The petitioners had also filed annexure P-6 along with C.M. 502-W/of 1970 which was said to be a report of the sub-committee issued by the Indian Standard Institution which sub-committee had recommended three grades of the Katha.

A reference to P-6 and the relevant portion will show that table 1 shows the requirements for Katha for grade 1, grade 2 and grade 3 and lays down different characteristics that it should possess. Report P-1 shows that it is said to be adulterated due to excess of moisture by 43% and excess of ash insoluble in Hydrochloric acid by 0.84%. Similarly P-2 is said to be adulterated due to 1.2% excess of ash insoluble in Hydrochloric acid, and P-3 is said to be adulterated due to excess of 1.2% ash insoluble in hydrochloric acid. The standard by which it has been judged is laid down in A.21 of Appendix B of Rule 5 of the Rules as reproduced above. If reference is made to P.6, the documents filed by the petitioners it will be seen that the requirements laid down for grades 1, 2 and 3 in item No. 1 are 12% on drying by weight. This corresponds to what is given in Cl. (b) of A.21. Similarly Item 6 of page 6 of P 6 gives the requirement of acid insoluble ash percent by weight as 0.5 for grade 1 and 0.5 for both grades 2 and 3. A comparison of Cl. (f) of A.21 will show that 0.5% is given there as being common to all grades. This comparison will show that of these two items the standard laid down in A.21 is almost similar to the standard which according to the petitioners has been suggested by the sub-committee of Indian Standard Institution. It is quite obvious, therefore, that if a sub-committee in which the petitioners have faith has itself recommended the standard for some of the characteristics for Katha in almost similar terms as laid down in A.21, the challenge to the said Rules as being unreasonable and impossible of attainment is futile and without any justification. Mr. Bali was not able to give any cogent reason how the said Rule A-21 can be considered to be ultra vires. Challenge to this ground also fails.

21. The result is that there is no merit in the petition and the same is, therefore, dismissed with costs. The prosecution had been stayed for all these years and the counsel for the parties have not been able to tell me in which court the prosecutions are pending. I, therefore, thought it proper to direct the parties through their counsel to appear before the Chief Judicial Magistrate on 15-5-1970.

Petition dismissed.

not accompanied by a certificate of the Commissioner to the effect that the appellants had deposited with him the compensation payable. The compensation had been deposited earlier with him by the appellants on 14th January, 1969. The appeal came up for hearing on 2nd July, 1969, when it was pointed out by this Court to Mr. Ataide Lobo, learned Counsel for the appellants, that the memo of appeal was not accompanied by the required certificate of the Commissioner. Mr. Lobo thereafter made an application on 8th August, 1969, seeking permission to place the certificate on the record. This application was later followed by an affidavit sworn by him on 17th August, 1969. In that affidavit it was affirmed that the appellants had sent him the certificate along with their letter dated 15th January, 1969, but on account of a mistake of his office, it was not attached to the memo of appeal.

According to Mr. Kakodkar, learned counsel for the respondent, in absence of the certificate, there was really no appeal in law on 6th February, 1969, under Section 30 (1). In other words, the appeal was not competent. It was for the first time on 8th August, 1969, that the certificate was produced and by this time, continues Mr. Kakodkar, the appeal became barred by limitation under sub-section (2) of Section 30. Mr. Lobo, in his turn, submits that the appellants had deposited compensation before the period of limitation prescribed, and a mere omission to attach the certificate with the memo of appeal on 6th February, 1969, is not fatal to the maintainability of the appeal. He also submits that assuming it is, even then this is a good case for condoning the delay in filing the certificate under Section 5 of the Limitation Act.

4. The third proviso has been construed in a number of cases and Mr. Kakodkar relies on the principles enunciated thereunder. The first case cited by him is *Nandy v. G. M. E. I. Rly.*, AIR 1954 Cal 435. In this case the compensation awarded was not deposited when the memo of appeal was filed. The preliminary objection taken was that the appeal is not maintainable, inasmuch as in the absence of compensation deposited, no appeal lay from the order passed by the Commissioner. This objection was upheld. The learned Judges of the Calcutta High Court observed:—

“The principle of the section appears to me to be that if the appeal be such that by it the workman's right to the compensation awarded to him is placed in jeopardy, security for the workman must be provided for by the deposit of the amount of compensation and such a deposit would be essential to the maintainability of the appeal.”

The second case is *Bhurangya Coal Co. v. Sahebjan*, AIR 1956 Pat 299. This decision also is by a Division Bench. The facts of

this case are that the order awarding compensation was passed on 27th August, 1951. The appeal was filed on 9th November, 1951. It was then barred by limitation. Therefore, an application for condonation of delay as provided by sub-section (3) was filed, along with the memo of appeal, wherein it was stated that a certificate had been applied for. The Patna High Court, on hearing the application, condoned the delay and thereafter admitted the appeal. The certificate was not even filed on that day. It was produced for the first time in the Court on 16th January, 1955 in the course of the hearing of the appeal. It was argued on behalf of the workman that the appeal was barred by limitation and, as such, it should be dismissed in limine. The learned Judges after considering the earlier decision of their Court in *Ramnivas v. Marian*, AIR 1951 Pat 260, said:—

“..... the proviso to Section 30 (1) of the Act on a true construction demands that the certificate should be filed along with the memorandum of appeal as an essential part of it. In other words, an appeal as contemplated by it cannot be said in law to be an appeal unless it is accompanied with the aforesaid certificate of the Commissioner. If that is the import of the proviso, which, I think, it is difficult to resist on its language, then the filing of a memorandum of appeal cannot by itself amount in law to a formal presentation of an appeal unless the memorandum of appeal is accompanied with the certificate referred to in that Proviso. That being so, I think it has to be held that the appeal as presented here is time-barred. But on the facts of this case and on the submissions made by Mr. Chatterji as to the circumstances in which the certificate could not be filed earlier, though it was secured long before, I think it is a fit case in which the delay in filing the certificate should be condoned under Section 30 (3) of the Act.”

The earlier decision also was by a Division Bench of the Patna High Court. This decision is relied upon by Mr. Lobo and, it would not be out of place, to reproduce the relevant passage therefrom:—

“On the language of the section it is doubtful whether when an appeal has been filed within the period of limitation allowed by law, it would be time-barred merely because it is not accompanied with a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against. It says that no appeal by an employer under sub-clause (a) shall lie unless the certificate is given. In other words, if the certificate is not produced at some stage before the hearing of the appeal, the appeal will not be entertained. The limitation of 60 days applies to the preferring of an appeal. It is no doubt true that the certificate in question may be a very material document which the law enjoins to be filed

in order that the appeal may be entertained, but I feel doubtful whether merely because of the non-production of this certificate within the period of limitation the appeal will become barred."

The delay in this case was condoned by the learned Judges of the Patna High Court on the ground that the appellant should be given benefit of the period taken in securing a certified copy of the order passed by the Commissioner. This decision expresses doubts, apart from the consideration that it was really not necessary to have expressed any opinion. In any case it is obiter.

Sada Ram v. Chhotu Ram, AIR 1957 Him Pra 26, is the third case cited by Mr. Kakodkar. The order passed by the Commissioner awarding compensation was dated 16th March, 1955. The memo of appeal was presented on 7th May, 1955, that is, within the period of limitation after excluding the period of 37 days taken in obtaining a certified copy of this order. It was, however, unaccompanied by a certificate of deposit. The period of limitation prescribed expired on 21st June, 1955. On 20th May, 1955, the Deputy Registrar granted the appellants 10 days' time to produce the certificate. On 7th June, 1955, their counsel stated that he could not contact them and therefore he asked for three weeks' further time to produce the certificate. The compensation was finally deposited with the Commissioner on 5th July, 1955, that is, 14 days after the expiry of the period of limitation prescribed. The learned Judicial Commissioner came to the conclusion that the appellants had made out no case for condonation of the delay under Section 5 of the Limitation Act.

It was argued on behalf of the appellants that since the appeal had been presented within the period of limitation, the delay in producing the certificate could not affect competency of the appeal. This argument was not accepted. The learned Judicial Commissioner expressed the opinion that a memo of appeal by an employer presented within the period of limitation, but unaccompanied by a certificate of deposit issued by the Commissioner, will not save limitation. In view of the particular facts found, the delay in producing the certificate was not condoned because the appellants were regarded as negligent.

The fourth case cited by Mr. Kakodkar is *Bihar Journals Ltd. v. Nityanand*, AIR 1939 Pat 112. In this case the application under Section 5 of the Limitation Act for condonation of the delay in filing a certificate was made on 1st August, 1938. Along with that application, certificate was produced on 29th March, 1955. The memo of appeal was also filed on that day, and along with it, a chalan indicating deposit was produced. The application for condonation of the delay in producing certificate was rejected as sufficient cause had not been made out within the

meaning of the said Section 5. The learned Judges said:—

"In our opinion this is not a sufficient ground for condoning the delay made by the petitioners in filing the appeal. We should also refer to the fact that this appeal came up for hearing before a learned Single Judge on the 11th February, 1958, and even on that day the appellants had not taken steps for procuring the certificate from the Commissioner and no application for condoning the delay was filed before the learned Single Judge."

The fifth case cited by Mr. Kakodkar — and the last on this topic — is *C. E. Corporation v. Dorai Raj*, AIR 1960 Orissa 39. This decision by a Single Judge after considering the principles enunciated in the Calcutta case and the two Patna cases of 1951 and 1956 cited earlier, held that the appeal was not maintainable under Section 30 (1). In this case memo of appeal was not accompanied by a certificate and the preliminary objection that the appeal did not lie in absence thereof was sustained. The argument that the third proviso was mandatory and not directory was accepted by the learned Judge.

In reaching this conclusion, the learned Judge also referred to the decision of the Supreme Court in *Kamaraja Nadar v. Kunju Thevar*, AIR 1958 SC 687 wherein the meaning of S. 117 Representation of the People Act 1951, was elucidated by the Supreme Court. Section 117 provides that the petitioner shall enclose with the petition a Government Treasury receipt showing that deposit of 1,000/- rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary of the Election Commission as security for the costs of the petition. The question for consideration before the Supreme Court was whether the words "in favour of the Secretary to the Election Commission" are "mandatory in character".

Bhagwati, J., speaking for the Supreme Court, said that they were directory in character. In the words of the Supreme Court:—

"What is of the essence of the provision contained in Section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else. If, therefore, it can be shown by evidence led before the Election Tribunal that the Government Treasury receipt or

the chalan which was obtained by the petitioner and enclosed by him along with his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to realise the said sum of rupees one thousand for payment of the costs to the successful party it would be sufficient compliance with the requirements of Section 117. No such literal compliance with the terms of Section 117 is at all necessary as is contended for on behalf of the appellant before us."

The requirement of enclosing a Government Treasury receipt, however, was regarded as essential to the maintainability of the election petition under Section 81 of this Act. This had to be fulfilled absolutely. The said Section 117 was relied upon by the Orissa High Court by way of analogy. The Patna case of 1959 also relies on the Calcutta case.

Coming back to the third proviso, it is true that it does not expressly declare what shall be the consequence of non-compliance, but from its language and the object, the requirement of a certificate is essential to the maintainability of the appeal. There is an implied nullification for disobedience that an appeal will not lie in absence of a certificate. The object is to assure a workman that he will receive the compensation awarded to him in case an appeal fails. An appeal postpones his right to receipt of compensation awarded. It places in jeopardy this right and hence the above legislative safeguard. An absolute provision has to be obeyed exactly unlike a directory provision which has to be obeyed substantially. I agree that the third proviso is mandatory and, in absence of the certificate in this case, this Court will not have jurisdiction to deal with the appeal. This view is technical and may cause hardship, but it cannot be helped.

In *Ohene Moore v. Akesseh Tayee*, AIR 1935 PC 5, Lord Atkin, a celebrated Judge, delivering speech on behalf of the Judicial Committee, observed:—

"After all, it is to be remembered that all appeals in this country and elsewhere exist merely by statute and unless the statutory conditions are fulfilled no jurisdiction is given to any Court of Justice to entertain them"

It is quite true that their Lordships, as every other Court, attempt to do substantial justice and to avoid technicalities; but their Lordships, like any other Court, are bound by the statute law and if the statute law says, there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other Court to have jurisdiction."

5. The third proviso having not been complied with, a further question arises whether

the delay in producing the certificate after the memo of appeal was filed should be condoned. The important consideration in this case is that the amount of compensation awarded had been deposited with the Commissioner before the memo of appeal had been filed within the period of limitation prescribed. The certificate had also been obtained before the memo of appeal was filed, but due to a mistake on the part of the office of Mr. Lobo, learned Counsel, it was not produced along with the memo of appeal. There is therefore no negligence in this case. The appellants have made out a sufficient cause for condoning the delay in producing the certificate within the meaning of Section 5 of the Limitation Act. It is a fit case for exercising discretion in their favour. It is well settled that the words "sufficient cause" in this section should receive liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant (*Dinabandhu v. Jadumoni*, AIR 1954 SC 411). Each case has to be judged on its own merits and circumstances, the decisions in other cases being illustrative. The delay is accordingly condoned. The appeal is competent.

6. The second preliminary objection raised by Mr. Kakodkar is that no substantial question of law is involved in this case in terms of the first proviso to Section 30 (1) of the Act and, therefore, the appeal filed is not maintainable. The first proviso says:—

"Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and, in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees."

We are not concerned in this case with the order referred to in Clause (b). The amount in dispute in the appeal is more than Rs. 300/- and, therefore, it is necessary for the appellants to satisfy this Court that a substantial question of law is involved in this appeal. Mr. Kakodkar contends that in the memo of appeal no such plea is taken, but I am not inclined to view this omission seriously provided the appellants can satisfy the Court on facts found that the appeal involves a substantial question of law. It may be convenient to consider this aspect of the matter after the merits of the appeal are discussed.

7. The facts found by the Commissioner and also gathered from the evidence recorded by him are:— (1) that the deceased was in the employment of the appellant for a period of 15 years before his death; (2) that there was no quarrel between him and the respondent widow before he left for the barge; (3) that he asked the respondent to look after the sick child in his absence before he left for the barge; (4) that the deceased was not in the habit of taking

drinks, nor was he seriously sick at any time; (5) that the deceased started the engine of the barge before it left Sirigao at about 9 p.m. on 22nd May, 1967; (6) that the deceased was on the barge upto 10-30 p.m. and he was last seen by Waman Shambu Porob leaving the wheelhouse at that time; (7) that the deceased did not inform Waman Shambu Porob as to why he was leaving the wheelhouse; (8) that there was a strong wind and the barge was found jolting; (9) that, on inquiry, it was found later that the deceased was missing; (10) that there was no latrine or lavatory in the barge for the crew to answer calls of nature; (11) that the deck of the barge is one foot wide and the metal guard runs round from inside the deck and that the members of the crew answer calls of nature sitting on the deck and catching the metal guard; (12) that there was no quarrel or ill-feeling between the deceased or any other member of the crew before he was found missing from the barge; (13) that the deceased was not seen by any member of the crew falling into the sea; (14) that the corpse of the deceased was found next day at about 4 p.m.; (15) that there were very few cases of members of the crew falling from the barges into the sea by accident; (16) that there were no marks of violence on his corpse and, according to medical evidence, death was due to drowning. In view of these facts, is the inference drawn by the Commissioner — "it is highly probable that the deceased during the course of his employment accidentally fell from the barge into the sea resulting in his death" — reasonable?

8. It is common ground that the onus is on the respondent to prove that the accident arose out of and in the course of employment. This she can prove either by direct evidence or from inferences drawn from the facts found. The death by drowning proves that the deceased fell from the barge into the sea. It is not the case of the appellants that he committed suicide or was murdered. There is a presumption against suicide *Bender v. Owners of S. S. Zent*, (1909) 2 KB 41 C. A. p. 45. The accident occurred on the barge and therefore we are not concerned with the doctrine of notional extension, as in *S. S. Manufacturing Co. v. Bai Valu Raja*, AIR 1958 SC 881, and *B. E. S. T. Undertaking v. Mrs. Agnes*, AIR 1961 SC 193.

In the latter case, after reviewing some leading English decisions, Subba Rao, J. (as he then was), delivering majority judgment observed that the Courts are agreed that the employment does not necessarily end when the "down tools" signal is given or when the workman actually leaves the workshop where he is working. There is a notional extension at both the entry and exit by time and space.

The language of Section 3 (1) of the Act "if personal injury is caused to a workman

by accident arising out of and in the course of his employment" — is similar to the language employed in the English Workmen's Compensation Act, 1925 and the National Insurance (Industrial Injuries) Act 1946. In *Weaver v. Tredegar Iron and Coal Co. Ltd.*, (1940) 3 All ER 157 (at pages 163 to 165) cited by the Supreme Court, the House of Lords after reviewing the case law in England gave a wider meaning to the concept of duty. Lord Porter, while dealing with the test of duty, observed at p. 179.—

"The man's work does not consist solely in the task which he is employed to perform. It includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from one portion of his employer's premises to another, and periods of rest may all be included. . . . The question is not, I think whether the man was on the employer's premises. It is rather whether he was within the sphere of area of his employment."

As, stated earlier, the deceased was not seen in this case by any member of the barge falling from the barge into the sea. There is no evidence that before his fall he did some work for his own benefit unrelated to his employment, and that he contravened some statutory regulations or instructions by his employers or by the Tindal. The doctrine of "added peril" also has no application in this case, apart from the fact, as pointed out by Lord Denning M. R., in *R. v. Industrial Injuries Commissioner*, (1966) 1 All ER 97 C. A. that, "the house of Lords itself in 1939, in *Harris v. Associated Portland Cement Manufacturers Ltd.*, (1938) 4 All ER 831 had to throw over — I use the word deliberately — the whole doctrine of "added peril" which the House itself enunciated in *Lancashire and Yorkshire Rly. Co. v. Hingley*, (1917) AC 352 in 1917, and in *Stephen v. Cooper*, (1929) AC 570 in 1929". There is also no evidence that the deceased fell into the sea because he was drunk. There is, on the contrary, evidence to show that he was not given to drinking.

According to Mr. Lobo, the place of the duty of the deceased has to be confined to the engine room and not beyond it, and, therefore, when the deceased left the wheelhouse and the engine room it cannot be said that he was on duty when he fell down. This argument takes a very narrow view of the place of duty. The entire barge was his place of duty. A member of a shipping company while at sea is continuously in the course of his employment. (See *Halsbury's Laws of England*, 3rd Edition Vol. 27 p. 805). With a greater force it can be said that a member of a barge, on a barge, while at sea, is continuously in the course of his employment. I have no doubt that when the deceased fell from the barge, he was within the sphere of area of his employment. In

other words, the accident arose in the course of his employment, but this, by itself, is not enough. It is also necessary to prove that it arose out of his employment. This is a case of unexplained drowning and, in this connection, my attention is drawn by Mr. Kakodkar to Mackinnon Mackenzie and Co., Pvt. Ltd. v. Ibrahim Mahommed Issak, Civil Appeal No. 850 of 1967—(reported in 1969-2 SCC 607), decided by the Supreme Court on 14th August, 1969. This decision cites some cases of unexplained drowning in England. Ramaswami, J., speaking for the Supreme Court, construed the words "accident arising out of and in the course of his employment" thus:—

"The words 'in the course of the employment' mean 'in the course of the work which the workman is employed to do and which is incidental to it'. The words 'arising out of employment' are understood to mean that 'during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered'. In other words there must be a causal relationship between the accident and the employment. The expression 'arising out of employment' is again not confined to the mere nature of the employment. The expression applies to employment as such — to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'."

As regards the burden of proof, His Lordship said:—

"On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference. It is of course impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it."

9. The cases of unexplained drowning in England cited by the Supreme Court are:—Kerr or Lendrum v. Ayr. Steam Shipping Co. Ltd., (1915) AC 217; (1909) 2 KB 41; Marshall v. Owners of S. S. "Wild Rose", (1909) 2 KB 46; Rice v. Owners of Ship "Swansea Vale", (1912) AC 238; Catten v. Limerick Steamship Co., (1910) 2 IR 561; Rourke v. Hold and Co., (1917) 2 IR Rep. 318 at 321; Simpson v. L. M. and S. Rly. Co., (1931) AC 351; and Rosen v. S. S. "Quercus" (Owners), (1933) AC 494.

The facts of these cases as mentioned by the Supreme Court may be recalled. They are interesting. In Kerr's case, the steward of a ship in harbour was lying in his bunk, when he was told by his Captain to prepare

tea for the crew. He was shortly afterwards found missing, and the next day his dead body, dressed in his underclothes only, was found in the sea near the ship. The bulwarks were 3 feet 6 inches above the deck. The steward was a sober man, but was subject to nausea. Murder and suicide were negatived by the Arbitrator, who drew the inference that the deceased left his bunk, went on deck, and accidentally fell overboard and was drowned. He accordingly held that the accident arose out of and in the course of his employment as steward. The Court of Sessions reversed his decision on the ground that there was no evidence to support it. The House of Lords, by a majority, upheld the decision of the Arbitrator on the ground that, although upon the evidence it was open to him to have taken a different view, his conclusion was such as a reasonable man could reach.

In Bender's case, 1909-2 KB 41 the chief cook on board a steamship fell overboard and was drowned while the ship was on the high seas. He was seen at 5-25 a.m. looking over the side; 5-30 a.m. was his usual time for turning out; and he was last seen at 5-35 a.m. going aft. The weather was fine at the time. It was daylight. The ship was steady, and there was no suggestion that the duties of the deceased would lead him into any danger. There was a 4' rail and bulwark all round the ship and there was no evidence to show how the deceased had fallen overboard. The County Court Judge drew the inference that his death was caused by an accident arising out of and in the course of his employment, but the Court of Appeal held that there was no evidence to warrant such an inference. Cohens-Hardy M. R., pointing out that, although it was conceivable that he might have been engaged on some ship's work, it was equally conceivable that he had been larking or had committed suicide.

In Marshall's case, 1909-2 KB 46 an engineer came on board his vessel, which was lying in a harbour basin, shortly after 10 a.m. Steam had to be got up by midnight. He went below and took off his clothes, except his trousers, shirt and socks. It was a very hot night, and he subsequently came out of his berth, saying that he was going on deck for a breath of fresh air. Next morning his dead body was found at the side of the vessel, just under the place where the men usually sat. It was held by the Court of Appeal, reversing the decision of the County Court Judge, that there was no legitimate ground for drawing the inference that the engineer died from an accident arising out of his employment. This decision was upheld by the House of Lords by a majority of one.

In Rice's case, 1912 AC 238 where the deceased was a "seaman" in the strict sense of the term — that is to say, one whose duty it was to work on deck — and not a

ship's cook, as in Bender's case, 1909-2 KB 41 nor an engineer as in Marshall's case, 1909-2 KB 46 a different conclusion was arrived at. In that case the Chief Officer who was on duty on deck, disappeared from the ship in broad daylight. No one saw him fall overboard, but there was evidence that not long before he had complained of headache and giddiness. It was held that there was evidence from which the Court might infer that he fell overboard from an accident arising out of and in the course of his employment. The cases of Bender, 1909-2 KB 41 and Marshall, (1909) 2 KB 46 were considered as distinguishable, as in those cases their duties were below deck and at the time they lost their lives they had certainly no duties which called them on the deck.

In Catten's case, 1910-2 IR 561 a night-watchman on board a vessel, whose hours of duty were from 7 p.m. to 7 a.m. when he awoke the crew, was last seen on board at 6 a.m., but on that morning he did not awake the crew. His cap was found on the deck, and his body was found in the harbour some months afterwards. The County Judge held that it was not proved that the accident arose out of his employment and the Court of Appeal on the ground that this was a finding of fact with evidence to support it, refused to interfere.

In Rourke's case, 1917-2 IR Rep 318 a seaman disappeared during his spell of duty at wheel in the wheel-house in the centre of the flying deck and was not afterwards seen. The night was rough, the sea choppy but the vessel was steady. The flying deck was protected by a rail. There was no evidence as to how he met his death and in spite of the presumption against suicide the County Court Judge was unable to draw the inference that the death was due to accident. It was held by the Court of Appeal that in the circumstances of the case the conclusion of the County Court Judge was right.

In Simpson's case, 1931 AC 351 Lord Tomlin after reviewing the previous decisions, enunciated the principle that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment.

Lastly, in Rosen's case, 1933 AC 491 Lord Buckmaster explained that in Simpson's case, 1931 AC 351 the place referred to was not the exact spot at which the accident occurred, but meant, in that case, the train on which the workman was travelling and in the later case in the House of Lords, the ship on which the workman was employed.

The material facts of the Mackinnon Mackenzie and Co. case, Civil Appeal No. 850 of 1967, D/- 14-8-1969= (reported in 1969-2 SCC 607) (supra) were that Shaikh Hassan Ibrahim was employed as a deck-hand, a seaman of category II on the ship. The medical log book of the ship showed that on December 13, 1961, he complained of pain in the chest and was, therefore, examined, but nothing abnormal was detected clinically. The Medical Officer on board the ship prescribed some tablets for him and he reported fit for work on the next day. On the 15th, however, he complained of insomnia and pain in the chest for which the Medical Officer prescribed sedative tablets. The official log book of the ship shows that on the 16th when the ship was in the Persian Gulf, he was seen near the bridge of the ship at about 2-30 a.m. He was sent back but at 3 a.m. he was seen on the Tween Deck when he told a seaman on duty that he was going to bed. At 6-15 a.m. he was found missing and a search was undertaken. The dead body, however, was not found either on that day or later on. The evidence did not show that it was a stormy night. The Commissioner made a local inspection of the ship and saw the position of the bridge and deck and found that there was a bulwark more than 3½ feet. Nobody saw the missing seaman at the so-called place of accident.

The Additional Commissioner held that there was no material for holding that the death of the seaman took place on account of an accident which arose out of his employment. According to the Supreme Court he did not commit any error of law in reaching this finding and the High Court of Bombay was not justified in reversing it. In this view of the matter the appeal by the employers was allowed and the judgment of the Bombay High Court set aside.

10. Coming back to the facts of the case under consideration, the bulwark of the barge was one foot wide, unlike the bulwarks and rails in Kerr, Bender and Mackinnon Mackenzie cases. Murder and suicide are also negative, as in the Kerr case, 1915 AC 217. The deceased was hale and hearty before he was found missing and there was no quarrel between him and the respondent and also between him and other members of the barge. His duty as a deck hand was to work on the barge as in the case of Rice, 1912 AC 238 and he was also a "seaman" in the strict sense of the term. His cap and other clothes were not found on the deck as in Catten's case, 1910-2 IR 561. The flying deck was not protected by a rail nor was the vessel steady, as in the case of Rourke. There is evidence to show that the death of the deceased was due to drowning. He was not suffering from pain in the chest or insomnia and further he was not seen in rather odd circumstances before his death as in the case of Shaikh Hassan Ibrahim. His

dead body was found but not the dead body of Shaikh Hassan Ibrahim.

This case is relied upon by Mr. Lobo, but the facts are distinguishable. A case is an authority for what it decides. Do the facts found "give rise to conflicting inferences of equal degrees of probability so that the choice between them is a matter of mere conjecture", as observed by Lord Birkenhead L. C., in *Lancaster v. Blackwell Colliery Co. Ltd.*, (1918) WC Rep 345. I would answer this question in the negative. The Commissioner is the judge of the facts and he had the advantage of hearing and seeing the witnesses and, unless his conclusion is perverse, not based on evidence or influenced by irrelevant considerations, it would not be reasonable to reject it.

Earl Loreburn observed in *Kerr's case*, 1915 AC 217 that "they should regard these awards in a very broad way and constantly remember that they were not the tribunal to decide". In *Rice's case*, 1912 AC 238 decided by the House of Lords, Lord Loreburn, L. C., said:

"The other alternatives were suicide or murder. If we weigh the probabilities one way or the other, the probabilities are distinctly greater that this man perished during the accident arising out of and in the course of his employment".

I might also refer to one more Indian case of an unexplained drowning cited by Mr. Kakodkar before I conclude. This is *Vishram Yesu Haldankar v. Dadabhoy Hormasji and Co.*, AIR 1942 Bom 175. In this case the applicant's son was one of six khalasis employed on a barge which was tied up along side a steamer in the dock. The finding was that the khalasis had to prepare and take their meals on the barge and also to sleep there either in the rooms allotted to them by the employer when there was no work at night, or in the hatches when there was work at night. On the day in question, which was the night of 22nd/23rd October, 1940, meals were taken at half-past eight and the khalasis slept on the hatches. The work of loading goods into the ship was to begin at 3 a.m. on the 23rd. The deceased went to sleep on one of the hatches at about 9 p.m. and when his companions woke up, he was found missing and a considerable time afterwards his body was discovered in the dock where the barge had been. Owing to the amount of decomposition which had taken place, it was not possible to say what was the cause of his death. It was also in evidence that on the night in question there was a storm and that the hatches were on a higher level than the deck. The khalasis slept with their feet pointing towards the deck, and the deck was about one and half feet wide. The Commissioner did not find as a fact that the accident did not occur out of and in the course of employment, but he found that there was no evidence on which he could

base the finding that the accident occurred out of the employment.

Beamont, C. J., delivering judgment on behalf of the Division Bench after considering the cases of *Simpson*, 1931 AC 351 and *Rosen*, 1933 AC 494 (*supra*) observed:—

"..... that the workman was sleeping on the barge in the course of his employment, and there must necessarily be a risk inherent in the discharge of his duty in so sleeping that he may fall off the barge into the water. The most natural inference to draw is that the accident occurred because for some reason or other in the middle of the night the workman fell off the barge either in his sleep or when half awake and struck his head in the process. I say that because the evidence is that he was a good swimmer. So he must have lost consciousness before he got into the water. No doubt there are other possible inferences. It is conceivable though highly improbable, that the man committed suicide. It is conceivable, and rather less improbable, that he was murdered and his body was thrown into the water. But there is absolutely no evidence to suggest suicide or homicide and the most natural inference from the evidence is that he met with an accident which arose out of his duty in sleeping on the barge."

11. Applying the principles enunciated in all these cases, are not the probabilities greater in this case that the deceased accidentally fell from the barge into the sea and that his death was by "an accident arising out of and in the course of his employment"? Times during which meals are taken or moments during which calls of nature are answered and breaths of fresh air taken are matters incidental to the duties of barge crew including an engine driver and they fall within the sphere of their employment. Having a deck one foot in width and answering calls of nature in the manner mentioned above were, in my opinion, risks incidental to the duties of employment of the deceased. It could be reasonably said that the deceased brought himself within the zone of special danger, when engaged in his employment in the circumstances mentioned. The inference drawn by the Commissioner is legitimate.

The Act is a piece of what is known as social legislation and, in the words of Lord Wright in *Noble v. Southern Rly.*, (1940) 2 All ER 383 at p. 393, in relation to the English Workmen's Compensation Act 1925, "was intended to be administered with as little technicality as possible". In the words of Lord Denning M. R.

"the other mistake which the Courts made in the earlier decisions was to interpret the Workmen's Compensation Act too narrowly. Even the House of Lords did not appreciate the social significance of this legislation". "They debarred men from compensation when Parliament thought that they ought to have it". (*R. v. Industrial Injuries Commis-*

sioner', (1966) 1 All ER 97 at p. 101 C. A.). I agree with Mr. Kakodkar that the inference drawn by the Commissioner is reasonable based on the evidence and not on conjectures. This is not one of those cases where, in the words of Lord Shaw of Dunfermline in Marshall's case, 1909-2 KB 46, "the name of inference may be apt to be given to what is purely conjecture".

In the view taken of this matter, I am inclined to hold that the probabilities are greater that the deceased died by an accident arising out of and in the course of his employment, while taking a breath of fresh air or answering a call of nature. The finding of fact recorded by the Commissioner that the deceased died by an accident arising out of and in the course of his employment is supported by evidence, and, therefore, I would not interfere. The Commissioner did not commit any error of law in reaching this finding. The cause may be jolting of the barge due to a strong wind and the sea being slightly rough. It takes seconds to fall off the deck. I do not agree with Mr. Lobo that the accident did not arise out of the employment of the deceased. The bulwark one foot wide coupled with jolting of the barge due to strong wind were risks inherent in the discharge of his duties.

12. Mr. Kakodkar next submits that the appeal does not involve a substantial question of law and, in this connection, he cites:—*Kaikhushroo Pirojsha v. C. P. Syndicate Ltd.*, AIR 1949 Bom 134; *Jawli v. Babu Lal*, AIR 1958 All 564; and *Chunilal V. Mehta v. C. S. and M. Co. Ltd.*, AIR 1962 SC 1314. In the Bombay case, Chagla, C. J., observed:—

"Frankly, it is not at all easy to determine what a substantial question of law contemplated by Section 110, Civil Procedure Code is. The only guidance that we have had from the Privy Council is that substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well-established principle of law and that principle of law is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court."

In *Jawli's* case, AIR 1958 All 564 the learned Judges of the Allahabad High Court said:—

"We are unable to accept the submission that the words 'substantial question of law'

in Section 30 (1) of the Workmen's Compensation Act must be given the same meaning as in the Code of Civil Procedure. Section 110 of that Code makes provision for appeals from decrees and final orders of a Court which, unless leave to appeal to the Supreme Court is granted, is a final appellate Court. Section 30 of the Workmen's Compensation Act on the other hand makes provision for an appeal to this Court from a tribunal of first instance and if learned counsel's submission is accepted it follows that this Court will have no jurisdiction in a case in which the Commissioner had arrived at an obviously wrong conclusion on a question of law. We do not think that that was the intention of the legislature. In our opinion the phrase "substantial question of law" as used in the proviso to Section 30 (1) of the Act must be given a wider construction than is to be attributed to it in Section 110 of the Code of Civil Procedure, and that the phrase should be construed to cover a case such as the present in which the Commissioner has clearly misdirected himself on a question of law."

In *Chunilal's* case, AIR 1962 SC 1314 Their Lordships of the Supreme Court said:—

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

The proper legal effect of a proved fact is necessarily a question of law, and so also where there is or is no evidence to support a finding of fact, and the interpretation of a statutory provision and its scope and effect. Whether a fact has been proved when the evidence for and against has been properly received is a question of fact. That the deceased was working for his employer is a question of fact. Questions of fact are not to be inflated or magnified into questions of law. This tendency has to be deprecated. Questions of law and of fact are often difficult to separate. Whether the death in this case was caused by an accident arising out of and in the course of the employment of the deceased is a mixed question of fact and law. The question of liability of the appellants is to be determined in the light of the facts found.

As, stated earlier, there is evidence to support the conclusion of the Commissioner in favour of the respondent. A question of law

undoubtedly arises in this appeal, but we have to go a step further and satisfy ourselves whether it involves a substantial question of law. The general principles on cases of unexplained drowning have been set out and explained by the Supreme Court in Mackinnon Mackenzie case, Civil Appeal No. 850 of 1967, D/- 14-8-1969= (reported in 1969-2 SCC 607) (supra), in the light of the English case-law cited. What remains is to apply them to the facts found. I am not called upon to consider the proposition that these words have a different meaning from similar words used in Section 110 of the Code of Civil Procedure.

According to Mr. Kakodkar, the appeal does not involve a substantial question of law because the general principles are well-settled. It may be contended, on the other hand, that the question of determining liability in this case is not free from difficulty or, at any rate, it "calls for discussion of alternative views". The probabilities of this case have been considered from different angles, but on the facts found, it may be difficult to agree with Mr. Lobo that the appeal involves a substantial question of law. There is no misdirection on question of law as in Jawli's case, AIR 1958 All 564, so as to warrant interference. The question of law directly affects the rights of the parties, but this consideration by itself is not enough. When we consider the probabilities of this case some difficulty does arise in reaching a correct conclusion, but this consideration also is not enough.

We have a welter of decisions on the construction of liability in the context of Section 3 of the Act, but by now the Law appears to be well established. I am inclined to uphold the submission of Mr. Kakodkar that the appeal does not involve a substantial question of law. This would be an additional ground for not accepting the appeal, apart from my decision on merits. It may be added that this Court is the final Court of Appeal. The law favours a finality in litigation except in special cases. The right to receive compensation need not be further postponed. In this view of the matter, the appeal is dismissed with costs. The respondent may be paid compensation as directed by the learned Commissioner. Order accordingly.

Appeal dismissed.

AIR 1970 GOA, DAMAN AND DIU 137
(V 57 C 24)

C. M. RAO, J. C.

Premnath Sitaram Raut, Petitioner v. Dr. Leao Pinto and others, Respondents.

Writ Petn. No. 23 of 1970, D/- 18-5-1970.

(A) Motor Vehicles Act (1939), S. 62(c) — Temporary permit — Grant of — Per-

GN/GN/D58/70/KSB/P

manent need and temporary need does not necessarily co-exist — New route — Existence of temporary need — Temporary permit can be issued under S. 62 (c).

Whenever there is permanent need to provide transport facilities it cannot be necessarily presumed that a temporary need also exists. AIR 1966 Cal 568 & AIR 1968 Goa 67, Dissented from.

(Para 5)

Permanent need and temporary need may co-exist on a particular route and temporary permit to provide transport facilities can be issued if the Regional Transport Authority comes to the conclusion that there is need to issue such permit. AIR 1966 SC 156 & AIR 1967 Madh Pra 141 & AIR 1968 Madh Pra 148, Rel. on.

(Para 5)

Whenever it is found that there is a particular temporary need, temporary permit can be issued under Section 62(c) irrespective of whether the route is an existing route or a new route. AIR 1966 Cal 568, Rel. on.

(Para 5)

When the Transport Authority after full enquiry, having convinced himself that there was a temporary need to provide transport facilities on a particular new route granted a temporary permit to meet that need under Section 62(c), it cannot be said that he acted without jurisdiction.

(Para 5)

Merely because certified copies of the documents relating to grant of temporary permit are not supplied to the petitioner it cannot be said that the grant of temporary permit is illegal.

(Para 6)

(B) Constitution of India, Art. 226 — Other remedy open but not availed of — Order granting temporary permit — No appeal filed against order — Writ petition to quash order on ground of illegality apparent on face of record — Writ petition is maintainable even if remedy of appeal is not availed of.

(Para 6)

Cases Referred: Chronological Paras (1968) AIR 1968 Goa 67 (V 55),

Ashok Auto Service v. Union of India 5

(1968) AIR 1968 Madh Pra 148 (V 55)

=1968 Jab LJ 752, M. P. State Road Transport Corpn., Bhopal v. R. T. A., Raipur 5

(1967) AIR 1967 Madh Pra 141 (V 54)

=1966 Jab LJ 427, Raipur Transport Co. Pvt. Ltd. v. R. T. A., Jabalpur 5

(1966) AIR 1966 SC 156 (V 53) =

1965-3 SCR 786, M. P. State R. T. Corpn., Bairagarh, Bhopal v. B. P. Upadhyaya 5

(1966) AIR 1966 Cal 568 (V 53), Burdwan Bus Service v. R. T. A., Burdwan 5

S. K. Kakodkar, for Petitioner; Joaquim Dias, Govt. Pleader, for Respondents.

ORDER:— This is a petition filed under Arts. 226 and 227 of the Constitution of

India praying to quash the temporary permit No. 6408 issued by respondents 1 and 2 under Section 62(c) of the Motor Vehicles Act to the third respondent to ply his bus No. GDT 2232 on new route between Sal and Margao.

2. The petitioner Premnath Sitaram Raut holds a regular stage carriage permit valid from 2/4/68 to 1/4/71 to ply his bus No. GDT 2119 from Sal to Betim via Cansarpal and Assonora and he has been plying that bus. The petitioner alleges that in January, 1970, on his coming to know that the first and second respondents were intending to open a new route between Sal and Margao via Sankirwal-Cansarpal and Assonora and grant temporary stage carriage permit thereon to the third respondent, got represented through his attorney Shri S. M. Dhond to the first respondent that there was no necessity of opening the intended route and that in any event there was no necessity of granting a temporary stage carriage permit on the said route but the respondents 1 and 2, without even giving oral hearing to him (petitioner) granted on 23/2/70 a temporary stage carriage permit to the third respondent on the newly opened Sal-Margao route via Sankirwal-Cansarpal and Assonora, that that route overlaps his (petitioner's) route from Sal to Assonora, that the first respondent, in spite of repeated requests by him (petitioner) did not grant to him certified copies of all documents connected with the grant of temporary stage carriage permit to the third respondent, that there are 23 buses plying on regular permits between Sankirwal and Margao via Assonora and there was no need to open the new route, that the grant of temporary permit to third respondent is illegal as not one of the conditions (a), (b), (c), (d), mentioned in Section 62 of the Motor Vehicles Act, 1939 is satisfied, that there was no particular temporary need to authorize the third respondent to ply the bus temporarily and that considerable loss is being caused to him (petitioner) by the grant of illegal temporary permit to the third respondent.

3. The respondents have filed affidavits opposing the petition. Their case is that as there was pressing demand from the villagers of several villages to open a bus route from Sal to Margao decision was taken to open that route after making full enquiries about the genuineness of the demand, that the enquiry was first made by the Assistant Inspector of Motor Vehicles and later on by the first respondent, that the Assistant Inspector of Motor Vehicles submitted his report on 6/2/70 recommending the opening of new route from Sal to Margao, that the first respondent visited Sal on 11/2/70 and there, among others, gave the petitioner an oral hearing, that the first respondent was con-

vinced about the genuineness of the need for a bus service from Sal to Margao, that then he ordered that the route be advertised for grant of regular permit and later on issued a temporary permit to the third respondent to meet the immediate demand, that there was temporary need for granting the permit to ply bus between Sal and Margao, that the temporary permit was granted to meet the immediate transport demand of traffic pending finalization of the case for issuing regular permit for which very elaborate procedure is prescribed by the Motor Vehicles Act, that there is no direct route from Sal to Margao, that the certified copies of the documents connected with the grant of temporary permit to the third respondent were not granted to the petitioner as he had no locus standi in the matter and as Shri Dhond, attorney of the petitioner, was not having authority to receive the certified copies, that no loss is caused to the petitioner by the grant of temporary permit to the third respondent, that the temporary permit issued to the third respondent is in accordance with law, that the petitioner could prefer appeal against the order by which temporary permit was granted to the third respondent, that the petitioner filed this petition without exhausting his remedies and so the petition is not maintainable, that the petition is misconceived, baseless and frivolous and that it is fit to be dismissed.

4. In view of the arguments advanced before me the first and foremost point for determination in this matter is whether the temporary permit granted to the third respondent is in accordance with law.

5. Grant of temporary permits is governed by Section 62 of the Motor Vehicles Act. Clause (c) of that section is as follows:—

"to meet a particular temporary need." The respondents contend that there is no direct bus route from Sal to Margao, that there was pressing demand from the villagers of several villages to open bus route from Sal to Margao, that the first respondent first got the enquiries made by the Assistant Inspector of Motor Vehicles and then he himself made enquiries, visiting Sal, about the genuineness of the demand made by the public to open bus route from Sal to Margao and was convinced that the demand was genuine and the route should be opened at once, that pending completion of the formalities for the grant of regular stage carriage permit temporary permit was granted and that no application for the grant of regular permit was received by the date on which temporary permit was issued to the third respondent. The learned Government Pleader, relying on the decisions in 'M. P. State Road Transport Corpn., Bairagarh, Bhopal v. B. P. Upadhyaya, AIR 1966 SC

156; Burdwan Bus Service v. R. T. A. Burdwan, AIR 1966 Cal 568 and Ashok Auto Service v. Union of India, AIR 1968 Goa 67, argued that whenever there is a permanent need to provide transport facilities it must be presumed that a particular temporary need also exists and that where necessity for grant of regular permits on a route exists it is within the jurisdiction of the Regional Transport Authority to grant temporary permit under Section 62(c) of the Motor Vehicles Act. I have gone through the rulings cited by learned Government Pleader carefully. The judgments reported in AIR 1968 Goa 67 and AIR 1966 Cal 568 cited by him are based on the judgment of the Supreme Court reported in AIR 1966 SC 156. In that judgment of the Supreme Court it has not been held that whenever there is permanent need to provide transport facilities it must be presumed that a temporary need also exists. For this reason I am unable to agree with the opinion expressed in the Judgments reported in AIR 1966 Cal 568 and AIR 1968 Goa 67 that, whenever there is permanent need it must be presumed that temporary need also exists. What has been held by the Supreme Court is that the view that whenever there was permanent need there could be no temporary need and so temporary permit could not be granted under Section 62(c) of the Motor Vehicles Act is erroneous, that there is no antithesis between a particular temporary need and a permanent need, that those two kinds of need may co-exist on a particular route, that sub-section (c) of Section 62 thus contemplates that there may exist a temporary need for transport facilities on a particular route even in case of permanent need for such facilities, and that where therefore the Regional Transport Authority considered in a case of permanent need for transport facilities there was also a particular temporary need and granted a temporary permit his action cannot be challenged as legally invalid. The Madhya Pradesh High Court in Raipur Transport Co. Pvt. Ltd. v. R. T. A. Jabalpur, AIR 1967 Madh Pra 141 and M. P. State Road Transport Corpn. Bhopal v. R. T. A. Raipur, AIR 1968 Madh Pra 148 held that the Supreme Court had not held in AIR 1966 SC 156 that whenever there is a permanent need then it must be taken that a temporary need also exists. I am in full agreement with the opinion expressed by the M. P. High Court. In view of the judgment of the Supreme Court noted above it is held that permanent need and temporary need may co-exist on a particular route and that temporary permit to provide transport facilities can be issued if the Regional Transport Authority comes to the conclusion that there is need to issue such permit. In the case on hand enquiries to find out

the genuineness of the demand made by the public to open new route from Sal to Margao were first made by the Assistant Inspector of Motor Vehicles in obedience to the orders of the first respondent and were later on made by the first respondent, Secretary, State Transport Authority and Director of Transport, Panjim. The order passed by the first respondent in connection with granting temporary permit to the third respondent is as follows:

"There is a demand from the residents of Sal and surrounding areas for a bus service from Sal to Margao. I have visited the place and heard some of the villagers of Sal who pressed to me the urgency for introduction of a bus service from Sal to Margao. They said that there will be at least 30 to 35 daily passengers who are going from Sal to Bicholim Ponda and Margao for their work. It is my firm conviction that there is a genuine need for a bus service from Sal to Margao and it is necessary to take immediate steps to provide transport for the people of Sal. This particular need leads me to examine the applications received from the following persons... ..

For these reasons I hereby order that Shri S. V. Joshi be issued a temporary permit to operate his bus No. GDT 2232 from Sal to Margao and vice versa for a period of four months with immediate effect and the route be advertised for grant of a regular stage carriage permit to operate the same service."

On reading the above order and paragraphs 4 and 9 of the affidavit filed by the first respondent I feel that the first respondent after full enquiry, having come to the conclusion that there was immediate need to provide transport facilities on the new route from Sal to Margao granted temporary permit as per clause (c) of Section 62 of the Motor Vehicles Act to the third respondent and that it is not correct to say that he (the first respondent) acted without jurisdiction or illegally. It may be noted that the petitioner has not charged the first respondent with mala fide in granting temporary permit to the third respondent. It is established that the first respondent after convincing himself that there was particular temporary need, issued temporary permit to meet that need and that he acted as per Sec. 62(c) of the Motor Vehicles Act. It had been argued on behalf of the petitioner that temporary permit can be issued only with regard to existing route and that it cannot be issued in respect of a new route. I find no force in that argument because under Cl. (c) of Section 62 of Motor Vehicles Act whenever it is found that there is a particular temporary need temporary

permit can be granted. I am supported in my view by the decision of Calcutta High Court in AIR 1966 Cal 568.

6. Even though the petitioner alleged that without giving him an oral hearing temporary permit was issued to the third respondent, during arguments the learned advocate for the petitioner admitted that on 11/2/70 at Sal the first respondent had heard the petitioner. If certified copies of the documents relating to the grant of temporary permit to the third respondent had not been supplied to the petitioner by the first respondent, it cannot be said that the temporary permit issued to the third respondent is illegal. In the course of the arguments the learned Government Pleader placed before this Court the entire record relating to the grant of the temporary permit to the third respondent. The contention of the respondents that there is no direct bus from Sal to Margao is not denied by the petitioner. The argument advanced by the learned Government Pleader, that the petition is not maintainable because the petitioner did not prefer appeal against the order by which temporary permit was granted to the third respondent and he (the petitioner) filed this petition without exhausting his remedies, has no importance because the petitioner had filed this petition contending that there is illegality apparent on the face of the record and because this Court thought fit to decide the petition on merits. It cannot be said that considerable loss is being caused to the petitioner by the grant of temporary permit to the third respondent because that permit had been issued in accordance with law. The petition is fit to be dismissed as it is proved that the temporary permit had been issued as per the provisions of Section 62(c) of the Motor Vehicles Act.

7. The petition is dismissed. Considering the circumstances of the case parties will bear their own costs

Petition dismissed.

AIR 1970 GOA, DAMAN AND DIU 140
(V 57 C 25)

C. M. RAO, J. C.

Arjun Shankar Naik, Applicant v. Sumitra, Respondent.

Reference No. 12 of 1969, D/-15-7-1970.

(A) Criminal P. C. (1898), S. 488 — Proceedings under — Nature of.

Proceedings under Section 488 are of civil nature but governed by provisions of Criminal P. C. A person against whom a case is filed under this section is not an accused. A petition filed under it is not a complaint. (Para 3)

(B) Criminal P. C. (1898), S. 242 — Maintenance under S. 488, Criminal P. C.

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granted to wife without examining husband under S. 242 — In revision no contention raised by husband that he was prejudiced by not being examined — It could not be said that there was failure of justice — Proceedings were not vitiated. (Para 3)

(C) Criminal P. C. (1898), S. 488(6) — Procedure laid down in, is not that prescribed for summons case—When summons was served on respondent but he did not appear or he appeared but did not file his counter, Magistrate is empowered to determine case ex parte and entire procedure of summons case is not applicable — Where maintenance was granted after following procedure under S. 488(6) the proceedings were not vitiated. Ref. No. 101 of 1966 (Goa), Dissented from; AIR 1960 SC 882, Expl. (Para 3)

Cases Referred: Chronological Paras
(1966) Reference No. 101 of 1966
(Goa) 1, 4

(1960) AIR 1960 SC 882 (V 47) =
1960 Cri LJ 1246, Nand Lal v.
Kanhaya Lal 4

M. D. Gaitonde, for Applicant; B. Ramani for Respondent.

ORDER:— The learned Sessions Judge at Panaji has made this reference. The applicant herein is the husband of the respondent Sumitra. The respondent filed petition under Section 488, Criminal P. C. in First Class Magistrate's Court at Quepem stating that her husband was not maintaining her and that he be directed to pay maintenance to her. The learned Magistrate allowed the petition after inquiry. The petitioner herein filed revision application in Sessions Court at Panaji against the order of the Magistrate, stating various reasons and contending that that order was bad in law. In the revision petition he did not state that for the Magistrate not recording his statement under Section 242, Criminal P. C. he was prejudiced or the proceedings had become null and void. After hearing the arguments in revision, the learned Sessions Judge made this reference to this Court stating that the Magistrate did not record the statement of the revision petitioner under Section 242, Criminal P. C., that as such as per the decision of this Court in reference No. 101 of 1966 (Goa) the entire proceedings have become null and void, that the order of the Magistrate is fit to be set aside and that the matter is fit to be remanded to Magistrate's Court to decide the case as per law after complying with the provisions of Section 242, Criminal P. C.

2. The point for determination is whether the proceedings have become null and void due to the Magistrate not recording the statement of the petitioner herein under S. 242, Criminal P. C.

3. Chapter 45 of the Criminal P. C. deals with the irregularities which vitiate

or do not vitiate the proceedings. In that chapter it is not mentioned that if in a case filed under Section 488, Criminal P. C. the respondent is not examined under Section 242, Criminal P. C. the proceedings are vitiated. It is clearly laid down in Section 537, Criminal P. C. that any error or omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment, or other proceedings before or during trial or any inquiry or other proceedings under the Criminal P. C. will not be reversed or altered under Chapter 27 or on appeal or revision unless such error or omission or irregularity etc. has in fact occasioned a failure of justice. In the case on hand, the learned advocate appearing for the revision petitioner stated in this Court that he had not contended in the Sessions Court that the proceedings were vitiated for his client not being examined under S. 242, Criminal P. C. When the revision petitioner himself does not contend that he was prejudiced by his not being examined under S. 242, Criminal P. C., it cannot be said that there was failure of justice. It is against law in this case to say that the proceedings are vitiated due to the Magistrate not examining the revision petitioner under S. 242, Criminal P. C.

4. The learned Sessions Judge based his reference on the judgment of my learned predecessor in reference No. 101 of 1966 (Goa). In that judgment my learned predecessor opined to the effect that the provisions of Section 242, Criminal P. C. in a case under Section 488, Criminal P. C. should be followed and if they are not followed the proceedings are vitiated. He referred to the judgment of the Supreme Court in *Nand Lal v. Kanhaiya Lal*, AIR 1960 SC 882 in his judgment. I have gone through that judgment of the Supreme Court. It is nowhere held in that judgment that for not following the provisions of Section 242, Criminal P. C. the proceedings under Section 488, Criminal P. C. are vitiated. That judgment is to the effect that Section 488, Criminal P. C. does not contemplate preliminary inquiry before issuing notice to the respondent. The procedure to be followed in cases filed under Section 488, Criminal P. C. is laid down in sub-sec. (6) of that Section. That sub-section is as follows:—

"All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any order so

made may be set aside for good cause shown, on application made within three months from the date thereof."

According to that sub-section the entire evidence is to be recorded in the manner prescribed in the case of summons cases in the presence of the husband or father as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader. Section 355, Criminal P. C. lays down the mode of recording evidence in summons cases. In summons cases the Magistrate has to record memorandum of the substance of the evidence of each witness as the examination of the witness proceeds if he does not think fit to act as per Section 358, Criminal P. C. In sub-section (6) of S. 488, Criminal P. C. it is not laid down that the cases filed under Section 488, Criminal P. C. shall be disposed of observing the procedure prescribed for the trial of summons cases. All that is mentioned in that sub-section is that the evidence shall be recorded in the presence of the husband or father as the case may be and it shall be recorded in the manner prescribed in the case of summons cases. The learned advocate appearing for the revision petitioner does not state that the procedure prescribed for recording evidence has been violated in this case. A person against whom a case is filed under Section 488, Criminal P. C. is not an accused. A petition filed under Section 488, Criminal P. C. is not a complaint. The proceedings under S. 488, Criminal P. C. are in the nature of civil proceedings, but they are governed by the provisions of the Criminal P. C. It has already been noted that the procedure which the Magistrate should follow in disposing of a case filed under Section 488, Criminal P. C. is laid down in sub-section (6) of that section. According to that procedure when the evidence has to be recorded in the presence of the respondent in the petition or his advocate, it will have to be said that the respondent in the petition will have to be summoned. If in spite of the summons being served on the respondent he does not appear in court, the Magistrate is empowered under the proviso to sub-section (6) of S. 488 to determine the case ex parte. In view of the fact that the Magistrate is empowered to determine the case ex parte, it cannot be said that the entire procedure prescribed for the trial of summons cases in the Criminal P. C. is applicable to the cases filed under S. 488, Criminal P. C. I am unable to agree with the finding of my learned predecessor in reference No. 101 of 1966. To my mind, the proceedings in this case are not vitiated. It is admitted that notice of the petition filed by the respondent herein, along with a copy of that petition was served on the petitioner herein as per the orders of the Magistrate and he (petitioner herein) was asked to appear in the

court to have his say. The petitioner herein appeared in the Magistrate's court but did not file any counter even though the case was adjourned number of times. The Magistrate then started recording evidence and disposed of the case. Under these circumstances it can never be said that there was failure of justice in this case. I cannot accept this reference. The reference is rejected. The learned Sessions Judge will dispose of the revision petition on merits.

Reference rejected.

AIR 1970 GOA, DAMAN AND DIU 142
(V 57 C 26)

C. M. RAO, ADDL. J. C.

Jose Filipe Menezes, Plaintiff v. Krishna Shiva Kambli, Defendant.

Civil Reference No 1 of 1970, D/-26-2-1970.

(A) Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order, 1965 — Validity — President of Portugal or Overseas Minister or Governor General of State of India could have had no power to pass Order of 1965 — Lt. Governor of Goa, Daman and Diu, therefore, has no power to pass that Order by virtue of Cl. 2 of Goa, Daman and Diu (Administration) Removal of Difficulties Order (1962), Cl. 2 (as amended on 19-12-1963) — Order of 1965 is, therefore, ultra vires and invalid — (Goa, Daman and Diu (Administration) Removal of Difficulties Order (1962) Cl. 2 (as amended on 19-12-1963).

(Paras 5 and 6)

(B) Goa, Daman and Diu Mamlatdar's Court Act (1966), S. 4 — Suit for eviction of tenant — Suit need not be filed in Mamlatdar's court only but in civil court also — Defendants seeking protection under Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order, 1965 — Court can consider validity of the Order of 1965 when found essential for just disposal of suit.

(Para 5)

M. S. Usgaocar, for Plaintiff; Joaquim Dias, Govt. Pleader, for the State.

ORDER:— This is a reference made by the learned Civil Judge, Senior Division, Bicholim.

2. In regular civil suit No. 63 of 1968 filed under the Portuguese Law in the Court of Civil Judge, Senior Division, Bicholim, for eviction of the defendant
(Cont. on Col. 2)

TABLE

I
President of Portugal, Overseas Minister
(Ministro do Ultramar), Governor General
of the State of India
Secretary General
Police Commandant (Comandante-general
da Policia)

from a cashew garden alleging that he (the defendant) even after the expiry of the lease period was not handing over possession of that garden to the plaintiff, the defendant pleaded that he was in possession of the suit property as lawful tenant since about 40 years and that he could not be evicted from it by Civil Court in view of the provisions of the Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order, 1965.

3. The learned Civil Judge, Senior Division, Bicholim after hearing the parties felt that the order of 1965 under which the defendant was claiming protection was not a valid order and he referred the matter under Section 9 of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963 for the opinion of this Court about the validity of that order.

4. Arguments of the learned Government Pleader and the learned Advocate for the plaintiff have been heard. The impugned order, viz. the Protection of Rights of Tenants (Cashewnuts and Arecanuts) Order, 1965 shows that it was passed by the Lt. Governor of Goa, Daman and Diu i.e. the Administrator in exercise of the powers conferred on him by Cl. 2 of the Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962 and all other powers enabling him in that behalf. It is contended on behalf of the plaintiff that Cl. 2 of Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962 does not empower the Lt. Governor to pass the impugned order and he had no power to pass that order and that that order is ultra vires and invalid. The said Clause 2 as amended on 19-12-1963 is as follows:

"Until any law in force immediately before the twentieth day of December, 1961, in Goa, Daman and Diu or any part thereof is altered, repealed or amended by a competent Legislature or other competent authority, the powers conferred and the duties imposed by or under any provision of such law on any functionary specified in Column I of the Table below shall, unless such provision is inconsistent with, or repugnant to, the provisions of the Constitution, be exercisable and performed, subject to such directions as the Central Government may give, by the functionary specified in Column II thereof opposite to that functionary.

II
Administrator
Chief Civil Administrator, Goa.
Senior Superintendent of Police.

5. A careful reading of the above Clause makes it clear that the impugned order could be passed by the Lt. Governor of Goa, Daman and Diu if it could be passed either by the President of Portugal or Overseas Minister or the Governor General of the State of India. Even though it has been argued on behalf of the plaintiff that the President of Portugal or Overseas Minister or the Governor General of the State of India had no power to pass the impugned order as it is against the provisions of the Portuguese Civil Code and Civil P. C., the learned Govt. Pleader was not in a position to contradict that argument. The defendant and advocate for the defendant have chosen to be absent in this Court. All that is stated by the learned Government Pleader is that under S. 4 of the Goa, Daman and Diu Mamlatdar's Court Act, 1966 the plaintiff could file the suit for eviction in Mamlatdar's Court and it is not necessary to decide in this case whether the impugned order is valid. The plaintiff was not bound to file the suit for eviction in Mamlatdar's Court only. He could file it in Civil Court and the Civil Court could entertain it. When for the just disposal of the suit filed by the plaintiff it has become essential to consider the validity of the impugned order and when it is coming to light that the President of Portugal or the Overseas Minister or the Governor General of the State of India could not pass that order it will have to be held that the Lt. Governor of Goa, Daman and Diu had no power to pass the impugned order. It has not been stated on behalf of the State that the impugned order could be passed by the Lt. Governor of Goa, Daman and Diu in exercise of any powers conferred on him except the powers under Cl. 2 of Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962. It has already been noted that under that clause the impugned order could not be passed by the Lt. Governor.

6. It is held that the impugned order is ultra vires and invalid.

Reference answered accordingly.

AIR 1970 GOA, DAMAN AND DIU 143
(V 57 C 27)

C. M. RAO, J. C.

Nandu Noorani, Appellant v. Jacinto Humberto Cirilo D'Cruz, Respondent.

Civil Appeal No. 41 of 1969, D/-13-7-1970.

Portuguese Civil Code, Art. 1566—Under S. 5(1), Goa Daman and Diu (Administration) Act (1962) laws in force in the territories were saved — However under Sec-

IN/IN/E14/70/BDB/T

tion 4(1), Goa, Daman and Diu (Laws) No. 2 Regulation (1963) corresponding laws stood repealed — Reading of the two provisions show that law relating to pre-emption under Art. 1566 is saved even after coming into force of T. P. Act (1882) as neither S. 44 nor any other section in T. P. Act deals with right of pre-emption. (Para 5)

B. Reis, for Appellant; V. M. S. Neuren-car, for Respondent.

ORDER:— This appeal is against order dated 17-10-1969 passed by the Civil Judge, Margao.

2. The facts necessary to be mentioned for the disposal of this appeal are these: One Valente I. X. Franco Coutinho commenced execution proceedings against Joaquim Manuel Raimundo da Cruz and his wife. In those proceedings a portion of the property named "Madaabata" situate at Margao was auctioned. The appellant herein was the highest bidder in the auction but the Court did not sell the property to him as the respondent herein claimed that he was co-owner and he had right to purchase the property in exercise of his right of pre-emption under Section 1566 of Portuguese Civil Code. By the order under appeal, the lower Court sold the property to the respondent herein.

3. The appellant contends that as the Transfer of Property Act, 1882 came into force in this territory from 1-11-1965, the lower court could not sell the property to the respondent herein as per Art. 1566 of Portuguese Civil Code.

4. The point for determination is whether there is any force in the contention of the appellant.

5. The Transfer of Property Act 1882 was extended to this territory by the Goa, Daman and Diu (Laws) No. 2 Regulation 1963. Section 4(1) of that Regulation is as follows:—

"Any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in Section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area, as the case may be."

According to that section if there is any law in force in this territory corresponding to Transfer of Property Act that law would stand repealed. The point in dispute in this case is whether the right of pre-emption claimed by the respondent herein was rightly accepted by the lower court. In the Transfer of Property Act 1882 there is no mention about pre-emption. When it is so, it cannot be said that the law relating to pre-emption existing in this territory has been repealed.

The learned advocate for the appellant brought to my notice Section 44 of the Transfer of Property Act, 1882. That section deals with rights of a person who purchased property from a co-owner. That section has nothing to do with pre-emption. Section 5(1) of the Goa, Daman and Diu (Administration) Act, 1962 is as follows:—

"All laws in force immediately before the appointed day in Goa, Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority."

Even according to that section the law relating to pre-emption existing in this ter-

ritory will continue to be in force till it is repealed by competent Legislature or authority. Up to now the Law relating to pre-emption has not been repealed. For this reason it will have to be held that in spite of the Transfer of Property Act, 1882 coming into force from 1-11-1965 in this territory, the lower court was right in selling the property in dispute to the respondent herein when he expressed his desire to purchase it and when it was proved that he was co-owner and he had right to purchase it in exercise of his right of pre-emption. I find no force in this appeal. The appeal is dismissed. Parties will bear their own costs.

Appeal dismissed.

E N D

test and must be held to be an officer. He was duly authorised for the purpose by Ex. 14. The receipt of the sample by Chemist Vaghela thus creates no infirmity and Mr. P. D. Desai's contention in this behalf has no merit.

36. The aforesaid were the only contentions raised on merits and for the reasons stated, they are not capable of acceptance. The various points of law raised earlier have been answered by me as aforesaid. In the result, I must maintain the conviction of the appellant. As regards the sentence, although the minimum sentence provided for the offence is one of imprisonment which shall not be less than six months and fine which shall not be less than Rs. 1,000/-, the learned Magistrate appears to have found that there were adequate and special reasons in the case to impose a lesser sentence. The reasons considered are that the milk contained the required percentage of fat and further that the accused was a hawker. The learned Magistrate has accordingly awarded the lesser substantive sentence of one month's R. I. He has, however, imposed the minimum sentence of fine of Rs. 1,000/- and in default R. I. for three months. In my opinion, having regard to the special facts and circumstances of this case and the further fact that the accused has already undergone seven days' imprisonment before he was released on bail in this appeal, it would be appropriate to reduce his substantive sentence to the period already undergone. Mr. G. T. Nanavaty's objection to the reduction of the sentence has not impressed me as of much substance. Accordingly, I maintain the conviction of the accused as also the sentence of fine and the sentence in default of payment of fine as awarded by the learned City Magistrate, but I reduce the substantive sentence to the one already undergone. Orders accordingly.

Orders accordingly.

AIR 1970 GUJARAT 257 (V 57 C 40)

M. U. SHAH AND D. P. DESAI, JJ.

Mulchand Dasumal Pardasani, Appellant v. Union of India, Ministry of Finance (R. D.), New Delhi, Respondent.

Second Appeal No. 594 of 1968, D/- 16-6-1969, from order of 2nd Extra Asst. J., Baroda, in Civil Appeal No. 250 of 1966.

(A) Civil Services — Fundamental Rules, Rule 56(b) (i) — Pre-April 1938 appointment of Ministerial Central Govt. servant — Age of compulsory retirement of all types of servants raised by memorandum of 1962 by President, from 55 to 58 years pre-condition being efficiency and

physical fitness — By subsequent memorandum dated 31-12-1963 superannuation age raised to 58 years without annual orders and made applicable to pre-April 1938 servants — No subsequent retention except in exceptional cases — Govt.'s right to retire servant after reaching 55 years age, upon three months' notice, not abolished — Pre-April 1938 servants put on par with other Govt. servants — Memorandum of 31-12-1963 created substantive rights and liabilities irrespective of the fact that the changes were not incorporated in relevant Service Code, namely F. R. 56 (b) (i) and memorandums were not gazetted and were not in usual form — Memorandums not being contrary to any provisions of Constitution, were rules under Art. 309 made by the President. AIR 1961 SC 1346 & AIR 1954 SC 369, Rel. on; AIR 1967 SC 1264, Disting. (Paras 6, 7, 10, 11)

(B) Civil Services — Fundamental Rules, Rule 56(b) (i) — Retirement age extended to 58 years by Presidential Memorandum — Pre-April 1938 servant on leave preparatory to retirement on age of 55 years as per original rule when memorandum came into force, is entitled to its benefit — He could not be said to have retired before expiry of leave. (Para 16)

(C) Civil Services — Fundamental Rules, Rule 56(b) (i) — Absolute right of Govt. to retire Govt. servant on 3 months' notice after he has attained age of 55 years is restriction on normal right of Govt. servant to continue in service till he attains age of 58 years — Order of retirement served on 28-12-1963 giving option to retire on 14-3-1964 date on which the Govt. servant attained age of 55 years or proceed on leave admissible preparatory to retirement — Govt. servant going on leave of 22 months as admissible — Notice held not in pursuance of Govt.'s absolute right, not being 3 months' notice — No instruction for procedure for review issued — Order cannot be said to be one of compulsory retirement in exercise of Govt.'s absolute power — Order is illegal and unconstitutional. (Para 18)

(D) Constitution of India, Art. 311 (2) — Illegal order of compulsory retirement in apparent exercise of Govt.'s absolute power — Order mentioning unsuitability as reason in attempt to bring order within terms of Fundamental Rules — Compulsory retirement however, has no stigma attached to it — Held no express words in order throwing any stigma — Order not one of 'removal' within meaning of Art. 311(2). AIR 1967 SC 1264 (1266), Foll. (Para 19)

(E) Constitution of India, Art. 311(2) — Permanent Govt. servant — Compulsory retirement — Three months' notice as required by rules not given — Notice held illegal and ineffective — Defect can-

not be cured by paying three months' salary in lieu of notice, since this would amount to introducing concept of relationship between the master and servant — Employee being a permanent Govt. servant has right to security of his service tenure as guaranteed by Constitution, subject of course to the rule of superannuation and rule of compulsory retirement — Moreover there is no service rule that upon payment of salary in lieu of notice a servant can be compulsorily retired. (Para 22)

(F) Civil Services — Fundamental (6th Amendment) Rules, 1965 — F. R. 56(b) (i) amended by substitution of new Rule 56(a) — Amendment Rules made by President under Art. 309, Proviso and Clause 5 of Art. 148 — Amended rule only clarifies scope of original rules increasing age of retirement as amended by office memorandum which memorandum had come into force *ex proprio vigore* on their issuance — The new rule does not bring them into force for first time and does not bring about any new change in the matter of age of superannuation or premature compulsory retirement. (Para 24)

(G) Civil Services — Fundamental (6th Amendment) Rules (1965), Para 3, Cl. (c) — Pre-April 1938 ministerial Central Government servant falling within purview of R. 56(b) (i) of unamended F. R. as it stood on relevant date held entitled to benefit of 6th Amendment and is entitled to be retained in service till his attainment of 60 years age — The civil servant held could invoke the new rule, which had come into force during pendency of proceeding in which he had claimed to continue in service upto 60 years of age under original F. R. 56(b) (i) — Civil P. C. (1908), O. 7, R. 7. (Paras 25, 28)

(H) Civil Services — Fundamental Rules R. 56(J) (as amended by Fundamental (6th Amendment) Rules (1965)) — Compulsory retirement — Notice — Impugned order passed on 18-12-1963 — Amended rule cannot be relied upon to canvass the view that notice was given under Cl. (J). (Para 27)

(I) Civil Services — Fundamental Rules, R. 56(J) (as amended by Fundamental 6th Amendment) Rules (1965)) — Power to compulsory retire Government servant after attainment of 55 years is exercisable only if the authority is of opinion that it is in public interest to do so. (Para 27)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1264 (V 54) —
(1967) 2 SCR 496, I. N. Saksena
v. State of Madhya Pradesh 13, 19
(1964) AIR 1964 SC 600 (V 51) —
(1964) 5 SCR 683, Moti Ram Deka
v. N. E. Frontier Rly. 19
(1961) AIR 1961 SC 1346 (V 48) —
(1962) 1 SCR 374, Kailash Chandra
v. Union of India 6

(1958) AIR 1958 SC 36 (V 45) —
1958 SCR 828, P. L. Dhingra v.
Union of India 19

(1954) AIR 1954 SC 369 (V 41) —
1955 SCR 26, Shyam Lal v. State of
Uttar Pradesh 14, 19

N. V. Karlekar (*Amicus Curiae*), for Appellant; C. N. Desai, Government Pleader, for Respondent.

M. U. SHAH, J.:— This second appeal has come to us by a reference made by Mr. Justice B. G. Thakore on February 18, 1969. It raises an important question concerning the age of compulsory retirement of a pre-1938 April ministerial Central Government servant

2. Appellant Mulchand Dasumal Pardasani was appointed as a clerk in the Sindh Salt Department on June 10, 1930. He was transferred to Bombay Central Excise Department with effect from 15th August 1947 and was appointed as Upper-Division Clerk in about October 1948. At that time, he was drawing a salary of Rs. 280/- plus Rs. 50/- dearness allowance per month in the scale of Rs. 130-5-160-8-200 E B-8-280-10-300. He continued to be in that scale on the date of the issuance of establishment order No. 286 of 1963 dated December 18, 1963 by the Collector, Central Excise, Baroda. The said order was served on him on December 28, 1963, and he proceeded on leave preparatory to retirement on March 14, 1964, the date on which he attained the age of 55 years. The order reads as under:

"Central Excise Collectorate, Baroda, Establishment Order No. 286 of 1963.

Shri Mulchand Pardasani, Upper-Division Clerk, Head Quarter Office, Baroda, who attains the age of 55 years on 14-3-1964 is hereby informed that the Collectorate Departmental Promotion Committee, 1963, has not considered him suitable for further retention in service beyond the age of 55 years. He has the option to retire with effect from 14-3-1964 forenoon or proceed on leave as may be admissible and granted to him preparatory to retirement.

Sd: Illegible.

For Collector. 18-12-1963."

Thereafter, the appellant made several representations to the appropriate authorities in the matter, served a statutory notice on the Government and instituted Regular Civil Suit No. 343 of 1965 in the Court of the Civil Judge (Senior Division) Baroda, on March 9, 1965. Therein the appellant challenged the aforesaid order Ex. 26 as being wrongful, illegal, ultra vires, mala fide, void, unconstitutional and inoperative at law on the grounds, *inter alia*, that it was in contravention of his right to be continued in service until he attains the age of 58 years as per Fundamental Rule 56(i) that the order casts a stigma on the appellant and was made

in violation of Art. 311(2) of the Constitution of India, that it was mala fide, that three months' notice required to be given to a Government servant to retire him on his attaining the age of 55 years was not given and further that it was against the latest orders raising the age of superannuation to 58 years. The Union of India which was sued as defendant resisted the suit contending inter alia that the Government had the right to retire the appellant on his attaining the age of 55 years. It was contended that the appellant was found to be insubordinate, insolent and unreliable while in the service during years 1944 to 1946 in the Sindh Salt Department prior to partition. It was contended that the plaintiff was not found efficient and suitable for further retention and continuation in services beyond the age of 55 years and as such, he was validly given the option as required by law. He was not found fit for promotion by the Departmental Promotion Committee for the post of Head Clerk. It was contended that the impugned order was legal and gave the requisite three months' notice to the appellant to retire him and further that the order was in conformity with the provisions of Fundamental R. 56(b) (i). The learned Civil Judge found that the impugned order of compulsory retirement was not in contravention of the provisions of Fundamental R. 56(b) (i). He found that the order did not violate the provisions of Article 311 (2) of the Constitution and the departmental rules. He negatived the defence contention that the suit was barred by limitation. However, as in his view the impugned order was valid order, he dismissed the suit. In First Appeal No. 250 of 1966 that was filed by the appellant against the decree of the trial Court dismissing his suit and which came to be heard by the learned Second Extra Assistant Judge, Baroda, the decree of the trial Court has been confirmed, on the learned Judge holding that the impugned order was not in violation of the Fundamental Rule 56(b) (i) and further that it was not in violation of Art. 311 (2) of the Constitution of India. The learned Judge further held that the appellant was not entitled to three months' notice. In this view of the matter, he has dismissed the appeal by his judgment and decree dated November 30, 1967. Being aggrieved, the appellant has filed this second appeal which has now reached hearing before us.

3. Mr. N. V. Karlekar, who has appeared as amicus curiae on behalf of the appellant-plaintiff, has contended before us that the age of compulsory retirement of pre-April 1938 ministerial Central Government servants was raised from 55 to 58 and as such the Government had no right to retire the appellant before he attained the age of compulsory retirement. He has contended that the impugned order

attached a stigma to the appellant and was in violation of Art. 311(2) of the Constitution of India. He has further contended that the impugned order is mala fide. Lastly, he has contended that the impugned order does not amount to an order of retirement within the meaning of para 6 of the office memorandum No. 33/18/62-ESTS.(A) dated 30th November, 1962, issued by the Government of India, Ministry of Home Affairs. Mr. G. N. Desai, the learned Government Pleader, appearing for the respondent, Union of India, has supported the decree of the lower Court. He has contended that the Fundamental Rule 56(b) (i) as it stood prior to November 30, 1962, was kept intact and that the age of compulsory retirement of the appellant who is a pre-April 1938 ministerial servant continues to be 55. He has contended that the impugned order amounted to notice within the meaning of para 6 of office memorandum dated 30th November 1962. According to him, even if the memorandum is held to have the force of the statutory rule, the right of the appellant to continue in service till the age of retirement was subject to the absolute right of the Government to retire a Government servant on three months' notice.

4. It is not in dispute that the plaintiff-appellant is a ministerial servant who had entered in Central Government service prior to April 1, 1938. It is also not in dispute that the appellant would have attained the age of 55 on March 14, 1964, and the age of 58 on March 14, 1967.

5. In order to appreciate the rival contentions aforesaid raised in this appeal, it will be convenient first to refer to Fundamental Rule 56 and the modifications or amendments that have been made in the rule from time to time. Fundamental Rules were applicable to members of services under the rule-making control of the Governor General in Council and were made by the Secretary of State in Council under Section 96-B of the Government of India Act, 1915. The rules as they stood on the 27th day of May 1930 were subsequently amended from time to time by the Governor General in Council in exercise of the powers conferred on him by Rules 33(2), 37, 42 and 44(d) of the Civil Services (Classification, Control and Appeal) Rules in respect of the personnel under his rule-making control. They have originally come in force with effect from the 1st January, 1922, and continue to be in force after the commencement of the Constitution. Question of compulsory retirement is dealt with in Chapter IX of the Fundamental Rules. F. R. 56 which deals with the compulsory retirement of the various classes of Government servants as prior to the 1962 amendment reads as under:

"F. R. 56(a): Except as otherwise provided in the other clauses of this Rule,

the date of compulsory retirement of a Government servant, other than a ministerial servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Local Government on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances." Proviso to CL (a) deals with the case of a workman and need not be set out. Clause (b) which is material for our purpose provides:

"(b)(i). A ministerial servant who is not governed by sub-clause (ii) may be required to retire at the age of 55 years, but should ordinarily be retained in service. If he continues efficient, upto the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing, and with the sanction of the Local Government.

(ii) A ministerial servant:

(1) who enters Government service on or after the 1st April 1938, or

(2) who being in Government service on the 31st March, 1938, did not hold a lien or a suspended lien on a permanent post on the date,

shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on public grounds which must be recorded in writing, and with the sanction of the Local Government and he must not be retained after the age of 60 years except in very special circumstances."

The other clauses of the rule are not relevant for our purpose.

6. It is obvious that the rule as regards compulsory retirement is more favourable to ministerial servants who fall within CL (b) (i) of F. R. 56 than those who fall under CL (b) (ii) of the same rule or Govt. servants who are not ministerial servants. For whereas in the case of these, viz. Government servants—who are not ministerial servants, and ministerial servants under CL (b) (ii) — retention after the age of 55 itself is intended to be exceptional, to be made on public grounds which must be recorded in writing and with the sanction of the Local Government, in the case of ministerial servants who fall under CL (b) (i) of F. R. 56 their retention after the age of 60 is treated as exceptional and to be made in a similar manner as retention in the case of the other servants mentioned above after the age of 55. It is clear, therefore, that whereas the authority appropriate to make the order of compulsory retirement or of retention is given no discretion by itself to retain a ministerial servant under CL (b) (ii) if he attains the age of 55 years, that is not the position as regards the minis-

terial servants who fall under CL (b) (i). Now, CL (b) (i) which would govern the case of the appellant provides (i) that the Government servant may be required to retire at the age of 55 years, (ii) that he should be ordinarily retained in service upto the age of 60 years, the pre-condition being continued efficiency, (iii) that after he attains the age of 60 years, he cannot be retained in service except in very special circumstances. The rule as it then stood, gave no right to the ministerial servant of pre-April, 1938, to continue in service beyond the age of 55 years. The appropriate authority has the right to require the servant to retire as soon as the age of 55 is reached. Between the ages of 55 and 60, the appropriate authority is given the option to retain the Government servant, but he is not bound to do so even if the servant continues to be efficient. His retention after the age of 60 is treated as exceptional and to be made in a prescribed manner. This is the resultant position of such a rule as found by their Lordships of the Supreme Court in the case of *Kailas Chandra v. Union of India*, AIR 1961 SC 1346, where the Supreme Court was dealing with the case of a railway servant falling under Rule 2045 (2) (a) of the Indian Railway Establishment Code which corresponds to Fundamental Rule 56 (b) (i), as it originally stood. Rule 2046 (2) (a) of the Railway Code reads:

"(2) (a). A ministerial servant who is not governed by sub-clause (b), may be required to retire at the age of 55 years, but should ordinarily be retained in service, if he continues efficient upto the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing, and with the sanction of the competent authority."

Dealing with the case, *Das Gupta, J.*, speaking for the Supreme Court, has observed at page 1349:

"The correct interpretation of Rule 2046 (2) (a) of the Code is that a railway ministerial servant falling within this clause may be compulsorily retired on attaining the age of 55, but when the servant is between the age of 55 and 60 the appropriate authority has the option to continue him in service, subject to the condition that the servant continues to be efficient."

On a parity of reasoning, F. R. 56 (b) (i) gives the plaintiff-appellant no right to continue in service beyond the age of 55. This would be the legal position if the F. R. 56 (b) (i) was not amended.

7. By office memorandum No. 33/18/62-ESTS (A) dated 30th November, 1962, Ministry of Home Affairs and M. F. (D. R.) F. No. 6/25/62-Coord (644), dated 4th December 1962, published at pages 531 and 532 of the C. B. R. Bulletin, Customs

and Central Excise Administration and Land Customs, October-December, 1962 — Part under the caption "Age of Compulsory retirement — Raising of" amendment was made in Fundamental Rule 56. The office memorandum may be here conveniently set out:

"Government have had under consideration for some time past the question whether the age of compulsory retirement of Government servants should be raised above 55 years.

2. It has now been decided and the President is pleased to direct that the age of compulsory retirement of Central Government servants should be 58 years subject to the following exceptions:

(i) The existing rules under which ministerial Government servants recruited before 1-4-1938 are to be retained in service upto the age of 60 years subject to their continuing to be efficient and physically fit after attaining the age of 55 years will remain in force.

(ii) The age of compulsory retirement for those categories of Class IV staff who are at present entitled to serve upto the age of 60 years including new entrants should continue to be 60 years.

(iii) xx	xx	xx.
3. xx	xx	xx.
4. xx	xx	xx
5. xx	xx	xx.

6. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason. This will be in addition to the provisions already contained in Rule 2(2) of the liberalized Pension Rules, 1950 to retire an officer who has completed 30 years' qualifying service, and will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. The Government servant also may, after attaining the age of 55 years, voluntarily retire after giving three months' notice to the appointing authority.

7. These provisions will have effect from 1st December, 1962.

8. xx xx xx."

By para 2 of the aforesaid memorandum, the age of compulsory retirement of all Central Government servants was raised to 58 years, but this was subject to the relevant exceptions (i), (ii), (iii) to be found in para 2 thereof. Exception (i) which is relevant for our purpose will govern the case of the Ministerial servants recruited before 1-4-1938, the appellant being the servant falling in that category. The exception is carved out in the general rule which raises the age of compulsory retirement of the Central Government servant to 58 years. However, in so far as it ap-

plies to the pre-April 1938 ministerial Central Government servants, it does not introduce any substantial modification in Fundamental Rule 56(b) (i) as it stood earlier which provided that a Government servant may be retained in service after he attains the age of 55 and upto the age of 60 subject to the pre-condition of the Government servant continuing to be efficient upto the age of 60 years. Only the words "and physically fit" are added to it, thus adding one more pre-condition for being retained in service after 55. This is indicated by the use of the significant expression "after attaining the age of 55 years" used in the last sentence in exception (i), which age still remained the starting point for the exercise of the discretion by the appropriate authority to retain the Government servant in service upto the age of 60 years and between the ages of 55 and 60. In our opinion, therefore, although the age of compulsory retirement is increased from 55 to 58 and thus appears at first sight to create an impression that the servant may be required to retire as soon as he reaches the age of 58 and not 55 as before, in substance, the modification relating to the retention of a Government servant between the ages of 55 and 60 is insubstantial and to this extent the original Rule 56 (b) (i) appears to have been kept intact. The memorandum, however, confers an absolute right in the appointing authority to require a Government servant to retire after he attains the age of 55 years on three months' notice.

8. The aforesaid office memorandum was subsequently modified by the decision of the President contained in Home Ministry's No. M. R. A. O. M. 33/2/63-Ests. 'A' dated 31-12-1963 and Finance Ministry's No. M. F. (D. R.) F. No. 6/4/64/Co-or (11) dated 15-1-1964, published in C.B. R. Bulletin, Customs and Central Excise Administration, January-March, 1964. Part, at Pages 3, 4, and 5 as item No. 6 under Caption "Age of compulsory retirement-raising of-Clarifications in respect of "pre-1938 entrant Ministerial Government servants, which reads:

"In partial modification of Ministry of Home Affairs Office Memorandum No. 33/18/62-Ests. (A), dated the 30th November, 1962, and 31st December, 1962 and the Ministry of Finance Officer Memorandum No. F. 22 (1)-EV/63, dated the 14th April, 1963, inserted as Government of India's decision No. (2) below F. R. 56 in the Posts and Telegraphs Compilation of F. R. and S. Rs., the President is pleased to decide that subject to the right of Government to retire any Officer on 3 months' notice after he has attained the age of 55 years, the pre-1938 ministerial officers governed by F. R. 56(b) (i) should also be continued in service like all other Government servants except those whose

age of retirement is (60) upto the age of 58 years without any annual order sanctioning their retention. After the age of 58 years and till he attains the age of 60 years however, such an annual order would be necessary. There will, however, be a review in the case of all employees (whether pre-1938 or post-1938) to assess their suitability for retention beyond the age of 55 years. Instructions detailing the procedure for conducting this review are being issued separately. In view of this, the date of compulsory retirement of a Government servant who is the substantive holder of a ministerial post and is governed by Cl. (b) (i) of F. R. 56 but who was officiating in a non-ministerial post on 1st December, 1962 or who may have been appointed to officiate in such a post after this date, will be the date on which he attains the age of 58 years. If such a person would like to become eligible for further retention in service under F. R. 56 (b) (i) or the grant of any leave (including leave preparatory to retirement) extending beyond that date, he must revert to a ministerial post before he actually attains the age of 58 years.

2. xx xx xx.

3. xx xx xx.

4. Action to make necessary formal amendments in F. R. & S. Rs. C. S. Rs. is being taken separately.

5. xx xx xx."

9. The aforesaid decision of the President thus covers the case of pre-April 1938 Ministerial officers who are governed by F. R. 56(b) (i). The decision is to continue such servants like all other Government servants except those whose age of retirement is 60 upto the age of 58 years and without requiring an annual order sanctioning the retention. Thus, the pre-1938 ministerial servants are, as a general rule, put on par with all other Government servants except the servants whose age of retirement was 60. But, thus again is subject to these absolute rights of the Government to retire any officer on 3 months' notice after he has attained the age of 55 years. Thus, to the pre-1938 ministerial officers, para 6 of the 1962 office memorandum was continued or made applicable. In case of all servants, whether pre-1938 or post-1938 ministerial servants, however, a provision for review in order to assess their suitability for their retention beyond the age of 55 years was made. The language of the second memorandum which extends the period of compulsory retirement of the Government servant to the age of 58 years and dispenses with an annual order sanctioning the retention of the Government servant beyond the age of 55 years and upto the age of 58 years is intrinsic evidence of the intention of the rule-making authority to put the pre-April 1938 ministerial Government servants on par with other Government ser-

vants whose age of retirement was formerly 55 years and which by virtue of the first memorandum was raised to 58 years as stated in para 2 thereof. The use of the expression "like all other Government servants" to be found in the second office memorandum thus strengthens our view that the age of retirement of the pre-April 1938 Central Government servants was raised to 58 years. This 1963 memorandum thus substantially amends the fundamental Rule 56 (b) (i). The result is that every Government servant shall retire on the date he attains the age of 58 years which appears to be the age of superannuation fixed. This will be subject to (a) the option of the appropriate authority to retain him in service after he attains the age of 58 years and till 60 years, (b) the right of the Government to review the case of all employees for retention beyond the age of 55 years in order to assess their suitability for retention, after following a prescribed procedure for conducting the review and (c) the absolute right of the appointing authority to retire any officer on 3 months' notice, after he attains the age of 55 years.

10. The 1962 office memorandum set out earlier which will hereafter be referred to as "the first memorandum" and the aforesaid memorandum containing Home Ministry's letter dated 31-12-1962 and Finance Ministry's letter dated 15-1-1964, which will hereafter be referred to 'as the second memorandum' thus introduce substantial amendments in fundamental R. 56 (b) (i) and create substantive rights and liabilities and as a result the corresponding provisions of the Service Code already in operation stand amended by implication as they are not expressly saved, and this is independently of the consideration whether the consequential changes in accordance therewith are or are not incorporated in the relevant Service Code, viz. in F. R. 56(b) (i), the act of incorporating the consequential changes in the Service Code in such cases being mostly a procedural part of the law. The result is that the appellant who was a pre-April 1938 Ministerial Government servant would be entitled to the benefit of the increased age of compulsory retirement subject to right of the Government to review his case for retention beyond the age of 55 and the absolute right of the Government to retire him on 3 months' notice as provided for in para 6 of the First memorandum.

11. Mr. Desai has, however, contended that neither of the two memorandums aforesaid can be said to be a rule or a condition of service. His submission was that the two memorandums were merely executive or administrative directions or instructions not having the force of a rule. His submission further was that the memo-

randums were not gazetted and that they were not in the usual form in which such Presidential decisions or rules are issued. Now, as regards the first memorandum, it may be remembered that, in our opinion, it kept the original Fundamental Rule 56 (b) (i) intact in a way so far as the appellant was concerned at the time of the issuance of the first memorandum, and therefore, it may be said that by itself and without the second memorandum following, it had no impact on the rights of the appellant after he attained the age of 55 years. Even then, as Mr. Desai's contention covers both the memorandums, the first and the second, we would deal with the question also as far as it concerns the first memorandum. Para 2 of the first memorandum in terms says that "It has now been decided and the President is pleased to direct" that the age of the compulsory retirement of Central Government employees should be 58 years subject to the exceptions which follow. The second memorandum says that "the President is pleased to decide" in partial modification of the first memorandum that pre-1938 ministerial officers governed by F. R. 56 (b) (i) should also be continued in service like all other Government servants except those whose age of retirement is 60, upto the age of 58 years. Thus, both the memorandums contain the rules in the form of the directions or decisions made by the President in the matter. The proviso to Art. 309 of the Constitution lays down that it shall be competent for the President to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under the Article and any rules so made shall have effect subject to the provisions of any such Act if made by an Act of the appropriate Legislature. No such relevant Act is shown to have been made. The President had thus the powers to make rules regulating the conditions of service of persons appointed to Central Government services in connection with the affairs of the Union. The rules are not shown to be inconsistent with any provision of the Constitution. In our opinion, therefore, the two memorandums are in substance rules made by the President regulating the conditions of service of the Central Government servants. The rules will have the same effect as if they are in the Act and are to be judicially noticed for all purposes of construction of rights and obligations.

12. It was contended by Mr. Desai that the office memorandums were not published or gazetted and as such, they had no force or validity. There is no merit in the contention. Neither the proviso to Article 309 of the

Constitution, nor the Rules of Business lay down any condition that the rule made in exercise of the powers under the proviso to Art. 309 shall not be effective or binding until the same has been published or posted in the relevant Service Code. The question of publication in the gazette or otherwise in such circumstances is a matter of propriety and desirability so that all persons concerned therewith may have necessary notice in regard thereto. But, surely that cannot lead to the conclusion that until the publication of the rules (the memorandums) is effected, any rule made in exercise of the powers given in the proviso to Art. 309 of the Constitution shall have no force as a statutory rule as contemplated therein. This is apart from the fact that the two memorandums have been published in the C. B. R. Bulletins.

13. Mr. Desai has relied upon a decision of the Supreme Court in the case of I. N. Saksena v. State of Madhya Pradesh, AIR 1967 SC 1264, where Wanchoo, J., speaking for the Court, had, while dealing with a memorandum raising the age of compulsory retirement of State Government servants to 58 years issued by the Government of Madhya Pradesh to all Collectors of the State, construed the memorandum as merely an executive direction and not a rule. In the case before their Lordships, the memorandum in question was issued by the State Government and stated that the State Government had decided that the age of compulsory retirement of the State Govt. servants should be raised to 58 years. The memorandum in para 5 contained a provision conferring a right upon the Government or the appointing authority to require a Govt. servant to retire after he attains the age of 55 years on 3 months' notice. It stated that necessary amendments to the Civil Service Rules will be issued in due course. In the subsequent notification which was issued by the Finance Department and was published by the Madhya Pradesh Gazette, this para 5 of the memorandum did not find its place. The subsequent notification was stated to have been issued by the Governor in exercise of the powers conferred by the proviso to Art. 309 of the Constitution. The earlier memorandum was not in the form of a rule. The memorandum in question was issued not by the Governor as required under proviso to Art. 309, but it was issued by the State Government. It was on the peculiar facts of the case that the Supreme Court took the view that the memorandum in question was merely an executive direction or instruction of the Government to the Collectors. In the case before us, the second memorandum in its para 4 clearly states that action to make necessary amendments in F. R. & S. Rs. C. S. Rs. is being taken separately. Thus, the second memorandum itself was considered as a rule and what

remained to be done was merely to make necessary formal amendments in the fundamental rules, etc.

14. As regards the form in which the order is to be expressed, we do not find any data or warrant for the contention of Mr. Desai that it should be in a particular form. In support of his contention, Mr. Desai invited our attention to the Fundamental (6th) Amendment Rules, 1965, which are expressed to be made in exercise of the powers conferred by proviso to Art. 309 and are made in the form of rules. Para 1 of the amendment states that "in the exercise of the powers conferred by proviso to Art. 309 of the Constitution and Cl 5 to Art. 148 of the Constitution and all other powers enabling him in this behalf and after consultation with the Comptroller and Auditor General in relation to persons serving in Union or Accounts Departments, the President makes the rules." It is true that the said rules are so expressed to be made. But that does not mean that in every case the rules or the office memorandums should be expressed to have been made by the President in exercise of the powers under the Article of the Constitution. The two memorandums in terms say that they have been made under the directions of the President. They contain the decisions of the President in the matter. The form in which the memorandums are issued is not material if the memorandums can be treated as issued under the powers of the President under the proviso to Art. 309. Again, the purpose of publishing a new rule in the form of amendment to the Civil Service Rules is, as observed by Their Lordships of the Supreme Court in *Shyamal v. State of Uttar Pradesh*, AIR 1954 SC 359, only to clarify the exact scope of those new rules and not to bring them into force for the first time. There can be no escape from the conclusion that the provisions made in the two memorandums as to the increase of age, viz. age of superannuation and of premature compulsory retirement had the character of statutory rules contemplated under the proviso to Art. 309 of the Constitution and are not administrative orders or executive instructions. We cannot, therefore, accept Mr. Desai's contention that the memorandums are in the nature of administrative or executive instructions and that the entire Fundamental Rule 56(b) (i) as it stood prior to the issuance of the President's directions to be found in the two memorandums was kept intact.

15. As aforesaid, the second memorandum introduces substantial amendments to the F. R. 56(b) (i) and creates substantive rights in the Government servants to be continued in service upto the age of 58 years subject to the right of the Government to dispense with his services on 3 months' notice and the right of review.

It would follow that the appellant who was a ministerial Government servant within the meaning of Fundamental Rule 56(b) (i) will be entitled to the benefit of the increased age of compulsory retirement subject to the right of the Government to review his case of retention beyond the age of 55 years and the absolute right of the Government to retire him on 3 months' notice. Here, we wish to make it clear that neither Mr. Karlekar, nor the appellant himself has contended that the proviso in para 6 of the first memorandum which purports to give the Government an absolute right to retire a Government servant on three months' notice, as also a similar provision contained in the second memorandum amount to the removal of the servant in question and is inconsistent with the provisions contained in Art. 311 (2) of the Constitution. We have, therefore, not examined the question of validity of the provision and proceeded on the assumption that it is valid.

16. Now, at the date when the impugned order Ex. 26 was served on the appellant, viz. on December 28, 1963, the appellant had not attained the age of 55. It is true that the order gave him an option to retire with effect from March 14, 1964 forenoon on which date he would have attained the age of 55 years. But, the order gave another option to the appellant, viz. to proceed on leave as may be admissible and granted to him preparatory to retirement. The appellant is not shown to have retired on the date on which he attained the age of 55 years. On the contrary, it appears to have been contended on behalf of the Government in the lower appellate Court, and the same arguments have been adopted here by Mr. Desai, that the plaintiff-appellant was on preparatory leave extending upto 28 months after 14-3-1964. In fact, the appellant was paid the salary that was admissible to him for this leave period of 28 months. Thus, for 28 months after he attained the age of 55, he continued to be the Government servant. The petitioner was granted leave preparatory to retirement and this precludes the concept of retirement before the expiry of such leave. The use of the word "preparatory" indicates that the leave granted precedes the retirement. It means that the servant retires only after the expiry of the leave, notwithstanding the fact that he attained the age of 55 years when the period of leave commenced. Thus, at the date of the issuance of the second memorandum which must necessarily have been some time prior to the end of the year 1963 A. D., the appellant continued to be in service. He was thus entitled to the benefit of the increased age of compulsory retirement, viz., 58 years as aforesaid. In this view of the matter, the impugned order Ex. 26 was clearly beyond the

powers of the Collector who issued the order. The order was in violation of the right of the appellant normally to continue in service until he attained the age of 58 years and now 60 years by virtue of the Fundamental (Sixth Amendment) Rules 1965, as we shall later on see, and as such, is illegal and unconstitutional.

17. As observed earlier, the normal right of the Government servant to continue upto the age of 58 years and now 60 is subject to (i) the power of the Government to review the case of the servant to assess the suitability of the servant for retention beyond the age of 55 years, the power to be exercised according to the procedure prescribed for conducting the review, and (ii) the absolute right of the Government to retire the Government servant on 3 months' notice after he attains the age of 55 years. Now, the impugned order does not purport to be a review order. In the very nature of things, Ex. 26 cannot be said to have been made by the Collector in the exercise of the power of review for the simple reason that the second memorandum was issued some time in the end of the year 1963. Although we have nothing on record to show on what particular date the President had passed the order and thus made the rules contained in the second office memorandum. Mr. Desai being unable to point out the date of the Presidential order, it is clear by a reference to the second memorandum as published in C. B. R. Bulletin, January-March, 1964, at pages 3, 4 and 5 that the second memorandum contains the Ministry of Home Affairs memorandum dated December 31, 1963, and Ministry of Finance memorandum dated January 15, 1964. It follows that the second memorandum must necessarily have been issued some time prior to December 31, 1963. It might very probably have been issued prior to December 28, 1963, when the impugned order Ex. 26 was received by the appellant. Apart from that, at the date of issuance of the impugned order which was on December 18, 1963, instructions detailing the procedure for conducting the review are not shown to have been issued, nor is it shown that the Collectorate Departmental Promotion Committee which appears to have considered the appellant unsuitable as stated in the impugned order had the right or authority to review the case. The second memorandum, in terms, says that instructions for detailing the procedure for conducting the review are being issued separately. Thus, there was no question of the Government exercising the power of review at the time of the issuance of the impugned order. Therefore, the contention of Mr. Desai that the impugned order was an order in exercise of the power of review as contemplated by the second memo-

randum has no merit and cannot be accepted.

18. This will take us to the next question, viz., the absolute right of the Government to retire a Government servant on 3 months' notice after he has attained the age of 55 years. This restriction on the normal right of the Government servant to continue in service until he attains the age of 58 years, the benefit of which was conferred on the pre-April, 1938 Ministerial Government servants by the second memorandum has to be read, in the context of para. 6 of the first memorandum which we have set out earlier. It was urged that para. 6 of the first memorandum which provides that the appointing authority may require a Government servant to retire after he attains the age of 55 years on 3 months' notice without assigning any reason, would be operative in the case of pre-April 1938 ministerial Government servants only after the issuance of the second office memorandum some time in December, 1963. Apart from that, we have to see whether the impugned order Ex. 26 amounts to the exercise of such absolute right of the Government. What is contemplated by the powers under para 6 of the first memorandum is to require a Government servant to retire after he attains the age of 55 years, That can be on 3 months' notice and without assigning any reasons. Now, the impugned order Ex. 26 which we have set out earlier does not conform to this requirement as we shall presently see. The order merely communicates the view of the Collectorate Departmental Promotion Committee, 1963, that the appellant was not found to be suitable for further retention in service beyond the age of 55 years. But, it does not require him to retire after he attained the age of 55 years. He was, on the contrary, given an option (i) to retire with effect from March 14, 1964, forenoon, or (ii) to proceed on leave as may be admissible and granted to him preparatory to retirement. In pursuance of this order, the appellant did not retire on that date, nor was he made to retire on that day; but, on 14-3-1964, he simply proceeded on leave admissible and as granted to him preparatory to retirement. Again, it is to be remembered that the order was admittedly received by the appellant on 28-12-1963 and he was called upon to exercise the option on 14-3-1964, within 3 months of the date of the order. Obviously, the order did not give him 3 months' time. Considering the tenor of the document as a whole and in the context of the appellant opting for 28 months' preparatory leave which was granted to him and for which he was paid salary admissible under the rules, it could not be said that the impugned order amounts to the exercise by the appointing authority of the absolute right of the Government

did not dwell on this point. The correspondence does not reveal the mala fides of the appropriate authorities, viz., the Collector or the Collectorate Departmental Committee, 1963, which had considered appellant's case for retention beyond the age of 55 years and had found him not suitable for the purpose. We cannot, therefore, accept the appellant's contention that the impugned order suffers from the vice of mala fides.

22. It was contended by Mr. Desai that, in any view of the matter, the right of the appellant who was a pre-April 1938 Ministerial Government servant was only to have salary of 3 months' period in lieu of a notice required under para 6 of the first office memorandum. Now, this is an attempt to introduce the ordinary concept of the relationship between the master and servant. But, the appellant is a permanent Government servant and as such, he has the right to the security of his service tenure as guaranteed by the Constitution of India. He has a right to continue in service, subject, of course, to the rule of superannuation and the rule as to compulsory retirement. The concept of master and servant has no application. Again, there is no service rule that a permanent Government servant can be compulsorily retired on payment of salary in lieu of 3 months' notice. In any view of the matter, therefore, Mr. Desai's contention in this behalf must, therefore, be rejected.

23. Mr. Desai has lastly contended that Fundamental Rule 56 (b) (i) was amended for the first time by the Fundamental (Sixth) Amendment Rules, 1965, which substituted new Rule for original F. R. 56 and therefore, the amendments in the original F. R. 56 should be considered to have been made, not by the first or the second memorandum, but by the Sixth Amendment Rules, 1965, and as such, the appellant was not entitled to the benefit of the increased age of retirement at 58 under the two office memorandums. This contention, as we shall presently see, is fallacious and has no substance. The Sixth Amendment Rules, on the contrary, increase the age of retirement of a Government servant from 58 to 60 and make the benefit of the increased age available to the appellant who must be deemed to have continued in service when the Fundamental (Sixth Amendment) Rules, 1965, came into force.

24. Now, Fundamental (Sixth Amendment) Rules, 1965, were made by the President further to amend the Fundamental Rules and this is stated to have been made in exercise of the powers conferred by the Proviso to Art. 309 and Clause 5 of Art. 148 of the Constitution. The rules are to be found in Notification No. M. F. 12 (2) LV (C)/63 dated 21-7-65.

Para 2 of the notification says that these rules may be called the Fundamental (Sixth Amendment) Rules, 1965. Para 3 reads:—

"3. In the Fundamental Rules for Rule 56, the following rule shall be substituted, namely:—

56 (a). Except as otherwise provided in this rule, every Government servant shall retire on the day he attains the age of fifty-eight years.

(b) xx

(c) xx

(d) xx

(e) xx

(f) xx

(g) xx

(h) xx

(i) xx

(j) Notwithstanding anything contained in this rule, the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any Government servant after he has attained the age of fifty-five years by giving him notice of not less than three months in writing

It clearly appears from the substituted Rule 56(a) aforesaid that it merely clarifies the scope of the rules increasing the age of retirement of Government servants to be found in the first and the second memorandums and does not bring them into force for the first time. The relevant rules in the two office memorandums came into operation ex proprio vigore on the issuance of the said memorandums and their subsequent publication for general information in the form of amendment to the fundamental rules was only to make their scope clear. It does not appear to be the intention of the rule-making authority to make any such new rule on the date of such incorporation. The Sixth Amendment Rules do not bring about any new change in the rule as to the increased age of superannuation or as to age of premature compulsory retirement. They had already been in existence prior to the date of the Sixth Amendment. Therefore, the argument of Mr. Desai that the rule raising of age of superannuation of the pre-ministerial Government servant to 58 was made for the first time in the Sixth Amendment Rules, 1965, is incapable of acceptance.

25. On the contrary, it was urged by the appellant in person and with substance that he was entitled to the benefit of clause (c) of para 3 of the Fundamental (Sixth Amendment) Rules, 1965 aforesaid, as notified. The submission was that the appellant was a pre-1938-April ministerial Central Government servant falling within the purview of the original Fundamental Rule 56(b) (i) as it stood on the relevant date and sub-clause (ii) of clause (b)

thereof did not apply to him and as such, he was entitled to be retained in service till he attained the age of 60 years. Now, clause (c) of F. R. 56 as amended by the Fundamental (Sixth Amendment) Rules, 1965 provides:

"A ministerial Government servant who entered Government service on or before the 31st March, 1938, and held on that date:

- (i) a lien or a suspended lien on a permanent post, or
- (ii) a permanent post in a provisional substantive capacity under clause (d) of Rule 14 and continued to hold the same without interruption until he was confirmed in that post. shall be retained in service till the day he attains the age of sixty years."

26. It was never in dispute that the appellant was a pre-1938 April Ministerial servant of the Central Government and held a permanent post. As he was governed not by F. R. 56(b) (ii) but by F. R. 56 (b) (i), in the very nature of things, he must be having a lien on a permanent post on the relevant date. The term 'lien' has been defined in F. R. 2 (13) as meaning "the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively. The appellant was a substantive holder of a ministerial post. His case would thus fall within the purview of sub-clause (i) of clause (c) of F. R. 56 as amended by the Amendment Rules, 1965. It was contended by the learned Government Pleader that such was never the plea that was raised by the appellant-plaintiff in his plaint and further that the question whether the appellant held a lien or a suspended lien on a permanent post was a question of fact and as such could not be allowed to be heard in this second appeal. Now, in the very nature of things, it was not possible for the appellant to have raised such a specific plea in the plaint that was instituted on March 6, 1965, the amendment Rules which extended the retiring age of a Government servant in service till he attained the age of 60 years having been enacted in the Fundamental (Sixth Amendment) Rules, 1965, published by a notification No. M. F. 12 (2) LV (C)/63 dated 21-7-1965. Even then, we find that in para 3 (a) of the plaint, the plaintiff has claimed that he was entitled to continue in his service upto the age of 60 years as per the Fundamental Rule 56 (b) (i), although this prayer was made on the ground that he was not made physically unfit or inefficient. Again, the granting of the consequential relief to the appellant does not require any question of fact to be determined. Having regard

to the facts and circumstances of the case, we are not inclined to accept Mr. Desai's contention that the appellant cannot be permitted to invoke clause (c) of Rule 56 as amended by the 6th Amendment. In this view of the matter, in our opinion, the appellant would ordinarily be entitled to be retained in service till the day he attained the age of 60 years.

27. Mr. Desai had, in passing, contended that the impugned order Ex. 26 was one contemplated by clause (i) of Fundamental Rule 56 as amended. Now, it is true that clause (i) set out earlier is a non obstante clause and confers on the appropriate authority the absolute right to retire a Government servant, after he has attained the age of 55 years by giving a notice of not less than three months. But, such a right is exercisable only if the appropriate authority is of the opinion that it is in the public interest to do so, which is not the case here. Again, this clause has come into effect on July 21, 1965. In any view of the matter, therefore, the impugned order Ex. 26 dated December 18, 1963, which is relied upon by Mr. Desai to canvass the view that the appropriate authority has given such a notice falling within the purview of clause (i) of the amended Fundamental Rule 56 cannot be construed as the requisite notice. This is apart from the question of validity of clause (j) which has not been challenged before us.

28. As aforesaid, the first and the second memorandums introduced substantial amendments in original Fundamental Rule 56(b) (i), as it stood prior to the date of the issuance of these office memorandums. The second memorandum has put the pre-April, 1938 Ministerial Government servants of the Central Government on par with all other Government servants and they have been given the benefit of the increased age of retirement that was conferred on other Government servants by the first memorandum. The Fundamental (Sixth Amendment) Rules, 1965 raised the age of retirement of the Government servant to 60 years. The resultant effect is that the appellant was entitled normally to be continued in service until he attained the age of 60 years, subject to the right of the appropriate authority to review his case for further retention beyond the age of 55 years in the prescribed manner and the absolute right of the appointing authority to retire him on 3 months' notice. We have found that the impugned order is not falling under either of the two accepted categories. The impugned order was thus beyond the powers of the appointing authority and is in violation of the appellant's normal right to be retained in service till he attains the age of 60 years. The impugned order Ex. 26 must, there-

fore, be found to be unconstitutional and illegal and as such ineffectual.

29. For the aforesaid reasons, we cannot sustain the impugned order and uphold the decree now under appeal. Accordingly, we allow the appeal, set aside the decree of the lower appellate Court, as also of the trial Court and quash the impugned order Ex. 26. The appellant will be deemed to have been continued in the service of the Government until he attained the age of 60 years. As, however, the appellant has attained the age of 60 years on March 14, 1969, it is not possible now to declare that he continues in service. Nonetheless, he will be entitled to his salary for the period and such benefits and emoluments of service as might have accrued to him and to which he was otherwise entitled to if he had been continued in service until he attained the age of 60 years. The appellant will get his costs from the respondent throughout. Decree accordingly.

30. We express our thanks to Mr. N. V. Karlekar who has appeared as *amicus curiae* at our request.

Appeal allowed.

AIR 1970 GUJARAT 269 (V 57 C 41)*

M. U. SHAH AND N. G. SHELAT, JJ.

A Firm of Pt. Ramprasad Chhotalal and others, Appellants v. Bai Reva, Respondent.

A. F. O. D. No. 1128 of 1960, D/- 18-4-1969, from decision of Extra Civil J., Sr. Division at Ahmedabad in Ju. Civil Suit No. 50 of 1958.

(A) Limitation Act (1908). Art. 60 — Loan or deposit — Determination of.

Art. 60 does not say that the amount due to become a deposit must be given to a banker or that he must be in a fiduciary position. In order to apply Art. 60, it is no doubt required to be shown that the amount was deposited with the firm. The evidence in that regard can well appear from circumstances disclosed leading to an inference that it was not a loan but kept as a deposit with the firm. (Para 8)

Under Art. 60 it is not necessary to prove that the borrower is carrying on business only as a banker. A man might become a banker, or place himself in the position of a banker, with regard to a particular customer, and if the dealings with the lender and the borrower are such that the Court is satisfied that it can be said that the borrower is in the position of a banker to the lender, then the money so lent can be considered as a deposit. Whe-

ther a transaction is a transaction of loan or deposit does not depend merely on the terms of the document but has got to be judged from the intention of the parties and all the circumstances of the case. Even though the transaction is a transaction of deposit the deposit can be coupled with an agreement that it will be payable on demand. Such an agreement can be express or implied and if an express agreement in that behalf is recorded in the document the transaction of deposit cannot be thereby converted into a transaction of loan and the words "we shall pay the said sum" cannot convert the document into a promissory note. The promise to pay will be involved in a promissory note as well as in a deposit within the meaning of Art. 60, Limitation Act and the Court will have regard to the intention of the parties and the circumstances of the case. (Para 8)

Where no writing was obtained so as to serve as a security for the amount given to the firm viz. by way of receipt or promissory note or agreement and only a khata was opened in the name of person giving the amount; interest was regularly added to the same every year and account was regularly sent to the person for a long time; it was not shown that firm had borrowed the money out of necessity; the firm was not under a duty to seek out the creditor in a suit for repaying the amount but it had only to pay the amount on demand, the firm in such circumstances can well be said as if it acted as a banker qua the creditor and the amount was in the nature of deposit and a suit to recover that deposit will be governed by Art. 60. AIR 1926 Bom 168 & AIR 1956 SC 12 & AIR 1940 PC 132, Foll. (Para 8)

(B) Hindu Law — Pious obligation — Trade debts — Karta member of firm — Members of his family are liable to discharge liability of firm to the extent of their interest in coparcenary property.

The liability of Hindu sons in a Mitakshara coparcenary family to discharge the debts of the father, the karta, which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father. (Para 9)

Where R and C were members of a firm which was a running concern till C's death and the liability of the firm to a third person was admitted, the heirs of C would be liable to pay the debts of the firm. Their liability is limited to the extent of their interest in the joint property. Taking C as a partner of that firm in his own personal capacity and not acting as a manager or a head of the family by reason of his being the father of the members in the family, the liability in respect of any debt devolves or, at any rate, is required

* Only portions approved for reporting by High Court are reported here.

to be discharged by the sons by reason of this doctrine of pious obligation provided that it was not tainted with immorality. AIR 1959 SC 282, Foll. (Para 9)

(C) Partnership Act (1932), S. 42(c) — Dissolution of partnership by death of partner — Rights of strangers in firm not affected.

There is no provision in Partnership Act which says that the rights of the strangers to the partnership firm are affected thereby. Such a right continues in the creditor unless it is discharged by the firm or its partners, provided the claim is otherwise in time. AIR 1938 Rang 335, Rel on.

(Para 10)

(D) Limitation Act (1908), Art. 60 — Partial receipt from deposit of firm — Does not amount to demand.

A receipt of some amount out of the deposit amount lying with the firm could not amount to a demand made in respect of the whole amount so as to allow the period of limitation to run against the plaintiff.

(Para 21)

Cases Referred: Chronological Paras

(1959) AIR 1959 SC 282 (V 46) =

1959 SCR 1384, S. M. Jakati v. S. M. Barkar 9

(1956) AIR 1956 SC 12 (V 43),

V. E. A. Annamalai Chettiar v. S. V. V. S. Veerappa Chettiar 8

(1940) AIR 1940 PC 132 (V 27) =

42 Bom LR 971, Suleman Haji Ahmed Umer v. Haji Abdulla Haji Rahimtulla 8

(1938) AIR 1938 Rang 335 (V 25) =

1938 Rang LR 468, Dav Hnit v. Anamalai 11

(1926) AIR 1926 Bom 168 (V 13) =

28 Bom LR 73, Bhimanna Kumaji v. Venichand Fattechand 8

(1924) AIR 1924 Bom 28 (V 11) =

25 Bom LR 503, Govind Chintaman Bhat v. Kachubhai Gulabchand 7

A. V. Mody, for Appellants; S. B. Vakil, for Respondent.

SHELAT, J.:— The suit from which this appeal arises was instituted by the respondent-plaintiff in the Court of the Civil Judge (S. D.) at Ahmedabad for recovering in all a sum of Rs. 17,131-86 p. due as per statement of accounts dated 27-10-1954 with future interest and costs of the suit, against the defendants-appellants.

2-5. xx xx xx

6. Two points have been urged by Mr. Mody, the learned advocate for the appellants, before us. The first is that the trial court has erred in holding that the amount due from defendant No. 1 the firm running in the name of Ramprasad Chhotalal was in the nature of a deposit so as to be governed for the purpose of limitation by Art. 60 of the Indian Limitation Act. According to him, it was merely

a loan and not a deposit and would, therefore, be governed by Art. 57 or 59 of the Indian Limitation Act. As the period of Limitation in that event commences from the date when the loan is made, this suit filed after a period of three years provided for the same, would be barred by limitation. On the other hand, it is said that the cause of action for a claim for money deposited with the firm under Article 60 of the Indian Limitation Act would commence from the date when the demand is made. On that basis the suit is within time — it having been filed within a period of three years from the demand made in the month of May 1956. The other point raised by him is that the right and share in the ancestral joint family properties of Chhotalal Lalubhai, with defendants Nos 4 to 10 cannot be held in any way liable for the suit claim since the family had nothing to do with that firm, and its partners were only Ramprasad and Natwarlal. Natwarlal, according to him was taken as a partner in the firm in his individual capacity and not as manager or the eldest member in the family. In order to appreciate the contentions raised before us, a few facts may well be set out. One Atmaram Kalidas happened to have close connections with both Ramprasad and Chhotalal. He had deposited in the name of his first wife by name Kamila a certain amount with the firm running in the name of Ramprasad Chhotalal Patel, even prior to S. Y. 1938. After her death, Atmaram's marriage took place with the present plaintiff. The amount that stood due in the name of his first wife with the firm was then transferred to the name of his second wife — the plaintiff. At any rate, that amount stood in the firm's accounts in the name of the plaintiff since 10-11-1931. A statement of accounts as per ext. 85 sent by the firm shows that Rs. 8784-12-0 were due to her. Later on it appears that some amounts were withdrawn by her and some were added to her account. It is common ground that the firm used to prepare statement of accounts at the end of every Samvat year and it was sent to her. That went on up to the death of Chhotalal which took place on 21-11-1950. Even after his death the firm continued in the same name and as the evidence discloses, Natwarlal-defendant No. 2, the eldest son of Chhotalal, joined in that partnership firm. He appears to have looked after the affairs of the firm as well. The statement of accounts in respect of the plaintiff's dues came to be sent to the plaintiff as usual every year as would appear from Exs. 87 to 106 and the last one was sent under the signature of Natwarlal as per Ex. 107. The amount due thereunder was Rs. 13,773-1-0 on Kartik Sud 1 of S. Y. 2010. As already pointed out hereabove, a demand was made in the month of May

1955 and since nothing came out from it, a notice under Ex. 108 dated 3-10-55 was sent to the defendants. The reply as per Ex. 111 dated 31-10-1955 thereto was given by defendants Nos. 2 and 3 both for themselves and on behalf of the firm-defendant No. 1 whereby while they admitted the amount due from them, they denied the liability of the other heirs and legal representatives of Chhotalal, including in respect of their shares in the ancestral or joint family properties of Chhotalal. In the suit, defendants Nos. 1, 2 and 3 did not appear and contest the claim. However, defendants Nos. 1 and 3 and also the heirs and legal representatives of defendant No. 2 have joined as appellants along with the defendants Nos 4 to 10—the heirs and legal representatives of deceased Chhotalal in this appeal, against the decision passed by the trial Court.

7. As to the amount due to the plaintiff, there is no dispute whatever raised before us. The question, however, is whether the amount due from the firm-defendant No. 1 was a deposit so as to be governed by Art. 60, or that it was a loan contemplated in Art. 57 or 59 of the Indian Limitation Act as urged by Mr. Mody before this Court. Mr. Mody's contention is that the onus of proving that the amount was deposited so as to entitle the plaintiff to claim it on demand with the firm would be on the plaintiff and she has failed to discharge the same. According to him, when a person hands over money to any person not being in the nature of a gift, even though payable when demanded, would ordinarily mean a loan so as to say that money was lent to the other person. In order to show that it was in the nature of a deposit so as to have the claim brought under Art. 60 of the Limitation Act, it would be essential for the plaintiff to show that it was not merely a loan but was a deposit. In support thereof, he invited a reference to the observations made in a decision in the case of Govind Chintaman Bhat v. Kachubhai Gulabchand, AIR 1924 Bom 28. The contention was of a similar character we have before us and while dealing with that contention it was observed as under:—

"It is not clear what the Legislature meant by the word "deposited" in Article 60 but there must be some difference between "money lent" and "money deposited", and one can only assume that a plaintiff relying upon Art. 60 must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money "a deposit", and not "a loan".

Going further, the material observations relied upon run thus:—

"Ordinarily when A hands over money to B on the understanding that it is not a gift, but has to be repaid when demanded,

that would be considered in law "a loan"; and when the plaintiff seeks to prove that the money so handed over was "a deposit", the onus would lie upon him to prove that there are additional circumstances which turned the "loan" into a "deposit". There is no distinction in the Act between the money lent and money deposited with regard to the agreement to re-pay. So that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved, and it is not possible to define exactly what that something further must be. It has sometimes been suggested that facts must be proved which create a sort of fiduciary relationship between the lender and the borrower. It cannot be said that that is always necessary".

8. It was pointed out by Mr. Mody that the firm was carrying on business in cloth etc. and was not acting as a banker and that there existed no fiduciary relationship with the firm so as to say that amount was taken by way of deposit. No special circumstances are also shown to suggest that it was not a loan and that it was a deposit. In those circumstances, he argued that it was a claim for money payable for money lent so as to come under Art. 57 or even if it were to come under Art. 59 as a suit for money lent under an agreement that it shall be payable on demand, since the period of limitation commenced from the date when the loan is made, the suit would be time barred. It cannot be called a deposit as contemplated under Article 60 so as to say that the suit is in time from the date of the demand made for the same. If it is found to be a loan, it is not in dispute that the suit would be time barred. Now in the first place it is essential to point out that Art. 60 does not say that the amount due to become a deposit must be given to a banker or that he must be in a fiduciary position. In order to apply Art. 60, it is no doubt required to be shown that the amount was deposited with the firm. The evidence in that regard can well appear from circumstances disclosed, leading to an inference that it was not a loan but kept as a deposit with the firm. Before we refer to some of the decisions referred to by Mr. Vakil, the learned advocate for the respondents, we may observe, that it appears clear from the very decision relied upon by Mr. Mody that it cannot be said that there must exist fiduciary relationship between them, though if that existed, it may help in determining the nature of the transaction. In the case of Bhimanna Kumaji v. Venichand Fattechand, 28 Bom LR 73 = (AIR 1926 Bom 168) it was pointed out that under Art. 60 of the Indian Limitation Act, it is not necessary to prove that the borrower is carrying on business only as a banker. It has been

further observed that a man might become a banker, or place himself in the position of a banker, with regard to a particular customer, and if the dealings with the lender and the borrower are such that the Court is satisfied that it can be said that the borrower is in the position of a banker to the lender, then the money so lent can be considered as a deposit. The mere fact, therefore, that the firm was carrying on some business in cloth etc. would not necessarily mean that it cannot be treated as a banker qua the plaintiff in the circumstances of the case. As observed in the case of *V. E. A. Annamalai Chettiar v. S. V. S. Veerappa Chettiar*, AIR 1956 SC 12, whether a transaction is a transaction of loan or deposit does not depend merely on the terms of the document but has got to be judged from the intention of the parties and all the circumstances of the case. Even though the transaction is a transaction of deposit the deposit can be coupled with an agreement that it will be payable on demand. Such an agreement can be express or implied and if an express agreement in that behalf is recorded in the document the transaction of deposit cannot be thereby converted into a transaction of loan and the words "we shall pay the said sum" cannot convert the document into a promissory note. The promise to pay will be involved in a promissory note as well as in a deposit within the meaning of Art. 60, Limitation Act and the Court will have regard to the intention of the parties and the circumstances of the case. In other words, even if there existed any document wherein there had been a promise to pay the said sum, it would not necessarily be taken as a document of loan and that the Court would be required to find out the intention of the parties as to whether the amount sought to be secured was a deposit or a loan secured by the document itself. In the various statements of accounts sent by the defendant-firm under the signatures of defendant No. 2 or Natwarlal, the words "Baki lewa" have been used. They indicate no doubt about their having made a statement to the effect that they owed to them that much amount stated therein. But the use of such expression in the statements of account would not necessarily mean to convey that it was not a deposit and that it was in the nature of a loan. Going further, we may refer to a decision in the case of *Suleman Haji Ahmed Umer v. Haji Abdulla Haji Rahimtulla*, 42 Bom LR 971 = (AIR 1940 PC 132), where their Lordships of the Privy Council laid down some of the tests to determine as to whether any such amount given to the other person was in the nature of a deposit or loan. The facts of the case were that the plaintiff handed over his money to the defend-

dant who credited it in a bank in his own name, and credited it in his account-book to the plaintiff. That went on from time to time over a long period of time. A question having arisen whether the transaction was a loan or deposit for the purposes of the Indian Limitation Act, it was held that the transaction was not a loan falling within Arts. 57 and 59 of the Act because of the absence of any security for the alleged loans such as of any receipt in writing, or any promissory note, or any agreement as to what rate of interest the loan was to carry. It further held that the course of dealing between the parties was that the defendant was acting very much as a banker for the plaintiff, he received for safe custody whatever moneys the plaintiff wished to hand over to him, and he paid those moneys to the plaintiff only when the plaintiff asked for them, and that there was nothing to show that the defendant was under any duty to seek out the plaintiff to repay him. In these circumstances, the transaction was that of a deposit and the suit was governed by Art. 60 of the Indian Limitation Act. Applying these tests to the present claim by the plaintiff, it appears that at no stage any writing was obtained so as to serve as a security for the amount given to the defendants viz. by way of a receipt or a promissory note or the agreement. All that was done was that the amount was handed over to the defendant-firm and a Khata in her name was maintained in the account books of the firm. The interest was added to the same every year and after making accounts at the end of the year, a statement thereof was sent to the plaintiff showing the amount due from the firm to her. This course of conduct continued for long. It shows that it was not the defendant No. 1 who had borrowed the amount out of some necessity on its part or about the plaintiff having advanced or lent any such sum. On the contrary, the circumstances indicate, that having regard to the close connection of the plaintiff's husband with the firm and with a view to have the amount remain in the name of his wife that the amount was kept by way of a deposit with the firm. The firm was carrying on business and there is hardly any suggestion much less any evidence on record to show that the firm was in need of money or had at any time asked for any amount to say that it borrowed the same from the defendant. There was, therefore, no question of lending the money, but it was a question of depositing the amount in the name of the plaintiff in view of such relationship that existed between her husband and defendant No. 1 and the manner in which the amount has been allowed to remain with the firm. It also appears clear that the defendant-firm was not under duty to seek out the creditor such as the plaintiff in the suit for re-

paying the amount as it should have ordinarily happened in the case of having received a loan. On the contrary, the defendant had to repay the same only on a demand made by the plaintiff. The defendant-firm can, in those circumstances, well be said as if it had acted as a banker or shroff qua the plaintiff in the case. If we turn to the pleadings in the case, a clear case of deposit with the firm-defendant No. 1 was set out in the plaint. While the defendant-firm and its partners Nos. 2 and 3 have not chosen to appear and contest the claim, the other defendants also had not even suggested that it was in the nature of a loan and not a deposit. More than that we find some reference at two different places in the reply Ex. 111 given by defendants Nos. 1, 2 & 3 to the notice Ex. 108 whereby this amount was demanded by the plaintiff from them. In the very first para thereof it has been stated that in about the S. Y. 1988 the amount was deposited in the name of Bai Reva with interest at the rate of $4\frac{1}{2}$ per cent. "Terikhe Vyajuka nana jama mukela" (Original in Gujarati transliterated here—Ed.). Towards the end of the reply in para 10 thereof a similar reference has again been made by saying that the amount was deposited at the rate of $4\frac{1}{2}$ per cent by Atmaram in the name of his wife Bai Reva with the firm and that a Khata was maintained and that it continued for all the time. The words "nana jama mukela" (Original in Gujarati transliterated here—Ed.) clearly indicated about her having deposited the same and not about the firm having borrowed the same or about the plaintiff having lent or advanced the same to the defendant No. 1. There is, therefore, hardly any substance in the contention now raised that the amount was in the nature of a loan and not as a deposit so as to come within the ambit of Article 57 or 59 of the Indian Limitation Act. In our view, therefore, apart from clear admissions made by the persons concerned, in respect of the amount lying with the firm, applying the different tests to the facts of this case, we feel amply satisfied that the amount was in the nature of a deposit with the firm and that was payable on demand under an implied agreement and that the interest was to run at the rate of $4\frac{1}{2}$ per cent. The suit claim would, therefore, be governed by Article 60 of the Indian Limitation Act and that the cause of action for filing a suit commenced from the date when the demand was made by the plaintiff in May 1955. That way the suit was filed within a period of three years contemplated for the same under Article 60 of the Indian Limitation Act. The finding of the learned Civil Judge in that respect is, therefore, correct.

9. The next question relates to the nature of liability of defendants Nos. 4 to

10, the heirs and legal representatives of deceased Chhotalal who happened to be a partner in the firm till his death. The liability of the firm is not in dispute. Its partners Ramprasad and Chhotalal were also personally liable for any such debt. There is no challenge on account of Ramprasad's heirs and legal representatives. The only question before us is whether the shares of defendants Nos. 4 to 10 in the joint family properties of Chhotalal were liable for the debt of Chhotalal. Mr. Vakil, the learned advocate for the respondents, urged that even on the basis that in the firm-defendant No. 1, Chhotalal was a partner in his individual capacity and not as a Karta or manager of the family, the liability in respect of such a debt of the firm would certainly be even against the joint family properties in which defendants Nos. 3 to 10 had the coparcenary interest by reason of the doctrine of pious obligation to pay the debt of the father unless it is shown that the debt was illegal or immoral. In that respect, he invited a reference to some decisions the principles whereof have been well set out in paragraph 290 of Mulla's Hindu Law. We may, therefore, conveniently refer to them instead of referring separately to those decisions. Clause (1) of paragraph 290 refers to the pious obligation of son, grandson and great-grandson to pay ancestor's debts. It relates to debts which have been contracted by the father in the capacity of manager and head of the family for family purposes. In that event his sons as members of the joint family are bound to pay the debts to the extent of their interest in the coparcenary property. The second part thereof, however, is important and that relates to debts which have been contracted by the father for his own personal benefit while the sons are joint with him. When such is the case, as stated therein, the sons are liable to pay the debts provided they are not incurred for an illegal or immoral purpose. The liability to pay the debts contracted by the father, though for his own benefit, arises from an obligation of religion and piety which is placed upon the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality. The fact that the father was not the karta or manager of the joint family or that the family consisted of other coparceners besides the father and sons, does not affect the liability of the sons in any way. This pious obligation, as set out in Cl. (2) thereof, to pay the ancestor's debts to the extent of their interest in the joint family property is not abrogated by the Hindu Succession Act and then as stated in Cl. (3) thereof, their liability is not a personal one, that is to say, the father's creditor is not entitled to proceed against their person or their separate property. It is limited to their interest in the joint

family property unless there is acceptance of personal liability. Then we may usefully refer to CL (4-A) in paragraph 292 which relates to a creditor's suit. This CL 4(A) relates to a suit against the son after father's death, there being no suit against the father. In such a case, the creditor may file a suit and obtain a decree against the son, and attach the entire interest of the father and son in the coparcenary property, and have it sold in execution of the decree. The son being under a pious obligation to pay the father's debts, he cannot claim the benefit of survivorship. Such a debt as contracted by the father must be not one for an unlawful or immoral purpose. We may in this connection refer to the decision in the case of S M Jekati v. S M Borker, AIR 1959 SC 282, where it has been held that the liability of Hindu sons in a Mitakshara coparcenary family to discharge the debts of the father, the karta, which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property unless a provision has been made for the payment of the just debts of the father. In other words the liability of the sons to discharge such a debt contracted by the father continues not only during his lifetime but also after his death. It is, therefore, not necessary that a decree must have been obtained against the father as a head of the family or that the sons should have been party to a suit in which that decree is passed. It is, therefore, clear that the firm-defendant No. 1, even as admitted by defendant No. 5 in his deposition before the Court, was a running concern till Chhotalal's death which took in November 1950. Taking Chhotalal as a partner of that firm in his own personal capacity and not acting as a manager or a head of the family by reason of his being the father of the members in the family, the liability in respect of any debt devolves or, at any rate, is required to be discharged by the sons by reason of this doctrine of pious obligation provided that it was not tainted with immorality.

10. Before we consider this aspect of the matter, we may deal with some points raised by Mr. Mody having reference to the claim being due on death of Chhotalal. In our view, the debt such as the one in this case continued to exist so far as the firm was concerned and that the cause of action in respect of that debt for recovering the same against the firm would only arise on a demand made thereof. The demand was made both from defendants Nos. 1, 2 and 3 as also from the members of the family of Chhotalal in May 1955 and the suit filed is in time. It was said that as soon as Chhotalal died, the part-

nership stood dissolved by reason of his death as contemplated under Section 42(c) of the Indian Partnership Act and, therefore, the debt became payable with effect from that date. On a perusal of the provisions of the Indian Partnership Act, we find no provision which says that the rights of the strangers to the partnership firm are affected thereby. Such a right continues in the creditor unless it is discharged by the firm or its partners, provided the claim is otherwise in time. Now in this connection we may state that it is no doubt true that the firm would be dissolved by the death of a partner, but that is always subject to the contract between the partners as contemplated in Section 42 of the Act. Such a contract need not be express. It may be implied and can well be gathered from the conduct of the parties and the circumstances disclosed in the case. We may in this connection point out that it is with effect from the date of the death of Chhotalal that defendant No. 3 Natwarlal is said to have entered into this partnership firm. That would appear from the registration certificate produced at Ex. 116. It is dated 14th January 1952. The recitals thereof indicate that Natwarlal joined this partnership firm running in the same name as of defendant No. 1 with effect from 21-11-1950, the date on which Chhotalal died. He was the eldest member in the family surviving after Chhotalal's death, the other sons being minors then. They were all joint and were living together. In those circumstances, there was hardly anything to the contrary to suggest that Natwarlal was taken in as a partner of the same firm in his individual capacity as is attempted to be said by Natwarlal and Ramprasad in their reply Ex. 111 to the notice given by the plaintiff. Ramprasad was the brother of Chhotalal and that way the uncle of Natwarlal. The course of events clearly suggests that Ramprasad on Chhotalal's death took Natwarlal, the eldest member of the joint family, as a partner in the firm, and he must have thus been a partner as representing the family. He has chosen to say otherwise, with a view to enable other members of the family escape the liability to the extent of their shares in the joint family property. Neither Natwarlal nor Ramprasad has chosen to produce the partnership deed. Nor any of them has appeared in the suit and given evidence in the case. In those circumstances we feel inclined to hold that Natwarlal being the eldest member in Chhotalal's branch was taken as a partner representing the members of the joint family of Chhotalal. That has been the plaintiff's case and it has remained almost uncontroverted by any evidence whatever led by Natwarlal or Ramprasad. Mere registration certificate Ex. 116 cannot justify them to say or even

help other defendants in saying that Natwarlal was joined as a partner of that firm in his personal capacity and that he did not represent the family. In those circumstances, there would not arise any question of the dissolution of the firm so as to say that any money was required to be demanded on the dissolution of the firm. In fact the firm continued in the same name and the statements of account had thereafter continued to be sent to the plaintiff in the name of the firm in the same way as it was done before. No demand was at that time made and consequently the character of the amount of deposit lying with the defendant-firm cannot be said to have been lost so as to say that it was in the nature of a loan as is attempted to be said by Mr. Mody before us.

11. Mr. Mody also tried to suggest in that connection that even a receipt of some amount from the deposit amount lying with the firm would amount to a demand and that way he tried to show that the plaintiff had off and on recovered some amounts long before and the cause of action for the remaining amount had started from that date when some amount was withdrawn and that way the suit was time-barred. As we said above, the nature of the amount lying with the defendant-firm does not lose its character. It does not become a loan by reason of the fact that the partnership was taken to have been dissolved in the circumstances of the case, nor could it be said that even a receipt of some amount out of the deposit amount lying with the firm could amount to a demand made in respect of the whole amount so as to allow the period of limitation to run against the plaintiff. In the case of *Daw Hnit v. Anamalai*, AIR 1938 Rang 335, such an argument was advanced and it was held that the demand contemplated by Art. 60 is demand for the repayment of the whole amount of the deposit due, and not a demand for partial payment. As to the change in the character of the amount lying with the defendant, a similar argument appears to have been advanced in that case and it was observed that the creditor's claim was that of a deposit and that deposit had not lost its character as such by reason of insolvency proceedings. In other words, the dissolution even if it had taken place of the partnership firm with the death of Chhotalal cannot be taken to change the character of the amount lying with the defendant so as to affect the plaintiff, and the cause of action would therefore, only arise when a demand is made in respect of the entire amount of deposit due from the defendant-firm.

12. We may incidentally refer to the effect of the dissolution of the partnership or say winding up of the partnership arising under the provisions of the Indian

Partnership Act. In order to wind up the affairs of a dissolved partnership, it is necessary first to pay its debts and then to settle other questions of account between the parties. In other words, the consequences of a dissolution of a partnership arise both as regards the creditors and as regards the partners themselves. As between the partners, as to the consequences on a dissolution of a partnership we are not concerned in this suit. But we may refer to the principles deduced from different decisions in so far as they relate to the creditors of the partnership firm, in "*Lindley on Partnership*" (Eleventh Edition) at page 722. Of the six principles so set out, the first two are of some relevance. They are as under:—

1. That a dissolution of partnership, whether general or partial, does not discharge any of the partners from liabilities incurred by them previously to the time of dissolution.
2. That in order that a member of a firm, wholly or partially dissolved, may be freed from his liability to a person who was a creditor of the firm at the time of its dissolution, such creditor must either have been paid, or satisfied, or must have released or discharged the late partner, or have accepted some fresh obligation in lieu of that which existed when the firm was dissolved.

We may point out that certain arguments advanced by Mr. Mody would be amply met thereby. His first argument was that the original partnership which ran in the name of Ramprasad Chhotalal was between four persons as would appear from the partnership deed Ex. 114 dated 7th December 1931. The amount was deposited with the firm even before that. Now this document makes no reference whatever about the plaintiff's dues. But it appears from the statement of accounts as per Ex. 85 that it has come to be acknowledged by this partnership firm from the previous one. That firm can be taken to have taken over the liability to the plaintiff for her dues from the previous firm. It was not discharged at any time. It can hardly be said that the liability came to an end with the same firm taking over some other partners or releasing some therefrom. How it came to be so changed we have no material on record. Now we find that the partnership again continued in the name of M/s. Ramprasad Chhotalal as per the other partnership deed Ex. 115. This deed shows that Chhotalal Lallubhai had ten annas share as against six annas share in a rupee of Ramprasad Lallubhai. This partnership admittedly continued till the death of Chhotalal and it was on the death of Chhotalal that Natwarlal is said to have joined viz. on 21-11-1950 in place of his father Chhotalal. The firm name remained the same. The partners there-

after continued to be Ramprasad Lallubhai and Natwarlal in place of his father Chhotalal. During the existence of the partnership firm, as per the deed Ex. 115 the claim of the plaintiff continued to remain and the firm had sent statements of accounts to the plaintiff every year. As already pointed out hereabove, Natwarlal joined the firm on the death of Chhotalal. The partnership agreement which was arrived at between them has not been before us. In fact Natwarlal was summoned to produce the same and he failed to do so. The only inference that can be drawn is that Natwarlal continued to be in place of his father and that he being the eldest member in the family, represented the family in that partnership firm. The said firm can be said to have continued on the same basis in absence of anything shown to the contrary. Even after Natwarlal having joined his father's firm, in the statements of accounts sent by the firm and in fact as already pointed out hereabove, in the reply to the notice given by the plaintiff, both Ramprasad and Natwarlal had admitted it. Even if, therefore, the partnership had come to be dissolved for one reason or the other, and so far as the first partnership was concerned or even the second partnership was concerned, it will have to be assumed that the next partnership had accepted the same obligation in lieu of that which existed when the firm was dissolved. In absence of any material whatever to show that the creditor must have been paid or his claim was satisfied or that he had released or discharged any such partner of the firm, this position would be covered in the second principle just set out hereabove from *Lindley on Partnership*. It is equally clear that even with the dissolution of partnership unless it is shown otherwise, the partners cannot be said to be discharged from the liability incurred by them previously till the time of dissolution. In view of these principles, the claim of the plaintiff would in no way stand affected by reason of the change in the partners of the firm, and the character of the dues so far as the plaintiff is concerned may also remain unchanged in respect of the firm having two partners and later, on the death of Chhotalal, Natwarlal having been taken over on behalf of the family. Thus, by reason of the fact that Natwarlal happened to be the manager of the family of defendants Nos 4 to 10, they would be liable, though not personally, to the extent of their interest and share in the joint family property.

13. Turning back to the doctrine of pious obligation even if Natwarlal was a partner of the firm in his individual capacity and not in his capacity as a head of the family representing all the members of the family, they would be liable to the extent of their share or interest in the

joint family property by reason of the doctrine of pious obligation to discharge the debts of their father who was the partner of the firm till his death and in respect of which no demand was made till 1955. His liability as a partner continued in absence of the same having been discharged or taken over with the consent of the plaintiff by the new partners. That has not been so shown. As we said above, defendants Nos. 1, 2 and 3 were ex parte. They have not appeared and challenged the claim. Defendants Nos 4 to 10 have also not alleged that Chhotalal had contracted a debt which was illegal or immoral so as to enable them to avoid their liability in regard to their share or interest in the family property. No such plea is raised. It was urged by Mr. Mody that there has been no averment to that effect in the plaint for holding them liable on that basis viz., upon the doctrine of pious obligation to pay the father's debts, that they would be able to contend that the debt was of an immoral character. The claim of the plaintiff has been obviously on the basis that Natwarlal had become a partner of the firm as a head of the family and he represented them as such in that partnership firm in place of Chhotalal. The attempt on the part of the defendants was that Natwarlal had joined the firm in individual capacity and if that was the contention, naturally the question would arise as to their liability in respect of the debts of deceased Chhotalal by reason of his being a partner in that firm. That liability would be based on principle of law and if at all it was a suggestion or contention of the defendants that such a debt was illegal or immoral, the plea ought to have been raised that they are in no way responsible for paying the debts incurred by the father on such a ground. It was, however, pointed out by Mr. Mody that he can show that it was a debt contracted by the father in starting a new business, and that he cannot bind his sons for the debt contracted for a new business which may well be called *Aavyavaharik* debt. Some cases were referred to by him. It may not be so very necessary to refer to them for we find the principles well deduced from those decisions and have been set out in paragraph 224, clause (2) at page 264 in *Mulla's Hindu Law* under the caption "New Business". The principle set out therein is that the manager of a joint family cannot impose upon a minor member of the family the risk and liability of a new business started by him—estate in order to provide money for one self and the other adult members. Even where the father is the manager, he is not entitled to mortgage the joint family of his sons to start a new business. Such a mortgage is wholly invalid against minor coparceners. Later on it has been

observed that as regards adult members it has been held in India that the manager cannot impose even upon them the risk and liability of a new business started by him, unless the business is started or carried on with their consent, express or implied or though started by the manager only. Joint funds were afterwards utilised for the business to the advantage of the joint family or its continuance was found beneficial to the family or it was adopted as a family business by the other members who continued to enjoy the benefits of the same. Before applying any such principle, it has to be established that the debt was contracted for the purpose of entering into a new business by any individual member in the firm so as to bind other members in the family. In the present case, as already pointed out hereabove, we have no material on record to exactly know how and for what purpose the amount was accepted by the firm. The only thing that we are able to gather from the material on record is the statement of accounts sent to the plaintiff every year from time to time by the firm acknowledging the firm's liability to pay the same. What happened to the first partnership and in what manner it came to be dissolved we do not know. All that could well be known by the defendants themselves. Their accounts would have shown the same. None of those accounts has been produced to show as to whether this amount was taken by way of a loan for starting a new business so as to create any such effect in respect thereof subsequently. Since the first partnership had two partners Ramprasad and Chhotalal, this amount was carried forward as the amount deposited with them. In other words, there is not an iota of evidence or material on record to suggest much less show that this amount was borrowed for the purpose of starting a new business. No attempt is made to explain the same and the material in that regard could only be with the defendants who have remained ex parte and have not chosen to produce the same. The written statement Ex. 24 filed by the defendants Nos. 4 to 10 does not even suggest any such thing and all that it says is that Natwarlal had become a partner of the firm in his individual capacity and that they were not bound by it. No such plea is raised and even there has been no material in that regard to substantiate any such argument advanced before us. In those circumstances, it is abundantly clear that the interests or shares in the joint family property so far as defendants Nos. 4 to 10 are concerned, would be liable for the claim of the plaintiff against the firm-defendant No. 1 of which Ramprasad and Chhotalal were partners and later on on Chhotalal's death Natwarlal joined the same as the head of the family. The

learned Civil Judge was, therefore, right in holding accordingly.

14. In the result, the appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1970 GUJARAT 277 (V 57 C 42)

J. B. MEHTA AND S. H. SHETH, JJ.

Chhotalal Vaghjibhai, Applicant v. Vivekanand Mills Co., Ltd., Ahmedabad and others, Opponents.

Special Civil Appln. No. 399 of 1967, D/- 1-5-1969.

(A) Industrial Disputes Act (1947), Sch. 2, Item 3 — Dismissal — Fair trial — Allegation against disciplinary authority by delinquent servant — Inquiry held by Labour Officer — Final order of dismissal by disciplinary authority — He being interested party, order is illegal. AIR 1959 SC 1376 & AIR 1967 SC 408 & (1966) 2 Lab LJ 315 (SC) & AIR 1964 Guj 139, Rel. on. (Para 5)

(B) Constitution of India, Art. 226 — Natural justice — Judge or adjudicator with a bias is disqualified. (Para 6)

(C) Bombay Industrial Relations Act (11 of 1947), Ss. 27-A, 32, 33 — Union representing a workman filing application to Labour Court and further filing appeal — Withdrawal of appeal — Individual cannot re-agitate grievance. (1962) 1 Lab LJ 369 (SC), Rel. on. (Para 10)

(D) Constitution of India, Art. 141 — Precedent — High Court not competent to distinguish a Supreme Court decision on facts — Doctrine of "Obiter per incuriam" (Obiter of the Court) or distinguishing case on facts applies to concurrent courts. (Para 9)

Cases Referred: Chronological Paras

AIR 1967 SC 408 = (1961) 2 Lab LJ 117	5
1966-2 Lab LJ 315 = (1966) 12 Fac LR 361 (SC)	5
AIR 1964 Guj 139 = ILR (1964) Guj 45	6
1962-1 Lab LJ 369 = 1962 Supp (2) SCR 890	9
AIR 1959 SC 1376 = (1960) 1 SCR 580	4
(1854) 5 HLC 72 = 10 ER 824	6

V. S. Patel with B. R. Shelat, for Applicant; K. S. Nanavati for I. M. Nanavati, for Opponent No. 1.

MEHTA, J.: The petitioner-employee challenges in this petition under Articles 226 and 227 of the Constitution, the order of the Industrial Court, dated October 11, 1966 by which the Industrial Court set aside the order of the Labour Court allowing the Mill's Appeal and dismissed

GN/GN/D132/70/BDB/T

the application filed by the petitioner in the Labour Court. The short facts which have given rise to this petition are as under—

2. The petitioner was employee in the Respondent No 1 Mills Co. hereinafter referred to as 'the Mills', for a number of years and at the relevant time he was a Storekeeper in the Stores Department. One other Clerk, Kantilal, worked in the Sales Department and he had been discharged by the Mills. On August 4, 1959, Kantilal wrote a letter to the Manager referring to some misappropriations which were committed by the Manager from the sale proceeds of the two transactions in question. It appears that the petitioner was thereafter transferred as a Provident Fund Clerk. Kantilal reiterated his complaint by his second letter on November 9, 1959. It should be noted at this stage that both Kantilal and the petitioner are the share-holders of the Respondent No 1 Mills Co. Kantilal issued similar notices to the firms involved in those transactions viz., to one Kalidas of M/s. Barrels and Machinery Supplying Co. and to one Chimanlal Jemaldas mentioning that the proceeds of these goods purchased by them were not credited in the Mills account and were misappropriated by the Manager. These two transactions are of May 3, 1956 of sale of Beam Flanges to Chimanlal Jemaldas and on June 20, 1956 of sale of Cast Iron, a controlled item, to M/s Barrels and Machinery Supplying Company through the said Kalidas. The Manager, the said Kalidas and the said Chimanlal had on December 1 and 2, 1959 sent replies to that Kantilal. It appears that on September 4, 1959, the Gate-keeper reported to the Manager that the petitioner took away kachha gate passes from him on the pretext that he wanted to make pucca gate passes but he had not returned them. A show cause notice was issued by the very Manager, against whom these allegations were made by Kantilal, at Ex. 17 on December 3, 1959. Under the relevant Standing Order No 12, the petitioner was asked to show cause as he had misappropriated the amounts of the said two transactions which was detected when the inquiry was made after the said Kantilal who was a share-holder complained by giving a notice to the Manager. These amounts were not credited to the Mills, while the amounts were realised by the petitioner from the concerned Merchants. It was further alleged that an attempt was made to involve the Manager in this matter and the petitioner had colluded with Kantilal in this connection. In order to save himself, he had got defamatory allegations made against the Manager through Kantilal and thus he had committed misconduct under the relevant Standing Order 12 for which he was liable

to be dismissed. After the said show cause notice was served on the petitioner, the Company served another letter at Ex. 19 dated December 5, 1959 on the petitioner pointing out that as the Manager was going to be a witness, if the petitioner wanted that the inquiry should be held by some other person, the Managing Director had ordered the Labour Officer Mr Desai to hold inquiry. The inquiry was started on December 16, 1959. At the time of the inquiry, the petitioner was consulted and as the Manager was going to be the witness, the inquiry was handed over to the Labour Officer who was appointed in this connection to hold inquiry by the Managing Director. When the inquiry was commenced by this Inquiry Officer, the petitioner filed his written reply dated December 16, 1959 at Ex. 25. In the said reply, the petitioner pointed out that he had prepared gate passes but the Manager had instructed him to prepare the gate passes of the merchants who had taken the goods and had paid the price to him. The Manager used to sign these kachcha gate passes and they were prepared by the petitioner as per the instructions of the Manager and many such gate passes had been prepared by him during the course of his service. The petitioner further pleaded that the Manager used to give him specific instructions before preparing these kachcha gate passes by telling him that the concerned merchants had paid the monies to him and so far the goods mentioned by the Manager the kachcha chits were to be prepared as instructed by him. It was according to this permanent practice, which was observed in the Mills for preparing such kachcha chits, that the two impugned kachcha chits, for the transactions of 3-5-1956 of M/s Chimanlal Jemaldas for Beam Flanges and on June 20, 1956 of M/s Barrels Supplying Co. for Cast Iron, were prepared by him on the instructions of the Manager himself. It was, therefore, finally pleaded by him that in the circumstances it was obvious that a person who was guilty himself was trying to find fault with the other person and the whole thing had been intelligently done to involve this innocent petitioner. After the written statement was presented, the petitioner submitted before the Inquiry Officer an application dated December 16, 1959. In that application, a request was made that before the inquiry commenced, the petitioner should be given a list of the Mills' witnesses and of the record and documents which the Mills wanted to rely upon against the petitioner and to permit inspection of all the records and only after this was done that further inquiry should be held. The petitioner also gave a second application on the same day to the Inquiry Officer asking for production of certain docu-

ments as they were vital for his defence, before even he could file the written statements. These records were (1) The gate-keeper's "Awak-Jawak" books of the Mills for the years 1955, 1956, 1957, 1958 and his daily "Awak-Javak" reports, (2) physical stock list of the stores department for 1955, 1956, 1957 and 1958 A.D. and the Mills' pucca stock list, (3) Store-ldgers for the said years with monthly figure books for the said years, (4) Awak Javak books of the stores department for the said years. It was finally requested that these books or records should be produced before the inquiry was commenced. The Inquiry Officer, however, rejected the second application on the ground that the show cause notice was relating to only two transactions and the application for production related to books or records of four years. The petitioner, thereafter, presented the final application on the same day stating that he had a feeling that the inquiry that was going to be held against him in the matter was not going to be impartial and that he felt that the inquiry would be held as per the deliberately pre-determined scheme of discharging or dismissing him. On this ground, the employee refused to participate in the inquiry. It appears that the Inspector of the Textile Labour Association, the Representative Union, advised the employee to take part in the inquiry, but as the employee was in these circumstances not prepared to participate in the inquiry, even the said Inspector withdrew from the inquiry as he also did not think it proper to take part in the inquiry. Thereafter, an ex parte inquiry was held where the said Manager was examined before the Inquiry Officer and statements were taken of the concerned two merchants. Thereafter, considering the report of the Inquiry, the very same Manager against whom all these allegations were made has passed the dismissal order against the petitioner on December 23, 1959. An approach letter under Section 42(4) was written by the Textile Labour Association as a Representative Union on March 15, 1960 and thereafter the application was filed in the Labour Court by the Textile Labour Association as a Representative Union challenging the said dismissal order and for claiming reinstatement relief, on April 20, 1960. The Labour Court held that there was no fair and impartial inquiry as the petitioner's right of defence was completely stultified by withholding these material documents and as the Manager had such a bias, as he was himself charged for these misappropriations and had taken such an active interest throughout the proceedings and had been a witness and had been a judge also in his own cause. The Labour Court, therefore, held that the inquiry was vitiated and the order of dismissal

was bad. However, the reinstatement was not ordered considering the strained relations between the management and the petitioner, and it was only ordered that the petitioner be deemed to be continued in service till the date of the order of the Lower Court dated February 19, 1965. The Mill Company was directed to pay his full wages from the date of dismissal to the date of the order of the Labour Court and from that date his services were to stand terminated and he was to be given all benefits to which an employee who has been discharged simpliciter would be entitled to. Against this order of the Labour Court, the Textile Labour Association filed an appeal and the Mills also filed a cross appeal before the Industrial Court. When these appeals came up for hearing before the Industrial Court, by a pursis given in the appeal filed by the Textile Labour Association, the Textile Labour Association withdrew the said appeal on the ground that the concerned clerk was advised to accept the reinstatement subject to other conditions but he was not prepared to go in the Mills in view of the strained relations. Therefore, the question of the proceeding with the said appeal did not survive and the Textile Labour Association did not press the said appeal and prayed for allowing it to be withdrawn. This appeal has, therefore, been dismissed by the Industrial Court, even though the petitioner himself wanted to press this appeal, on the ground that the Representative Union had a right to appear or act by excluding even any individual employee as per the settled legal position. As regards the other appeal of the Mills, the Industrial Court held that the Labour Court had completely misconceived the scope of the inquiry and it reversed the conclusion of the Labour Court that the employee's right of defence was stultified, by rejection of his request for the various books or records for the four years in question. The Industrial Court, further held that the inquiry was not vitiated on any other ground, especially as the concerned clerk had consented to the Manager remaining present at the inquiry and the enquiry was entrusted to an independent officer of the Company by the Managing Director. The Industrial Court also held that the employee in these circumstances was not justified in withdrawing from the inquiry and he must thank himself if he refused to participate in the inquiry. In the result, the order passed by the Manager was held to be justified on the basis of ex parte inquiry recorded against the petitioner and the petitioner's application was dismissed by the Industrial Court, by the impugned order dated October 11, 1966. The petitioner has, therefore, as a concerned employee, filed this petition chal-

linging the said order of the Industrial Court in this petition.

3. At the hearing, Mr. Patel raised the following contentions:

(1) That the Industrial Court had disregarded the settled law in coming to the conclusion that such a dismissal order was not vitiated, even though it was passed by a Manager, who was a person against whom allegations for these particular misappropriations were made and who had himself started the inquiry by issuing the show cause notice and who was a witness and a Judge in his own cause.

(2) That the Industrial Court, on a complete misconception of the nature of the inquiry before the Management, had come to a patently erroneous conclusion that the right of defence of the petitioner was not stultified.

(3) That the Industrial Court on the aforesaid conclusion should not have dismissed the petitioner's appeal and in any event, should have invoked the powers under Order 41, Rule 33 or relevant Regulation 65 for doing substantial justice even in the Mills' appeal by declaring that the petitioner continued in service unaffected by the order of dismissal sought to be passed by such a disqualified person who totally lacked jurisdiction and which was against all the principles of natural justice.

(4) That in any event, the order of the Industrial Court is perverse even on the basis of the material of the ex parte inquiry.

(5) That the order in any event was vitiated because of the unfair labour practice as found by the Labour Court.

4. As regards the first question, from the facts which we have already set out, it is obvious that Kantilal made allegations in 1959 in his capacity as a shareholder against the concerned Manager that he had misappropriated the amounts realised from these two transactions in question which took place on May 3, 1956 and June 20, 1956, as the show cause notice itself mentions. It was the complaint of Kantilal which led to the said show cause notice being issued against the petitioner. The Manager, who was facing all these allegations of the concerned share-holder, had himself issued this show cause notice and even he mentioned this fact that the petitioner had colluded with Kantilal and to save himself the petitioner got these allegations made against the Manager that the Manager had himself misappropriated this amount. Even the notice addressed by

Kantilal to the Manager and the persons of M/s. Barrels and Machinery Supplying Co. and Chimanlal Jemaldas, the concerned merchants, were replied by those three persons on December 1 and 2, 1959, just a day or two before the issuance of this show cause notice. Even the management was conscious of the fact that looking to the nature of this allegation the manager was a necessary witness in the case. The Managing Director had, therefore, ordered right from the beginning that if the petitioner objected, the inquiry should be held by the Labour Officer. The petitioner was consulted and he reiterated his objection even at the stage of inquiry and that is why the inquiry was handed over to the Labour Officer. Therefore, it is clear that the Manager being a Judge in his own cause and as he was the person against whom this very allegation was made by the share-holder and who himself had issued the show cause notice and had initiated this inquiry against the petitioner and who was a vital witness could not become a judge in his own cause, as he naturally could not remain unbiased or impartial in such an inquiry. It is in these circumstances, that the Managing Director directed the present Manager not to hold the inquiry if the petitioner objected. Therefore, it is obvious from these facts that the present Manager who was in the position of the person facing the charge, the complainant, witness and the tribunal himself could not have passed the dismissal order. Such a dismissal order would be against all principles of natural justice by a bias of tribunal. The position of law in this connection is completely settled by various decisions of the Supreme Court. In *Nageswarrao v. State of Andhra Pradesh*, AIR 1959 SC 1376 (at p. 1378), the doctrine of bias has been explained:

"The principles governing the 'doctrine of bias' vis-à-vis judicial tribunals are well settled and they are: (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is 'subject to a bias (whether financial, or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal'; and that 'any direct pecuniary interest, however, small, in the subject-matter of inquiry will disqualify a Judge, and any interest, though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias'. The said principles are equally applicable to authorities, though they are not courts of justice or judicial tribunals, who have to act judicially in deciding the rights of others. I.e.,

authorities who are empowered to discharge quasi-judicial functions."

5. There is no dispute that the Manager dismissing the employee acts as a quasi-judicial tribunal and that is why this principle has been applied by their Lordships of the Supreme Court even in industrial adjudication. In *Andhra Scientific Co., Ltd. v. Seshagiri Rao*, AIR 1967 SC 408 (at p. 410), the dismissal order by a person who gave actual decision was held to be vitiated by violation of rules of natural justice on the ground that the person who gave evidence as a witness at one stage acted as a Judge at the later stage and he actively procured the evidence, with the avowed motive of securing a conclusion against the workman. On these facts, the manner in which the inquiry was conducted could hardly be said to have ensured fairplay which rules of natural justice required. The same view was reiterated by following this decision by the Constitutional Bench in *Workmen of Lambabari Tea Estate v. Lambabari Tea Estate*, (1966) 2 Lab LJ 315 (SC) (at p. 317). It was held that the manager did not keep his function as the enquiry officer distinct but became witness, prosecutor and manager in turns and therefore, the inquiry was vitiated for contravention of principles of natural justice. Their Lordships in terms observed that they should content themselves by saying that the inquiry should always be entrusted to a person who is not a witness. If it is not possible to find such a person from that estate some officer from another estate should be asked to help in the matter. An inquiry cannot be said to be held properly when the person holding the enquiry begins to rely on his own statements. These observations of their Lordships furnish a complete answer to Mr. Nanavati's contention that the standing order necessitated a departure from the principles of natural justice by requiring the Manager to pass such an order of dismissal. In fact, there is no such necessity if we look to the wordings of the standing order to see which include the definition of Manager even an acting manager. Therefore, in such circumstances, when the Managing Director appointed another inquiry officer another acting manager could have been equally appointed. Mr. Nanavati in this connection also sought to make a distinction that when an inquiry was ordered to be held by an independent officer there was sufficient compliance with the principles of natural justice. Their Lordships observed that the inquiry should be entrusted to a person who is not a witness and not to be entrusted in this manner for their Lordships intend that actually the decision should not be taken by a lis of bias manager (sic). The inquiry must be conferred impartially and

the very requirement of conferred impartial inquiry which is the necessity outcome of the principles of natural justice is that a person who is a witness should not only dis-associate himself with the inquiry but he should not pass even the actual decision. In such cases, it is obvious that he is a disqualified person being a judge in his own cause. He would not, therefore, remain indifferent or hold the scales even and that is why their Lordships went to the extent of observing that in such cases it is not possible to find such a person from that estate from that Company, some officer from other Company should be asked to help him to hold this inquiry. In the present circumstances it amply empowers the Company to appoint another officer for this purpose when this manager was disqualified.

6. In this connection, the decision of our Division Bench consisting of Miabhoy J. (as he then was) and myself, in *A. S. Razvi v. Divisional Engineer, Telegraphs*, ILR (1964) Guj 45 = (AIR 1964 Guj 139), is quite apposite. At pp. 59 to 62 (of ILR Guj) = (at pp. 143-144 of AIR), it was pointed out that this is a cardinal principle of administration of justice that no person shall be a judge in his own cause. The principle applies not only in a case where the judge or the adjudicator is himself the prosecutor or suitor, but it applies also to all those cases where the judge or the adjudicator is so situated with reference to the lis that there is a real likelihood of bias taking place in the final decision of the case. The principle had, therefore, been applied where the judge or the adjudicator appeared as a witness in the cause. The principle emerges from the fact that the judge or the adjudicator had a duty to act judicially. In the eye of law, a person cannot act judicially unless and until the person is qualified to be a judge or an adjudicator and a person is disqualified from being a judge or an adjudicator if he has a bias in the dispute which he is called upon to adjudicate. The seat of a judge or an adjudicator is held so sacrosanct that it cannot be occupied by any one unless and until he is qualified to be a judge or an adjudicator and a person, who has a bias in the lis, is totally disqualified and incompetent to occupy such a sacred seat. The principle emerges from the fact that the disqualification of a judge or an adjudicator results in the vitiation of the whole proceedings before him and demands that his orders should be quashed or set aside. The proceeding being void, the court does not pause to inquire whether the order passed or decision arrived at is right, nor does it pause to consider whether a qualified judge or

an adjudicator would have passed the same order or come to the same decision. The decision is quashed because the disqualified person had no jurisdiction to pass even a correct order or record a right decision. Theoretically, it is possible to say that holiness, piety or a high sense of duty may endow a person with the rare gift of deciding correctly a case even against himself. But the aforesaid principle does not take into account such rare gifts. The law views the matter entirely on the footing that an average individual is subject to human frailties, and it bases itself on the fact that a person, endowed with ordinary qualities and subject to human weaknesses, to which human flesh is heir to, is not likely to maintain that mental equipoise, open mindedness and fair-play, which are the true badges of a judge or an adjudicator. The mind of a judge or an adjudicator must be so pure that the moment the law feels that a judge or an adjudicator is so situated with reference to a cause that the stream of his thought is likely to be polluted by personal or extraneous consideration or as stated by Lord Cranworth, LC in *Ranger v Great Western Rly Co.* (1854) 5 HLC 72, the judge or the adjudicator is not likely to be indifferent, it concludes that the cause is one which cannot be entrusted to the person suffering from such a disqualification. In view of this settled legal position, the Industrial Court was obviously in error in disregarding the settled law which on admitted facts would have required the Industrial Court to quash the present order of dismissal. The Labour Court had in terms held that there was no fair and impartial inquiry by such a manager who was a judge in his own cause and who was so vitally interested in that matter. Without even looking to the reasoning of the Labour Court, the Industrial Court has summarily brushed off the whole question by observing that there was nothing whatsoever on the record to show that the inquiry was vitiated. The Industrial Court has only been influenced by the fact that the employee consented by saying that he did not object to the presence of the manager at the inquiry. That would only preclude the employee from raising contention about the inquiry being vitiated by the presence of the manager. That does not mean that the present employee had waived this objection which he had been pressing at all stages and which led the Managing Director to entrust the enquiry to another officer. After this order of the Managing Director, this Manager who could never be expected to be an impartial judge in his own cause could not have passed the impugned order of dismissal. Therefore, on this short ground, the order of the Industrial Court which is in complete disregard of the settled law

laid down by the various decisions must be set aside.

7. Mr. Nanavati, however, vehemently argued that this question was not specifically raised at any stage and not even in the present petition and it should not be allowed to be permitted. We do not agree with this contention of Mr. Nanavati. The employee was all along feeling that there would not be an impartial inquiry and he had objected to the Manager holding even an inquiry because he was a witness in the case. Ultimately, the employee walked out after putting on record the application that he was not going to have any impartial inquiry. In this matter his apprehensions have now proved to be true because the same manager who was a judge in his own cause actually passed the dismissal order against this employee. Even in the application before the Labour Court it was in terms mentioned that he was dismissed without any legal inquiry and on the basis of an ex parte inquiry. Even before the Labour Court this point was in terms agitated and the Labour Court held the inquiry to be vitiated because the Manager was a judge in his own cause. It is only the Industrial Court which has treated this objection in the perfunctory manner by holding that there were no vitiating grounds in the circumstances of the case. It is true that the Textile Labour Association had not pressed its other appeal and, therefore, the written arguments presented by the petitioner where all these grounds are specifically raised need not have been looked into by the Industrial Court. The Industrial Court, however, could not shut its eyes to the judgment of the Labour Court where all these questions have been elaborately discussed and it could not uphold such a dismissal order which is all against the principles of natural justice. Even in the present petition, Mr. Patel was able to point out certain paragraphs where the impartial nature of the inquiry and the competence of the authority to pass dismissal order has been challenged. Besides, in the present case, the point goes to the root. The circumstances are also such that this employee could not personally appear for supporting his own case when the Textile Labour Association was appearing before the Industrial Court. In such circumstances, when the point is raised on admitted facts on the record and when it touches the jurisdiction of the authority to pass the dismissal order and which is based on the ground of contravention of principles of natural justice as per the settled law of the land, we would permit this point even at this stage. Therefore, there is no ground whatsoever made out by Mr. Nanavati for supporting the order on this count. We may incidentally mention that at some stage of the argu-

ment Mr. Nanavati touched the question of waiver but he was unable to substantiate this ground on the facts of the case because the employee had all along protested and even refused to participate in the inquiry, taking the risk of an *ex parte* inquiry. The point was pressed even before the Labour Court and even before the Industrial Court he was shouting at the top of his voice even in the written arguments. Therefore, this is not a case where this point has been waived by the employee at any stage.

8. As regards the second question also, the approach of the Industrial Court is totally perverse as it has misconceived the entire nature of the inquiry. The written statement of the employee was to the effect that there was an established practice in this unit according to which he was asked to prepare *kachcha* gate passes by the manager by instructing him that he had received the amounts for the goods which were allowed to be passed from the concerned merchants. It was the case of the petitioner that this practice was not only a long standing practice, but almost a permanent practice. The shareholder was alleging that the Manager had misappropriated these two amounts of the transactions which took place in 1956. As the complaint of the shareholder was made in 1959, after three years, the present inquiry was instituted in 1959 on the basis of the said complaint, as it is in terms stated in the show cause notice. In such circumstances, in order to arrive at the real truth of the matter, whether the manager misappropriated the amounts of these two transactions which took place in 1956 or the concerned employee misappropriated these two amounts, the relevant plea of the employee as to the established practice had to be taken into account. In support of this plea, the employee would have to prove the other instances where such *kachcha* receipts were signed both by the manager and the concerned employee and in which case the goods had gone from the Mills' stores and the proceeds had not been credited in the Mills' account or that the proceeds were credited as having been realised by the manager himself. It is only with a view to show these instances that the concerned clerk demanded these books or records from the year 1956. The Industrial Court felt surprised as the demand was made of these four years' books or records. The Industrial Court ought to have taken into consideration the fact that the transactions were of the year 1956 and when a plea was of a practice of long standing, the employee would at least seek to prove the instances from the years 1955 to 1958 to give a complete picture of the practice relied upon by the employee. Without considering this aspect which would

assume great importance in judging whether the employee or the concerned manager committed the alleged misappropriation, the Industrial Court summarily and cursorily brushed off this question on the ground that the show cause notice related to only two instances and, therefore, no evidence could be allowed of other instances. This conclusion of the inquiry officer, which is approved by the Industrial Court, is based on a complete misconception of the nature of the inquiry, where in order to ascertain the truth of the defence of the employee as to whether the Manager misappropriated or the employee misappropriated, the other instances would have to be examined. It is obvious that if the employee had been able to show a few instances where the same type of *kachcha* gate passes were signed by the Manager and the concerned employee and that the goods had gone out of the Mills' Stores and that the payments were not credited or were received by the manager, the employee's case, even in respect of the two present transactions would be completely corroborated by the independent documentary evidence. In these circumstances, the Industrial Court was entirely wrong in holding that these documents were irrelevant and that a roving inquiry was sought to be made for four years documents. The Mills' inquiry itself was started after three years and, therefore, the evidence had to be for the last four years. Therefore, the Industrial Court was wrong in holding that the Labour Court was under a misconception as to the nature of this inquiry. All these facts were not properly appreciated for otherwise the Industrial Court was bound to hold that the employee's right of defence was completely stultified by withholding these records, which were necessary to ascertain the truth of the defence of the concerned employee. Therefore, the Labour Court was right on both these grounds in holding that the inquiry and the dismissal order were vitiated. The Industrial Court had committed a patent error of law in reversing the decision of the Labour Court by disregarding the settled law in this connection and by a completely perverse approach on a total misconception of the nature of the inquiry. Therefore, on these two grounds, the order of the Industrial Court must be set aside.

9. As regards the reliefs which should be given, Mr. Patel vehemently argued his third contention. After the decision of the Supreme Court, in *Giriashanker Kashiram v. Gujarat Spinning & Weaving Co., Ltd.*, 1962 (1) Lab LJ 369 (SC) it is well settled that an individual employee has no right to appear or act in any proceeding where the representative Union has appeared or acted. Therefore, when the Textile Labour Association, which

had filed the original application in the Labour Court and filed the appeal before the Industrial Court, withdrew the appeal by acting in the matter, the individual had no locus standi to oppose that withdrawal. Mr Patel vehemently argued that the decision of the Supreme Court based on the scheme of Sections 27-A, 32 and 33 would not apply to the present case where the question was of reinstatement of a single employee. We do not agree with this contention of Mr Patel for the simple reason that even in that case the application was under Section 42(4) by individual employees and still it was held that where a representative had acted in that matter, the individual employees would have no locus standi to proceed with their applications. Mr Patel next argued that the representative union is bound to act on behalf of the employees and its right to act is as the representative of the employees and it could not, therefore, withdraw the appeal when the individual protested against any such action. The representative union cannot be made to split up its personality. In any event, the point is concluded by the decision of the superior court which is completely binding on us and it is not open to this Court to distinguish this decision on facts. It is only in case of the decision of the concurrent court that the doctrine of obiter per incuriam, or distinguishable on facts could be applied. Therefore, the Industrial Court was right in allowing the Textile Labour Association to withdraw its appeal. In that view of the matter, the claim of reinstatement which was the subject-matter of the appeal filed by the Textile Labour Association could not be granted. Mr. Patel, therefore, argued that the provisions of Order 41, Rule 33 of the C. P. Code could be invoked to grant such relief to the employee as the justice of the case requires. Mr. Patel is right in urging that this is a case where the order of the disqualified Manager is against all the principles of natural justice and is in contravention of the mandatory terms of the standing orders. Besides, when the inquiry was vitiated the company had a right to lead evidence before the Labour Court and to get a decision from the Labour Court on merits by justifying its action of dismissal. This course has also not been adopted. Mr. Patel, therefore, argued that the order of the Labour Court is patently erroneous as it has declared the employee to be continuing in service only till the date of the order of the Labour Court and has discharged him from that date, by the order of discharge simpliciter.

10. In these circumstances, Mr. Patel wanted us to pass an order that the employee continued in service till the date when he would have superannuated, meanwhile, during the intervening period,

or at least to grant compensation during the period. These were the reliefs which could be obtained in appeal filed by the Textile Labour Association. Once that appeal was withdrawn, in the Mills' appeal, no such relief could be granted. The provision of Order 41, Rule 33 of the Code of Civil Procedure has not been applied as Mr. Patel was unable to show any provision in the Industrial Court Regulations which required the Industrial Court to exercise all the powers of the appellate Court under the Code of Civil Procedure. Mr Patel only relied upon the Regulation 65 which corresponds to Sec 151. The said Regulation provides that nothing in these Regulations shall be deemed to limit or otherwise affect the power of the Court to make such order as may be necessary for the ends of justice. That residuary provision would not, in our opinion, be sufficient to invoke such a special power, which may be available under Order 41, Rule 33, for being resorted to even in the Mills' appeal. Therefore, once the order of the Industrial Court is set aside, the only relief that would be granted to the employee would be to restore the order of the Labour Court in toto.

11. As the first two points of Mr. Patel are accepted, it is not necessary to go into the fourth and fifth contentions of Mr. Patel.

12. In the result, this petition is allowed and the order of the Industrial Court is set aside and is quashed by a certiorari and the order of the Labour Court is restored in toto.

13. Rule accordingly made absolute with costs.

Rule made absolute.

AIR 1970 GUJARAT 284 (V 57 C 43)*

M. U. SHAH AND N. G. SHELAT, JJ.

Kumar Shri Kiritsinhji Bhagwatsinhji deceased by his heir—Gagar Jusab Tabani, deceased by his heir Haji Abdulla Bin Haji Abedbhai, Appellant v. Pharamroj Pirojshah Wadia, Respondent.

First Appeal No. 27 of 1961, D/- 25/26-3-1969.

(A) Limitation Act (1908), Art. 120 — Suit for price of goods supplied — No fixed period of credit fixed — Transaction including various items — Transaction though falling under different heads, treated as parts of single transaction — Dealings showing a sort of composite agreement—Defendant not putting up any

* Only portions approved for reporting by High Court are reported here.

GN/GN/D119/70/RGD/M

positive case — No plea of limitation raised — Held that moneys payable due to plaintiff at foot of accounts were payable on demand — Mere giving of debit memos did not amount to making demand — Art. 120 applied and not Art. 52 or 56 — Case Law Discussed.

(Paras 8, 9, 10, 11)

(B) Limitation Act (1908), Section 3 — Bar of limitation not pleaded — Court is not bound to speculate upon possible questions of limitation that may arise in the case and apply the section. (Para 8)

(C) Civil P. C. (1908), O. 6, R. 2 — Claim on entirely new grounds — Not sustainable — Claim implicitly founded in pleadings, is however, maintainable. AIR 1966 SC 735, Rel. on. (Para 9)

Cases Referred: Chronological Paras

AIR 1966 SC 275 = 1967-1 SCJ 304	9
AIR 1966 SC 735 = (1966) 2 SCR 286	9
AIR 1961 Mad 388 = 1961-1 Mad LJ 288	11
AIR 1961 Pat 485 = 1961 BLJR 498	11
AIR 1940 Bom 158 = 42 Bom LR 227	8, 11

A. H. Mehta, for Appellant; G. N. Desai, for Respondent.

SHAH, J.: 1-6. x x x x

7. Thus, although the plaintiff's theory that the oral agreement as set up in plaint para 2 was arrived at the very commencement of the transactions, namely, in year 1941, is not proved as such, in our opinion, the plaintiff has successfully shown a course of dealings and transactions between the parties that had taken place ever since 1938 upto year 1952 when the parties fell out, presumably because of the differences in relation to the partnership business which was carried on between the plaintiff and the defendant in the name of Wadia Kiritsinh Transport for which the plaintiff has filed Regular Civil Suit No. 874 of 1963 for dissolution of partnership and accounts, that there was a sort of a peculiar over-all understanding between the parties in the matter arising out of a peculiar relation resulting in trust and confidence in each other, as we shall presently see, while dealing with the question of limitation.

8. Mr. Mehta's contention on the point of limitation is that the transactions between the plaintiff and the defendant were distinct transactions falling under four distinct heads: (i) for the price of goods sold and delivered where no fixed period of credit was agreed upon; (ii) for the price of work done by the plaintiff for the defendant at his request, where no time had been fixed for payment; (iii) for money payable for money lent; and (iv) for money payable to the plaintiff for

money paid for the defendant, respectively covered by Articles 52, 56, 57 and 61 of the Indian Limitation Act, 1908 (Act 9 of 1908). As regards the first category of transactions, Mr. Mehta's particular submission is that the Court is bound to check up the various items which go to constitute that cause of action and to apply Article 52 to deliveries which took place more than three years before the filing of the suit, although the cause of action is one, namely, for the price of all the goods delivered. For the purpose, Mr. Mehta has relied upon the decision in *Atmaram Vinayak v. Lalji Lakhamshi*, AIR 1940 Bom 158 = (42 Bom LR 227). Mr. Mehta's over-all submission, in substance, is that transactions are distinct transactions governed by the aforesaid relevant articles of the Limitation Act. Now here, it may be remembered that although the plaintiff had supplied the defendant with copies of the relevant accounts and bills respectively with the notice Ex. 45 and reply Ex. 48 and had also filed the accounts from Samwat year 2004 to Samwat year 2010 (from 1948 A.D. to 1954 A.D.) as annexures to the plaint, and although the defendant had ample opportunity to examine the various items of accounts, in his written-statement, not only did he not challenge any specific items of accounts and put up a positive case, but what is more significant is that he did not raise any plea of the bar of limitation and did not make any averment of fact showing that the items of accounts or any one or more of them were barred by limitation, having regard to the nature of the transactions. It is true that Section 3 of the Limitation Act requires that although limitation has not been set up as a defence, every suit instituted after the period of limitation prescribed therefor by the First Schedule to the Limitation Act shall be dismissed. But, this cannot be taken to mean that when limitation has not been specifically pleaded in the defence and the facts are not apparent on the face of the record, the Court is bound to speculate upon possible questions of limitation that may arise in the suit. It appears that it was precisely for this reason that the learned trial Judge appears to have thought it proper to raise relevant issue set out earlier so that the attention of the parties may be focussed on the point. However, the omission to raise such a plea of the bar of limitation assumes importance in the instant case when what we have to consider is the nature of the manifold transactions, whether they were single and indivisible transactions or whether they were distinct transactions for which different Articles of the Limitation Act might be said to apply. Now, the course of dealings between the parties as evidenced by

the testimony of the plaintiff and his witnesses, as also the accounts that have been produced by the plaintiff at Exs 9 to 42 show the real nature of the transactions. The course of dealings discloses that the relations between the parties were cordial ever since the year 1938 when the defendant had purchased a motor car from the plaintiff. The relations appear to have grown thicker and each confided in the other. The evidence reveals that the plaintiff was in the effective control of the firm of M/s P H Wadia & Sons which carried on the business of the supply of provision materials, sale and purchase of motor cars, repairs of motor cars, sale of motor spare parts and accessories etc. ever since 1938 and that when the partnership was dissolved at the close of Samvat year 2005 (1949 A.D.), he became the sole proprietor of the concern. The relation had its origin some time in the year 1938 between the plaintiff who was residing in Rajkot and the defendant, who was a Prince or the Ruler of the nearby Gondal State and was working as a Road Superintendent of Gondal State and resided in Gondal, a nearby town. The transactions continued all along until almost the end of year 1952 when the parties appear to have fallen out, because of some dispute inter se relating to their partnership firm started in year 1949 in the name and style of Wadia Kiritsinh Transport. It appears that during all this intervening period, Rajkot was the place from which the defendant used to obtain most of his requirements of provision materials, cloth, motor-car, etc. Defendant used to make purchases of provision materials and other articles from the firm of M/s. P. H. Wadia & Sons on credit. The defendant used to purchase cloth and some other articles from some merchants in Rajkot, most of it on credit. The purchases were made and goods were obtained by the defendant from Rajkot either personally or through his trusted servant named Abedbhai, who was working in his bungalow since last about 35 years, and also through Abedbhai's sons Alibhai, Mamadbhai and Abdulla of whom Abdulla has subsequently become the heir, on the death of the defendant pending the hearing of the appeal, as shown in the title cause of the appeal before us. The acceptable evidence shows that the plaintiff was also looking after the various affairs and requirements of the defendant at Rajkot, sometimes paying up defendant's bills payable to other merchants in Rajkot, giving cash amounts to the defendant and his servants to make some cash purchases or make payments of defendant's various bills in Rajkot even paying off the defendant's Gymkhana bills and some medical bills of treatment of defendant's dog by a veterinary Surgeon at Rajkot, attending to defendant's

income-tax matters, making payments by cheques of large amounts of income-tax payable by the defendant, and attending to all and sundry works entrusted to him by the defendant. The defendant had admittedly purchased a motor car from the plaintiff. Defendant's motor-cars were repaired in plaintiff's workshop and spare parts and accessories were supplied by the plaintiff from his stores and all this on credit. In short, the plaintiff worked as a sort of defendant's general agent and financier in Rajkot, supplied provision materials and other goods on credit procured the required goods from other shops for the defendant, repaired motor cars in his workshop, supplied motor spare parts and accessories, paid bills of defendant's creditors, gave cash amounts to pay off the defendant's other bills, paid income-tax amounts on behalf of the defendant from his own Bank balance and attended to all and sundry needs of the defendant. This appears to have been a peculiar relationship which had grown up between the parties during the course of years beginning from 1938. All these transactions have been entered into in one single account of the defendant maintained by the plaintiff. Moneys were debited in defendant's single account, Debit memos, debit vouchers and statement of accounts were from time to time given by the plaintiff to the defendant or his trusted servants. Payment was never demanded until in the year 1952 when the relations became strained. This was all because of the great confidence and trust the plaintiff had reposed in the defendant and vice versa. This peculiar course of dealings shows that moneys due to the plaintiff at the foot of accounts of the transactions were payable on demand. In any event, such appears to have been the tacit understanding. Although the transactions can be classified under eight broad heads as observed by us earlier, in substance, it was all part of a single and indivisible arrangement and the plaintiff's claim for the suit amount cannot be split up into different items for applying the bar of limitation. It is not the case of the defendant that demand of the moneys due was made by the plaintiff at any time earlier. Mere giving of debit memos, vouchers, statements of accounts, etc., do not amount to a demand and that was never the case of the defendant. Apart from the fact that the defendant has not in his written statement raised a plea of bar of limitation, we find that no case was set up that the suit transactions were divisible and separate transactions. Even in his evidence, the defendant has not made any statement indicating the distinct and divisible nature of the transactions. There is no reason to classify the suit claim into four distinct heads as contended by Mr.

Mehta. The defendant has not challenged plaintiff's deposition stating that the demand of the suit dues was made by him of the defendant personally in August 1952 for the first time. Defendant's conduct as reflected in the course of dealings in the matter also indicates that the transactions were all to be treated as part of an over-all implied arrangement or agreement, a sort of a composite agreement, to treat the transactions, as one and indivisible, the amount due being payable on demand. In our opinion, all these facts and circumstances lead to a reasonable conclusion that the parties treated the transactions as part of one and indivisible over-all arrangement at least impliedly. Thus, although the oral agreement pleaded by the plaintiff in para 2 of the plaint, namely, that the arrangement was arrived at at the very commencement of the suit transactions, meaning in the year 1941, is not satisfactorily proved, the fact that such was the arrangement impliedly arrived at between the parties during the course of the transactions is amply borne out by the course of dealings between the parties, the system of accounting, the nature of the various transactions and the implicit trust one had in the other. The plaintiff would not have otherwise sat silent for such a long time and gone on supplying goods and making payments of large amounts to the defendant or on his behalf over a number of years. It must here be remembered that the plaint para 2 also speaks of such an understanding having been arrived at during the course of the transactions. The case set up in plaint para 2 as regards the understanding is two-fold: (i) that it was arrived at at the very commencement of the suit transactions; and (ii) that it was also arrived at during the course of the transactions or dealings between the parties. Thus, if we say that the agreement was to treat the transactions as one and indivisible and that this was a sort of a composite arrangement by virtue of an implied over-all agreement for which the payment was to be made by the defendant on demand made by the plaintiff, such an understanding, in our opinion, was implicit and is covered by the pleadings. On these premises, the suit relief is clearly within limitation, the demand having been made by the plaintiff on December 21, 1952, by notice Ex. 45 and the suit having been instituted on July 7, 1954. Mr. Mehta's contention that the suit relief is not founded on pleadings has thus no merit.

9. It is true that if a party asks for a relief on a clear and specific ground and in the issues or at the trial, no other ground is covered either directly or by necessary implication. It would not be open to the said party to attempt to sustain the same claim on a ground which is

entirely new. A party cannot be permitted to justify its claim on a ground which is entirely new and which is inconsistent with the ground made by it in its pleadings. But, even in such a case, considerations of form cannot override legitimate considerations of substance. As observed by the Supreme Court in *Bhagwati Prasad v. Chandramaul*, AIR 1966 SC 735, at p. 738:

"* * * in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot override the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case."

In our opinion, as aforesaid, the course of dealings does make out an over-all implied agreement between the parties of the sort set out in the plaint para 2. Even assuming otherwise, if the same sort of understanding can be spelt out or culled out from the course of dealings between the parties as is the case here, we would not allow the considerations of form to override the legitimate considerations of substance. We are inclined to take a liberal view of the matter. The suit transactions appear to us to be part of a single and indivisible arrangement (agreement) and the claim made by the plaintiff could not be split up into different items for applying the bar of limitation and therefore, in our opinion, Article 120 of the Indian Limitation Act which provides a period of six years from the date when the right to sue accrues applies. We are in a way fortified in this view by the observations of the Supreme Court in *Union of India v. Watkins Mayor and Co.*, AIR 1966 SC 275, where in a suit by the bailees for compensation on account of expenses incurred in storing goods under 7 different heads: (a) godown rent, (b) watch and ward, (c) terminal tax, (d) cartage, (e) unloading charges, (f) cooliage, and (g) interest, it was contended by the defendant, inter alia, that the suit was barred under Article 61 of the Limitation Act with respect to items (c) to (f). The

argument was repelled by the Supreme Court making the observations:

"The transaction of bailment between the parties was a single and indivisible transaction and the claim of compensation made by the plaintiff cannot be split up into different items for applying the bar of limitation. The High Court was right in taking the view that the suit was governed by Art. 120 of the Limitation Act and that the plaintiff was not barred under that Article."

It follows that in a case where the transactions are indivisible and the claim cannot be split up into different items, Article 120 of the Limitation Act applies, as in the instant case. It is not in dispute before us that if Article 120 of the Limitation Act governs the case, the entire suit of the plaintiff is within the period of limitation.

10. Article 120 is the residuary Article and it provides for a period of limitation of six years in a suit for which no period of limitation is provided elsewhere in the Schedule. The Article would apply unless it is clear that the suit is within some other Article, which, in our opinion, it is not. It is a general Article and it applies to suits to which no other Article is applicable. The time in such a suit begins to run when the right to sue accrues. The words "right to sue" mean a right to seek relief and there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement by the defendant. The question as to when a right to sue arises depends mostly on the facts and circumstances of each case. The facts in the instant case disclose that the right to sue accrued to the plaintiff only when the demand was made for the first time on December 8, 1952, and the defendant refused compliance. In this view of the matter, the plaintiff's suit as instituted on July 7, 1954, is clearly within the period of limitation under the Article.

11. In our opinion, neither Article 52, which provides a period of three years from the date of delivery of the goods, nor Article 56 which provides a period of three years from the date when the work is done can be applied in the case. One does not cover the price of work done and the other does not cover the price of materials supplied. Likewise Article 57 which provides a period of three years for money payable for money lent from the date of the loan and Article 61 which provides three years' period from the date when the money is paid, do not apply. The decisions reported in 42 Bom LR 227 = AIR 1940 Bom 158, AIR 1961 Pat 485 and AIR 1961 Mad 388, relied upon by Mr. Mehta to support his contention that Articles 52, 56, 57 and 61 apply have no application to the instant

case and need no detailed consideration. In the instant case, there appears to be a special, though implied, contract between persons who were friends and confidants. The parties appear to have made demand an integral part of the agreement or understanding and the transactions as aforesaid, in our opinion, were all a part of an over-all contract or understanding and they could not be split up into different items for applying the bar of limitation. Effect will, therefore, be given to their contract. The cause of action is a claim for the balance due at the foot of account, payable on demand. In any view of the matter, therefore, the suit of the plaintiff would be governed by Article 120 and is within the period of limitation.

Before parting with the case, we must refer to a contention raised by Mr. Desai for the respondent that document Ex. 46 dated December 21, 1952, constitutes an acknowledgment within the meaning of Section 19 of the Limitation Act. Now Ex. 46 is a reply of the defendant to the plaintiff's notice of demand, Ex. 45, dated December 8, 1952. In the reply, the suit claim is denied. It is denied that bills of accounts were given to the defendant. It states that nothing could be made out of the copy of the 'Khatavahi' (ledger) that was sent by the plaintiff to the defendants. It further states that, after examining the bills, an appropriate detailed reply will be sent. From this, Mr. Desai wanted us to infer that a sort of a jural relationship as of debtor and creditor subsisted between the parties. Mr. Desai's submission was that the reply did not in terms deny the correctness of the accounts and further that by asking for the accounts, the jural relationship was admitted. In our judgment, there is no merit in this contention. The reply merely denies the correctness of the accounts and calls for the relevant bills and says that on receipt of such bills, the defendant would give a detailed reply. Having regard to the tenor of the letter, it does not appear that the statements therein were made with the intention to admit jural relationship. In our opinion, the reply Ex. 46 cannot be construed as an acknowledgment of liability within the meaning of Section 19 of the Indian Limitation Act.

12. The aforesaid were the only contentions which were raised by the learned advocates of the parties. For the reasons stated, the suit is within limitation and is not barred. We must accordingly maintain the decree of the trial Court. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(c) The provision, if any, made for the existing incumbent of the post; and

(d) whether it is proposed to make any arrangements for the performance of the duties of the post held in abeyance, and if so, the particulars of such arrangements."

It is therefore clear that the Government has got the discretion to keep a particular cadre post in abeyance for a period exceeding six months, but in such a case the Government has to send a report to the Central Government regarding the matters mentioned in Clauses (a) to (d) (supra). We are fortified in our view by a decision of the Delhi High Court in *Madan Gopal v. Union of India*, 1969 SLR (Services Law Reporter) 576 at p. 596 where their Lordships observed as follows :—

"A plain reading of the rule (Rule 10 of the Indian Police Service (Cadre) Rules, 1954 (Supra) shows that it provides for the keeping of the post vacant or for the holding of it in abeyance only prospectively. . . . The petitioner has not averred anywhere in his petition that the report contemplated by Rule 10 was not sent by the State Government to the Central Government. On the other hand the presumption that official acts have been done according to law would clearly apply to this case and it must be presumed that the State Government did send a report to the Central Government; otherwise the Central Government would have called for an explanation from the State Government and the petitioner would have come to know about it.

Furthermore Rule 10 gives an undoubted power to the State Government to keep a cadre post in abeyance but prescribes certain steps that the Government has to take. The rule, however, does not lay down any penalty that would be visited if these steps are not taken. Therefore the sending of the report after keeping the post in abeyance has only a directory, not a mandatory force. It is however, not necessary for us to dilate on this question because the petitioner himself has not alleged that no report as contemplated by Rule 10 was sent to the Central Government, so, it must be presumed that the report was sent in the normal course of things. Furthermore, from the historical facts of the events in the State of which a judicial notice can be taken, it is manifest that between the time that the petitioner was appointed to the IPS and the time when the impugned order was passed, the Government had changed three times and three different Ministries had come into power.

It is not possible for us to infer malice against all the three Government against the petitioner, in the absence of specific and cogent reasons which have not been pleaded. On the other hand keeping the cadre posts in abeyance was done by the very Government which had appointed the petitioner and no

acts of malice have been alleged against that Government by the petitioner. Again the General Secretary has given cogent reasons why the posts were kept in abeyance, namely, that it took a long time for the Government to prepare the select lists both for the IAS and the IPS. It is absurd to expect that the Government was guilty of malice not only in the case of the petitioner but also in the case of IAS officers who had got nothing to do with the petitioner. Again if the Government decided not to fill up these vacancies and kept them in abeyance for a period of about 10 years, the petitioner made no grievance of it before filing this petition, and he cannot be heard to assail the conduct of the Government on the ground of mala fides ten years after the wrong was done. For these reasons the plea of the petitioner on this score is also overruled.

17. Lastly we come to the third stage namely the period between 1964-68 when according to the petitioner respondents 2 to 4 were appointed to cadre posts which could only have been held by members of the IPS. We have already mentioned that the Government for sufficient reasons was not in a position to prepare the select lists from 1958-68 and therefore the cadre posts of the DIsG Police were kept vacant. The appointment of respondents 2 to 4 to the alleged cadre posts was not really an appointment to the cadre post in the strict sense of the term. The respondents were merely promoted as DIsG Police in the State Service and were asked to look after the duties and responsibilities of these posts. It is obvious that so long as these posts were kept in abeyance or were not filled up, they could not be kept in a state of suspense or vacuum. These posts, namely the posts of DIG, CID, DIG Range and DIG Armed Police entail heavy and onerous responsibilities and the Government would have been failing in its duty if alternative arrangements to perform the duties attached to these posts were not made so long as the cadre posts were kept in abeyance.

It is not disputed before us that even while the respondents were asked to man these posts, they were not paid the emoluments which these posts carried if manned by a member of the IPS cadre, but they were given their own emoluments under the State service. In these circumstances it was the best solution that could have been achieved, although such a course was a little prejudicial to the respondents themselves because they had to discharge the difficult and onerous responsibilities of the high posts on their own emoluments. It was perhaps to remove this prejudice that the Government chose to appoint the respondents to these posts at the very first possible opportunity, that is to say the moment they became eligible after being appointed to the IPS cadre in the year 1968. In fact Rule 10 (d) of the Indian Police Service (Cadre) Rules (Supra) enjoins on the

Government a duty to make alternative arrangements for performance of the duties of the posts held in abeyance.

The action of the Government in asking the respondents to look after the duties of these posts was therefore in consonance with Rule 10 (d) of which a report had to be sent by the State Government to the Central Government. Further, the Government having exercised its discretion under Rule 10 and in accordance with the conditions mentioned therein we do not see how any malice can be attributed to it. Furthermore it has been clearly averred by the General Secretary in his counter-affidavit that even at the time the respondents were asked to look after the duties of the posts of DIG mentioned above, the claim of the petitioner was fully considered but he was not found suitable to man these posts and therefore the Government did not promote him even at that time.

This assertion has been made in paras 4(v) and 4(vi) of the counter-affidavit of the General Secretary which runs as under:—

"It may be stated that even at the time of promotion of respondents 2 to 4 as DIG in the State Police Service, the claims of the petitioner as well as other officers were considered and they were not considered suitable for such promotion on the basis of their merit and suitability. . . . While making adjustments to the posts of Dy. Inspectors General the Government against considered the merits, suitability and qualifications of the petitioner as well as other members of the IPS and it was only on relevant and material considerations that respondents 2 to 4 were adjusted as Dy. Inspectors General in the IPS cadre."

18. It is therefore clear that the petitioner's case was fully considered at the time the alleged promotions were made which happened in 1964, 1965 and 1968 but the petitioner was not found suitable. If the petitioner was aggrieved with the decision of the Government, he should have filed a writ petition in this Court and the prayer of the petitioner made at this stage for quashing the impugned order or holding it to be mala fide is absolutely belated and cannot be entertained.

19. It is true that Rule 8 of the Indian Police Service (Cadre) Rules at page 62 of the All India Services Manual does provide that every cadre post shall be filled up by a cadre officer. It is also not disputed before us that the post of DIG Range, DIG, CID and DIG Armed Police are cadre posts. But the State has taken the stand that the respondents were not appointed to these cadre posts but were only asked to look after the duties of these posts without being appointed as cadre officers and therefore there was no violation of Rule 8 (Supra). In fact as pointed out above, Rule 10 of the Cadre Rules clearly empowers the Government to make alternative arrangements for performing the duties of cadre posts and this is

exactly what the Government did in asking the respondents to discharge the duties attached to these posts. We are, therefore, unable to agree with the petitioner that the Government was guilty of mala fides.

20. It was then contended that at any rate the petitioner was of a much superior merit than at least respondent 3 who had risen from the lower ranks in the police department and therefore as against him the petitioner's claim should have been considered favourably for appointment to the cadre post of DIG when he was eligible for it. We have already pointed out that respondent 3 was a person of exceptional merit and ability by virtue of which he had risen from the lower ranks to the post of Superintendent of Police in the senior grade. It was in recognition of his services that the President of India appointed him to the IPS cadre in the senior scale. Having been appointed to this service, respondent 3 became as eligible as the petitioner for appointment to the cadre post of DIG. The post of DIG being a selection post, it was for the Government to have selected the best man available and after considering the case of the petitioner if the Government thought that respondent 3 was a more suitable person than the petitioner to be appointed as DIG, the order of the Government was perfectly valid and no fault could be found with it, merely on the ground that the petitioner was not selected.

21. Finally it was conceded that the order impugned is inconsistent with the Presidential order appointing the respondents 2 to 4, inasmuch as by virtue of the impugned order the respondents 2 to 4 would be deemed to have been promoted with effect from 26-10-63, the date of the Presidential order. The contention is prima facie attractive but on closer scrutiny we think it is devoid of substance. The preamble of the impugned order contains the following words:—

"Consequent upon the appointment of the following State Police Officers to the Indian Police Service Cadre of Jammu and Kashmir vide Government of India, Ministry of Home Affairs Notification No. 20/1/67-AIS (III) dated 26-10-63 the following postings and adjustments are hereby ordered.

A perusal of these words clearly shows that the impugned order was passed only as a consequence of the order passed by the President and it cannot therefore be held to be inconsistent with that order, because this order will take effect after the passing of the Presidential order, though both may be operative from the same date. It is not the case of the petitioner that the impugned order was given retrospective effect from a date previous to the passing of the Presidential order and if this was so something could be said in favour of the petitioner. In these circumstances we do not find any illegality in the impugned order on this ground.

22. Before closing this judgment we might state that although the State has taken the stand that the claim of the petitioner as against respondents 2 to 4 was fully considered both at the time when they were asked to perform the duties of the DI&G and at the time when they were subsequently promoted and adjusted as DI&G on their appointment to the IPS, yet there is nothing in the counter-affidavit of the General Secretary to show that there was anything particularly against the petitioner so far as his service record is concerned. It may be that the petitioner was not found suitable or could not be equated in merit with respondents 2 to 4, but if some other vacancy arises in future, he may be found to be equal or better than others who are then eligible for promotion. When this happens, we are sure that the Government will keep the petitioner's claim in view and consider the desirability of promoting him if he is found otherwise suitable in all respects.

23. For the reasons given above, the contentions raised by the petitioner fail. The application is dismissed but in the circumstances without any order as to costs.

JASWANT SINGH, J.:— 24. I agree.

Application dismissed.

AIR 1970 JAMMU AND KASHMIR 179 (V 57 C 44)

S. MURTAZA FAZL ALI, C. J. AND
JASWANT SINGH, J.

J. C. 13018 Subedar Surat Singh, Petitioner v. The Chief Engineer Projects (Beacon) C/O 56 A. P. O., Respondent.

Writ Petn. No. 252 of 1969, D/- 22-5-1970.

(A) Army Act (1950), Sec. 160 — Army Rules (1954), Rule 70 — Revision of finding or sentence — General Court Martial reaffirming its finding on revision and transmitting the proceedings for confirmation — Confirming authority if dissatisfied with the finding can refer the case to its superior authority but cannot withhold confirmation and order retrial by another General Court Martial. (Para 6)

(B) Constitution of India, Article 32 (2-A) (as applied to Jammu and Kashmir) and Constitution of Jammu and Kashmir Section 103 — Other remedy open — Order of confirming authority under Army Act — Order manifestly invalid being unwarranted by any provisions of the Act or Rules — High Court will not refuse to grant relief under its writ jurisdiction on the ground that alternative remedy available under Act was not availed of — (Constitution of India, Article 226). AIR 1961 SC 372 and AIR 1962 SC 1694 Rel. on. (Paras 9, 12)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1694 (V 49) =
(1963) 1 SCR 98, Collector of

Monghyr v. Keshav Prasad Goenka 11
(1961) AIR 1961 SC 372 (V 48) =
(1961) 2 SCR 241, Calcutta Dis-
count Co. Ltd. v. Income-tax Officer 10

R. N. Bhalgotra, for Petitioner; V. S. Malhotra, for Respondent.

JASWANT SINGH, J.:— The petitioner JC-13018, Subedar Surat Singh and G-75829 Pioneer Joginder Singh and G-87982 Pioneer Tahal Singh, all of 1615 PNR COY (GREF) who were subject to the Army Act, 1950 (Act XLVI of 1950 hereinafter called "The Act") were tried by the General Court Martial at Work Shop Base GREF under Sec. 69 of the Act read with Section 302/109 of the Penal Code for causing the death of G. 87630 Pioneer Suriya Prasad Sharma of 1617 PNR COY on the night intervening 4th and 5th June, 1967, at village Shakti within the jurisdiction of Police Station Leh, District Leh, Jammu and Kashmir State. The Court Martial was convened by the Chief Engineer, Project Beacon Stationed at Srinagar, respondent, herein, who was empowered to do so under Section 109 of the Act. At the conclusion of the trial on 30th May, 1968, the General Court Martial held the petitioner and his aforesaid co-accused "not guilty" and acquitted them of the charges upon which they were arraigned and transmitted the proceedings through proper channel to the respondent for confirmation under Sections 153 and 154 of the Act read with Rule 63 of the Army Rules, 1954, hereinafter referred to as "the Rules". Acting under Sec. 160 of the Act, the respondent vide his order dated 20th July, 1968, sent back the finding of "not guilty" for revision to the General Court Martial, which originally tried the aforesaid accused. Pursuant to the order of the respondent, the General Court Martial reassembled and deliberated again but seeing no reason to depart from its previous finding, reaffirmed the same. This finding was again sent up under Sections 153 and 154 of the Act read with Rule 68 of the rules to the respondent. Being dissatisfied with the finding the respondent refused to confirm the same and by his order dated 6th February, 1969 directed the re-trial of the petitioner and his other two co-accused by another General Court Martial.

2. Aggrieved by this order, the petitioner has moved this Court under Article 32 (2-A) of the Constitution of India as applied to the State of Jammu and Kashmir and Section 103 of the State Constitution for a writ of Certiorari quashing the order, inter alia on the grounds that there is no provision in the Act or the Rules according to which the confirming authority can refuse to confirm the verdict of "not guilty" after the same has been re-affirmed on revision under Section 160 of the Act and reconvened the General Court Martial for retrial of the offender.

3. In the affidavits filed on behalf of the respondent in reply to the petition, it is contended, that the finding of "not guilty" has no validity unless it is confirmed under Section 153 of the Act read with Rule 63 of the Rules, that if the confirming authority finds that the finding of "not guilty" is perverse it is empowered under Section 160 of the Act to send back the proceedings to the General Court Martial for revision, that this power can be exercised only once, that if on revision the General Court Martial adheres to its former finding and transmits the proceedings for confirmation and the confirming authority comes to the conclusion that the finding given second time by the General Court Martial on revision is still perverse it can refuse to confirm the finding and order retrial because not to try the offender again would mean allowing the charge against him to remain without valid adjudication which would be against the provisions of Sec. 153 of the Act that in exercise of the powers conferred under Rule 70 of the Army Rules, the respondent refused to confirm the finding of "not guilty" of the General Court Martial in respect of the petitioner and his co-accused pioneers and ordered their retrial in order to meet the requirements of discipline as well as ends of justice, that in the circumstances the proposed fresh trial of the accused by the General Court Martial for the same offences cannot be said to be against the provisions of the Act and the Rules and that it is not open to the petitioner to seek relief by means of a writ petition as a specific remedy under Sec. 165 of the Act is available to him.

4. The petition first came up for hearing before one of us and finding that it was a case of first impression and involved important questions relating to interpretation of Sections 121, 153, 154 and 160 of the Act and Rule 70 of the Rules, it has been referred to this bench for an authoritative pronouncement.

5. We have heard the learned counsel for the parties at considerable length. They have reiterated the stands taken by their clients in the petition and the reply affidavits respectively.

6. The crucial point for determination in this case is whether the order passed by the respondent is valid or not. The answer to this question turns on the true interpretation of Sections 121, 153, 154 and 160 of the Act and Rule 70 of the Rules, which are reproduced below for facility of reference.

SECTION 121

When any person subject to this Act has been acquitted or convicted of an offence by a Court Martial or by a Criminal Court, or has been dealt with under any of the Sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a Court martial or dealt with under the said sections.

SECTION 153

No finding or sentence of a general, district or summary general Court Martial shall be valid except so far as it may be confirmed as provided by this Act.

SECTION 154

The findings and sentences of general Court martial may be confirmed by the Central Government, or by any officer empowered in this behalf by warrant of the Central Government.

SECTION 160

(1) Any finding or sentence of a Court martial which requires confirmation may be once revised by order of the confirming authority and on such revision, the Court, if so directed by the confirming authority, may take additional evidence.

(2) The Court on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.

(3) In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the Court shall proceed with the revision, provided that, if a general Court Martial, it still consists of five officers, or, if a summary general or district Court martial, of three officers.

RULE 70

Upon receiving the proceedings of a general or district Court martial, the confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation or reservation shall be entered in and form part of the proceedings.

It will be seen that Section 121 *inter alia* prohibits the second trial of a person subject to the Act who has been acquitted or convicted of an offence by a Court martial or by a criminal Court. Section 153 provides that no finding or sentence of a general, district or summary general court martial would be valid unless confirmed as laid down in the Act. Section 154 enumerates the authorities who are competent to confirm the finding and sentence of a general court martial, Section 160 authorises the confirming authority to order revision of a finding or sentence by the court martial without taking or after taking additional evidence. But the finding or sentence of the Court martial requiring confirmation can be revised once only by the order of confirming authority. If on revision the Court does not find any reason to depart from its previous finding it has to reaffirm the same. If, however, the Court does not adhere to its former finding it has to revoke the finding and sentence and record the new finding and if such new finding

involves a sentence, it has to pass a fresh sentence. In either case it has according to Rule 68(4) of the Rules to transmit the proceeding for confirmation to the confirming authority. The powers of the confirming authority are not absolute and untrammelled but are defined and circumscribed by Rule 70 of the Rules. According to that rule it can upon receiving the finding of the general Court martial adopt any one of the following courses:-

- (i) confirm, or,
- (ii) refuse confirmation, or,
- (iii) reserve confirmation for superior authority.

The powers of the confirming authority being limited, as stated above, it cannot go beyond that and direct retrial of the accused specially in the absence of a provision for retrial like the one contained in Secs. 423 (1) (A) and 376 (b) of the Code of Criminal Procedure. It is true that in India unlike in England where the acquittal by the Court martial is conclusive and requires no confirmation, every finding of a general Court martial whether of acquittal or of guilty cannot be regarded as valid unless it is confirmed by the competent authority but the legislature could not have reasonably intended that an officer convening a general Court martial can go on dissolving such Courts and reconstituting them ad infinitum until he obtains a verdict or a finding of his own liking. That would not only be against public policy and the ancient maxim "nemo debet bis vexari pro una et eadem causa" (no person should be twice disturbed for the same cause) but would also reduce the provisions of the Act to a mockery and given an appearance of mala fides. In the present case if the findings arrived at by the general Court martial on revision appeared to the respondent to be perverse he should have referred the case to his superior authority for confirmation and should not have taken upon itself the odium of withholding confirmation and ordering a retrial.

7. Section 117 of the Act cannot also be pressed into service by the respondent as it appears to relate to contingencies arising before the return of the finding by the Court martial and not to cases of the present nature.

8. As the impugned order does not appear to be warranted by any provisions of the Act or the Rules, we have no hesitation in declaring it to be invalid.

9. Before concluding we must also advert to the objection raised in one of the counter-affidavits filed before this Court that since it was open to the petitioner to apply to the Central Government to annul the proceedings, and he has not availed of the remedy the petition is not maintainable. It is now well settled that if the impugned order is manifestly contrary to law or principles of natural justice, it can be interfered with by the High Court under its writ juris-

diction even though an alternative remedy is available and has not been exhausted.

10. In *Calcutta Discount Co. Ltd. v. Income Tax Officer*, AIR 1961 SC 372, it was held that the existence of an alternative remedy is not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. It was further observed in this ruling that when constitution confers on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief is refused without adequate reasons.

11. Again in *Collector of Monghyr v. Keshav Prashad Goenka*, AIR 1962 SC 1694, it was held that the High Court has certainly a discretion to grant relief under Article 226 even if there are other alternative statutory remedies.

12. In the present case, we find no reason which would justify our refusal to grant the relief.

13. In the result we allow the petition and quash the impugned order by a writ of certiorari and direct the respondent to order the release of the petitioner.

14. There will, however, be no order as to costs.

S. MURTAZA FAZL ALI, C. J.:— 15. I agree.

Petition allowed.

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(V 57 C 45)

S. MURTAZA FAZL ALI, C. J. AND
JALAL-UD-DIN, J.

Harnam Singh and another, Appellants v.
Mohan Lal, Respondent.

First Appeals Nos. 4 and 140 of 1969, D/-
22-12-1969, from order of Dist. J., Jammu,
D/- 16-1-1969.

(A) Hindu Law — Will — Construction
— Nature of interest given.

Intention of testator as to nature of interest bequeathed not made clear by express words — No presumption that bequest carries a limited interest can be made — Unconditional and unlimited bequest by son of his self-acquisition to mother — Bequest confers absolute estate on mother — No presumption that mother was given only a limited interest can be made from the fact that the bequest is to a woman. AIR 1951 SC 139 and AIR 1953 SC 495 and AIR 1960 Andh Pra 509, Rel. on. (Para 10)

(B) Hindu Law — Self-acquired property — Blending — Question whether self-acquired property was thrown into the joint Stock and treated as a joint family property is a question of fact and must be proved.

(Para 15)

Cases Referred:	Chronological	Paras
(1960) AIR 1960 Andh Pra 509 (V 47)		
= (1960) 1 Andh WR 318, Venkata Rama v. Rajyalakshmi		12
(1953) AIR 1953 SC 495 (V 40) =		
1954 SCR 243, Arunachala v. Muruganatha		11
(1951) AIR 1951 SC 139 (V 38) =		
1950 SCR 766, Ram Gopal v. Nand Lal		11
(1875) 24 WR 395 (Cal), Mt. Kollany Koor v. Luchmee Pershad		11
D. D. Thakur, for Appellants; Ishwar Singh, for Respondent.		

S. MURTAZA FAZI, ALI, C. J. :— These are two defendant's appeals in a suit filed by the plaintiffs for specific performance of a contract of sale of two shops and a house situate in Salimar Road, Jammu. As the facts and the points arising in the two appeals are identical, we propose to decide both the appeals by one judgment.

2. In first appeal No. 4 of 69— Harnam Singh v. Mohan Lal — the suit of the plaintiff which was based on the basis of an agreement to sell executed by Harnam Singh in favour of Mohan Lal dated 11-7-61 and 18-7-61 purporting to sell two shops and a house for Rs. 6,000 and Rs. 9,000 respectively, the plaintiff averred that the agreement was a valid one and the executant Harnam Singh agreed to execute a sale deed within one year of the date of the agreement but did not perform his part of the contract in spite of persistent demands by the plaintiff.

3. The suit was resisted by Harnam Singh defendant mainly on the ground that the agreement was void as it had been obtained by the plaintiff through fraud and undue influence. The defendant further pleaded, that the property being ancestral, there was no legal necessity to justify the sale in favour of Mohan Lal plaintiff.

4. Balwant Singh son of Harnam Singh filed another suit for injunction against the plaintiff restraining the plaintiff from getting the sale deed executed on the ground that the agreement executed by Harnam Singh in favour of his father was obtained by fraud and was not justified by legal necessity. First Appeal No. 140 of 69 arose out of the suit filed by Balwant Singh s/o Harnam Singh whereas first appeal 40 of 69 arose out of a suit filed by Mohan Lal for specific performance of the sale.

5. On the pleadings of the parties, the following issues were struck:—

1. Whether the suit is not maintainable because of the misjoinder of causes of action? OPD

2. Whether the suit is not maintainable as the description of the suit property given by the plaintiff is insufficient? OPD

3. Whether the defendant and his son S. Balwant Singh formed a Hindu joint family. Whether the suit property with regard to which agreements were executed by the defendant in favour of the plaintiff on 11th

July and 18th July 1961 was ancestral and joint qua his son? OPD

4. Whether the agreements dated 11th July and 18th July 1961, were got executed by practising fraud? OPD

5. Whether the facts given in the agreements are incorrect, if so, with what effect? OPD

6. In case issue 3 is proved, whether the agreed sale was made for legal necessity? OPD

7. Whether the market value of the suit property is more than what has been agreed upon by the parties and as such the suit for specific performance cannot be decreed? OPD

8. Relief. OPD

Additional issue

Whether the findings recorded in the civil suit S. Balwant Singh v. Mohan Lal and others amounts to res judicata in the present case? OPD

6. The learned Judge after a careful consideration of the entire evidence and circumstances before him decided issues Nos. 1 to 4 against the defendant in the suit brought by Mohan Lal and against the plaintiff in the suit brought by Balwant Singh.

7. We have gone through the judgment of the court below and we do not see any reason to differ from the findings arrived at by the learned Judge. In fact the learned counsel for the appellant has not at all challenged the findings of the court below on the question of fraud, and has accepted the position that there is no evidence worth the name to prove that the agreements executed by Harnam Singh in favour of Mohan Lal were obtained by fraud. In these circumstances this issue was rightly decided against Harnam Singh and Balwant Singh and in favour of Mohan Lal.

8. The only point canvassed before us was regarding the question of legal necessity. The learned counsel for the appellant submitted that the learned District Judge had found very clearly that there was no legal necessity at all justifying the sale and on this ground alone the suit of Mohan Lal for specific performance of the contract of sale ought to have been dismissed and the suit filed by Balwant Singh ought to have been decreed. It is true that the learned District Judge has given a finding on this point in favour of the appellant, but on the findings given by the learned District Judge the question of legal necessity does not arise at all.

9. The main question that fell for determination in the suits was whether or not the property in question was a joint family property either in the hands of Harnam Singh or in the hands of Balwant Singh. Mr. Thakur conceded that it may be taken for granted that the property in dispute originally belonged to Ishwar Das and although Ishwar Das was joint with his brother Kirpal Singh, the properties in suit were the self-acquired properties of Ishwar

Das. There is also cogent evidence on record to prove this fact. Ishwar Das executed a will in favour of his mother Mst. Malan in respect of the properties in suit and Mst. Malan bequeathed this property in favour of Harnam Singh by a will dated 19-1-2003 (Bikrami). It has thus been established from evidence that Harnam Singh got the property by virtue of a will from Mst. Malan his grandmother.

10. It was, however, contended by Mr. Thakur that the bequest by Mst. Malan who had a limited interest would not confer an absolute estate on the legatee Harnam Singh and it should be presumed that Mst. Malan intended to convey a joint family interest to Harnam Singh. We are, however, unable to agree with this argument. There is no presumption that a bequest made to any person carries a limited interest unless the intention of the testator is made clear by express words showing the nature of the interest bequeathed. So far as the first will executed by Ishwar Das in favour of his mother is concerned, it is not disputed that the bequest was an unconditional and an unlimited one and conferred an absolute estate on Mst. Malan. It was, however, faintly suggested that since Mst. Malan was a woman she could have got only a limited interest, even if there is no direction in the will to this effect. This legal position has now been settled by the Supreme Court in two decisions and it has been held that no such presumption can be drawn on this account.

11. In *Ram Gopal v. Nand Lal*, AIR 1951 SC 139 at p. 141, their Lordships of the Supreme Court observed as follows:

"It may be taken to be quite settled that there is no warrant for the proposition of law that when a grant of an immovable property is made to a Hindu female, she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her. The reasoning adopted by Mitter, J., of the Calcutta H. C. in (1875) 24 WR 395 which was accepted and approved of by the Judicial Committee in a number of decisions, seems to me to be unassailable".

xx xx xx
"This is the general principle of law which is recognised and embodied in Section 8, T. P. Act and unless it is shown that under Hindu Law a gift to a female means a limited gift or carries with it the restrictions or disabilities similar to those that exist in a widow's estate there is no justification for departing from this principle. There is certainly no such provision in Hindu Law and no text could be supplied in support of the same".

To the same effect is a later decision of the Supreme Court in *Arunachala v. Muruganatha*, AIR 1953 SC 495, where it was held that a Mitakshara father had complete powers of disposition of his self-acquired property and if he made any deed of gift

in favour of his son or some other relation there would be no presumption that the bequest was to confer the nature of a joint family property so that the property bequeathed became ancestral in the hands of the legatee unless there were express words to indicate the same.

12. In *Venkata Rama v. Rajyalakshmi*, AIR 1960 Andh Pra 509 it was observed:—

"It is now well settled that a gift or bequest to a woman should be construed in the same spirit as a gift in favour of a male".

13. It is therefore clear that a bequest by a male to a female would have to be construed in the same spirit as a bequest by a male to another male. It is true that at the time when Mst. Malan bequeathed the property to Harnam Singh, Harnam Singh was joint with his son, Balwant Singh, but that by itself would not show that Mst. Malan intended to treat the property as a joint family property. We have gone through the contents of the will and it has been mentioned in express terms that Harnam Singh was to get an absolute estate in the properties bequeathed. The words (Words in Urdu have been transliterated in English — Ed.) *Meri wafat ke baad do makanat mazdoor wo deeger jaedad khavadari her kism ka wahed malik Sardar Harnam Singh mazkoora pota mazhara hoga deeger kisi ka koyee taalug wasta na hoga*

clearly indicate that Mst Malan intended to convey an absolute estate to Harnam Singh in whose hands after her death the property would be self-acquired property of Harnam Singh. This being the position, the father Harnam Singh was fully competent to dispose of his self-acquired property as he liked and the question of legal necessity did not arise.

14. For these reasons, the first contention put forward by the appellant is overruled.

15. Secondly it was argued that there is some evidence to show that Harnam Singh after having acquired the property from his grandfather threw it into the joint stock and treated it as joint family property. The learned District Judge has gone into this question and has given a finding against the appellant. Furthermore, no such case appears to have been made out by the plaintiffs in their plaint. The question as to whether a self-acquired property was thrown into the joint stock and treated as a joint family property is essentially a question of fact and must be proved.

On the other hand the learned Judge has pointed out that there is overwhelming evidence to show that Harnam Singh never treated this property as a joint family property. One Karam Chand had obtained a decree against Mst. Buban, a concubine of Ishwar Dass and got the entire suit property attached. This was some time in 2003. Harnam Singh filed a claim under Order 21,

Rule 58 of the Civil P. C. and averred that he was the sole owner of the property which was therefore not attachable. The property was therefore released. Thus Harnam Singh himself clearly stated that the property was his self-acquired property and if he had any intention to treat it as a joint family property he would have said so.

The learned Judge has pointed out that in the agreement to sell by Harnam Singh there is a clear statement by him that he was the sole and exclusive owner of the suit properties. It is common ground that at the time when the contract of sale was executed, Balwant Singh was alive and was even made to sign the contract of sale as a witness. In these circumstances the declaration of Harnam Singh in the agreement that the property was his sole property becomes both important and binding on his son Balwant Singh. For these reasons the learned District Judge was fully justified in holding that there was no legal evidence to show that the property in suit was treated as a joint family property by Harnam Singh by throwing it into the joint stock. Thus both the contentions raised by the appellant fail. No other point was raised before us. The appeal fails and is dismissed, but without any order as to costs.

JALAL-UD-DIN, J.: 16. I have had the benefit of perusing the judgment prepared by my Lord, the Chief Justice, and fully agree with the observations recorded therein. I agree with the conclusions arrived at by him and have nothing further to add.

Appeal dismissed.

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(V 57 C 46)

JASWANT SINGH J.

Dr. Ashok Singh, Petitioner v. Chief Secretary Jammu and Kashmir Govt. and others, Respondents.

Writ Petn. No. 97 of 1969, D/- 14-5-1970.

(A) Constitution of Jammu and Kashmir, Section 103 — Wrongful termination of service — Existence of right to claim damages — Does not deprive the person to have a declaration that termination was unlawful — In appropriate cases court may order that he should be treated as lawfully in service. AIR 1964 SC 1680, Rel. on — (Constitution of India (J & K) Art. 32 (2-A)).

(Para 9)

(B) Constitution of Jammu and Kashmir, Section 45 — Order terminating service issued for and on behalf of Governor — Order signed by Secretary to Government — It is, by virtue of R. 13 of Jammu and Kashmir Government Business rules to be deemed to have been properly authenticated — Its validity cannot be questioned. AIR

1959 SC 65 & AIR 1963 SC 395 & AIR 1964 Cal 265, Distinguished; AIR 1952 SC 317 & AIR 1955 SC 160 & AIR 1961 SC 221 & AIR 1968 SC 765, Rel. on.

(Paras 12, 21)

(C) Constitution of Jammu and Kashmir, Section 126 — Contract authorising Government to terminate service without assigning any reasons by giving three months' notice — Order not mentioning that service to stand terminated at expiry of three months from its receipt — No benefits accrued to servant nor taken away nor aspersion cast on him. Order cannot be said to have been passed by way of penalty — Incumbent is not entitled to protection of S. 126. Case law discussed.

(Paras 22, 28)

(D) Civil Services — Jammu and Kashmir Civil Services (Temporary Service) Rules (1961) R. 3 — Status of quasi permanent Government servant — Essentials.

To acquire the status of quasi permanent Government servant, it is necessary that a person should only have not continued in service for more than three years, but also he should have entered Government service within the prescribed age limit and a declaration regarding his suitability in respect of his age, qualification, work and character for employment in quasi permanent capacity should also have been issued. AIR 1964 SC 1854 & AIR 1970 SC 537, Rel. on.

(Para 32)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 158 (V 57) =

(1970) 1 SCR 472, Ram Gopal Chaturvedi v. State of Madhya Pradesh 23

(1970) AIR 1970 SC 537 (V 57) =

1970 Lab IC 419, State of Nagaland v. C. Vasantha 24, 32

(1968) AIR 1968 SC 765 (V 55) =

1968 Cri LJ 972, Mohamad Yakub v. State of Jammu and Kashmir 16

(1968) AIR 1968 SC 1089 (V 55) =

1968 Lab IC 1286, State of Punjab v. Sukhraj Bahadur 28

(1964) AIR 1964 SC 1680 (V 51) =

(1964) 3 SCR 55, S. R. Tewari v. Dist. Board, Agra 7

(1964) AIR 1964 SC 1854 (V 51) =

(1964) 5 SCR 190, Champak Lal v. Union of India 82

(1964) AIR 1964 Cal 265 (V 51) =

Ram Chandra v. Secy. to Government of West Bengal 17, 20

(1963) AIR 1963 SC 395 (V 50) =

(1962) Supp 3 SCR 713, Bachhittar Singh v. State of Punjab 17, 19

(1963) AIR 1963 SC 1552 (V 50) =

(1964) 2 SCR 135, Ranendra Chandra v. Union of India 27

(1961) AIR 1961 SC 221 (V 48) =

(1961) 1 SCR 728, State of Bihar v. Rani Sonabati Kumari 15

(1959) AIR 1959 SC 65 (V 46) =

(1959) SCR 1424, Ghaio Mal & Sons v. State of Delhi 17, 18

- (1958) AIR 1958 SC 36 (V 45) =
1958 SCR 828, P. L. Dhingra v.
Union of India 26
- (1957) AIR 1957 SC 886 (V 44) =
1958 SCR 509, Hartwell Prescott
Singh v. Uttar Pradesh Govt. 26
- (1955) AIR 1955 SC 160 (V 42) =
1955 SCR 1011, P. Joseph John v.
State of Travancore Cochin 14
- (1953) AIR 1953 SC 250 (V 40) =
1953 SCR 655, Satish Chandra
Anand v. Union of India 25
- (1952) AIR 1952 SC 317 (V 39) =
1952 SCR 674 = 1952 Cri LJ
1269, State of Bombay v. Purshottam
Jog Naik 13
- A. P. Chatterjee, for Petitioner; A. N.
Raina, Advocate General, for Respondents.

ORDER:— Dr. Ashok Singh, a citizen of India and a resident of Banda, Uttar Pradesh, who was employed as Deputy Director in the Department of Geology and Mining has moved this Court under Article 32 (2-A) of the Constitution of India as applied to the State of Jammu and Kashmir and Section 103 of the Constitution of the State for a writ in the nature of Mandamus directing respondents Nos. 1 to 4 to withdraw and/or cancel and/or forbear from giving effect to the order dated 2nd May, 1969, terminating his services and to allow him to continue as Deputy Director, Geology and Mining.

2. The case of the petitioner is that after obtaining M. Sc. degree in Geology from the Benares Hindu University in 1953 he underwent an advanced course in Geology and Mining and obtained a doctorate from Clausthal Mining Academy, West Germany, and returned to India in 1958, that he was appointed as Economic Geologist in National Council of Applied Economic Research in November, 1958 and continued as such till 17th April, 1961, when on the recommendation of the Government of India, Ministry of Mining and Fuel, he was taken as Deputy Director in the Department of Geology and Mining of the State vide Government Order No. 126/MNG/61 of the even date, that the terms of his appointment were incorporated in the agreement dated 11th April, 1961, entered into between him and the Government of Jammu and Kashmir, that the said agreement which was to enure for three years expired on 21st April, 1964, that on the expiry of the said agreement the Government of Jammu and Kashmir did not enter into any further agreement with him but allowed him to carry on work treating him as a regular temporary officer as envisaged by Order No. 35-MNG/65 dated 17th February, 1965, according to which all gazetted and non-gazetted technicians employed in the department through the Public Service Commission were brought on the regular temporary basis from the date of their appointment, that the petitioner continued to work un-

interruptedly till the 9th July, 1966, when he was selected by the Government of India and sent by the State Government on deputation to France to qualify further in higher research and technique in the field of bauxite and bentonite deposits of Jammu Province, that while recommending his application for foreign training the Government of Jammu and Kashmir did not take any objection to his i.e., the petitioner's describing himself as "regular temporary" in the questionnaire and obtained an undertaking from him to serve the State for three years after completion of the training, that he returned from France after successfully completing the training and in terms of the undertaking given by him joined the service of the State Government on 3rd October, 1967, that though the deputation was to be treated as one under Government Order No. 351 of 1967 dated 6th June, 1967 read with clause 5 of the agreement he was not paid pay and dues for 21 months including the period of his foreign training, that the representation made by him in that behalf did not bear any fruit and ultimately the Government pressurised him to sign a fresh agreement, that as there was no service agreement since 21st April, 1964, when his first agreement expired and he was considered as 'regular temporary' in the State employment he lodged a protest against the attitude of the State Government trying to change his service conditions but was told that the said agreement was only a formality meant to meet an audit objection and to secure the release of his salary which had been withheld by the Accountant General, that the agreement which was thus signed by him in good faith on 13th June, 1968, was illegally given retrospective effect from 21st April, 1967 that differences cropped up between him and respondent No. 3 as he pointed out some "grave" flaws in the plans and proposals submitted by the said respondent which in his (i.e., petitioner's) opinion were bound to cause huge loss to the State Government, that immediately thereafter the said respondent vide his letter No. PA/DGM/491-492 dated 7th March, 1969, ordered him to hand over the charge of the files and records to Shri R. L. Kaul, a very junior hand, which he complied with, that the said order of the respondent was illegal, ultra vires and mala fide and in spite of several applications and reminders a copy of the same was not supplied to him, that the State Government gave him notice No. 144/MNG/61/ii dated 2nd May, 1969, (terminating his services under clause 3 (4) of the agreement of service) which was received by him on 12th May, 1969, and that he submitted his reply to the notice but the same was not acknowledged.

3. It is contended by the petitioner that the aforesaid order terminating his contract of service is invalid having been passed against him by way of penalty on account

of his pointing out certain flaws and fallacies in the proposals and plans submitted by the respondent No. 3 which was evident from the correspondence forming Annexure "E" to the petition and the warning given to him for the alleged direct representation to the Government in regard to the revision of his grade and pay, that the petitioner being on regular temporary basis by virtue of Government order No. 35 MNG dated 17th February, 1965, his services could not be terminated by invoking the terms of the contract which had ceased to apply to him by virtue of the aforesaid order, that his service could also not be terminated as his regular temporary status was equivalent to quasi permanent status and he had put in more than three years' service in the normal budget scheme of the Directorate of Geology and Mining as opposed to planned budget scheme of the said directorate that his services could not have been terminated except in accordance with Rule 6 of the Jammu and Kashmir Civil Services (Temporary Service) Rules, 1961 that in any event the contract of his service had to be read along with the bond (which was got from him at the time of his deputation for foreign training) and his services could not be terminated before the 4th October, 1970, that he has been discriminated against and his fundamental rights under Articles 14 and 16 have been violated as according to the Government order all persons on contract service had been made "regular temporary", and that the impugned order being in essence an order of dismissal or removal from service within the meaning of R. II of the Central Civil Services Classification, Control, and Appeal Rules, is illegal, unconstitutional and contrary to the principles of natural justice as it has been passed without following the procedure set forth in the Central Service Regulations and without giving him an opportunity as envisaged by Article 311 of the Constitution of India.

4. The petition has been resisted by the respondents inter alia on the ground that the petitioner was employed on contractual basis, that after the expiry of the initial period of three years specified in the agreement dated 11th April, 1961, the petitioner's services were extended for another term of three years vide Government Order No. 44/MNG/67 dated 18th March, 1964 on the same terms and conditions on which he was originally appointed under Government Order No. 126/MNG/61 dated 17th April, 1961, that the agreement dated 13th June, 1968, was executed by the petitioner not under any duress or misrepresentation or merely as a procedural formality but of his own free will pursuant to Government Order No. 425/MNG 68 dated 14th May, 1968, and as such was perfectly valid and binding upon him and it was not open to him to challenge the same after an inordinate delay of one year and specially in a writ petition, that the

petitioner cannot be deemed to be a regular temporary officer and has never been treated as such, that Order No. 35/Mining 65 dated 17th February, 1965, did not apply to the petitioner nor was he entitled to the benefit thereof as he was appointed directly on contractual basis and not on the recommendation or advice of the Public Service Commission, that the petitioner has all along been serving on contractual basis and the terms and conditions of his service were governed by the agreement dated 13th June, 1968, that the termination of the petitioner's service which was validly effected according to the contract did not amount to imposition of penalty or punishment, that the impugned order was neither illegal nor mala fide nor was it violative of Article 14 or 16 of the Constitution of India or Section 126 of the State Constitution corresponding to Article 311 of the Constitution of India and was passed by the competent authority in a proper manner and since the petitioner did not file any review application or avail of the other remedy available to him, the petition was not maintainable.

5. Respondent No. 3 has also in the course of a separate affidavit filed by him supported the stand of the State Government and had denied the allegations and imputations of mala fides levelled against him.

6. At the hearing of the petition, Mr. A. P. Chatterjee appearing on behalf of the petitioner has urged the following points:—

- (i) That the termination order is bad because it is not made by the Governor of Jammu and Kashmir.
- (ii) That the termination is in essence by way of penalty and has resulted in deprivation of the benefits that had accrued to the petitioner and as such Section 126 of the State Constitution corresponding to Article 311 of the Constitution of India was applicable to the present case.
- (iii) That in any event the petitioner had acquired a permanent or quasi permanent right to the post of the Deputy Director Geology and Mining.
- (iv) That the contract is to be read along with the bond executed by the petitioner at the time of his deputation to France for higher training in the field of Baurite and Bentonite deposits and the petitioner had a right to serve the Government for three years which has been taken away.

Mr. Raina appearing on behalf of the respondents has on the other hand contended that since contract relating to service cannot be specifically enforced by means of a suit in view of Section 21 (b) of the Specific Relief Act, the petition is not maintainable and the petitioner could at best have sued for damages that the impugned order

is in conformity with the requirements of Section 45 of the Constitution of the State and Rules 12 and 13 of the Jammu and Kashmir Government Business Rules that the petitioner's service was governed by the terms and conditions contained in the agreement dated 13th June, 1968, voluntarily executed by him and his service was validly terminated according to the agreement, that the impugned order was not passed by way of penalty and does not amount to dismissal or removal from service as conceived by Section 126 of the Constitution of the State or Rule 30 of the Jammu and Kashmir Civil Services Classification, Control and Appeal Rules, that the petitioner was not employed on regular temporary basis and had not acquired a permanent or quasi permanent right to the post of the Deputy Director, Geology and Mining.

7. Before dealing with the various contentions raised by Mr. Chatterjee, let me dispose of the first objection raised by Mr. Raina that since the relief claimed by the petitioner cannot be given even in a suit in view of the restriction contained in Section 21 (b) of the Specific Relief Act, the remedy, if any, of the petitioner lay in a suit for damages for wrongful termination of employment and not in a petition for a writ declaring the termination of employment unlawful and a consequential order for restoration to service. A similar contention raised in *S. R. Tewari v. Dist. Board, Agra*, AIR 1964 SC 1680 was repelled by their Lordships of the Supreme Court in the following words:—

"Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognized exceptions. It is open to the Court in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ".

8. It was further pointed out by their Lordships in that ruling that the powers of a statutory body are always subject to the Statute which has constituted it, and must be exercised consistently with the Statute, and the Courts have, in appropriate cases, the power to declare an action of the body illegal or ultra vires even if the action relates to determination of employment of a servant.

9. In view of the above unequivocal enunciation of law, I find myself unable to accede to the contention of Mr. Raina and hold that the fact that a person may have a right to claim damages for wrongful termination of his service does not deprive him of his right to have a declaration that his service was unlawfully terminated and in an

appropriate case the Court may command that the person be treated as lawfully in service.

10. Let me now proceed to consider each one of the grounds on which the impugned order has been challenged on behalf of the petitioner.

11. Regarding the first contention raised by Mr. Chatterjee I may at once observe that there is no substance in it. A reference to the agreement dated 13th June, 1968 between the petitioner and the Governor of the State would show that it was executed on behalf of the Governor by the Secretary to Government, Industries and Commerce Department, and Clause 3 (4) thereof empowered the State Government or their authorised officer to give three calendar months' notice in writing to the petitioner for terminating his service. Now under Section 45 (1) of the Constitution of Jammu and Kashmir all executive action of the Government is required to be taken in the name of the Governor or of the Government of Jammu and Kashmir. Sub-section (2) of that section provides that orders and other instruments made and executed in the name of the Governor or the Government of Jammu and Kashmir shall be authenticated in such manner as may be specified in the Rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor or as the case may be by the Government of Jammu and Kashmir. According to Rule 13 of the Rules of Business framed under Section 43 and sub-section (2) of Section 45 of the Constitution of Jammu and Kashmir, every order or instrument of the Government of the State is to be signed either by the Secretary, or an Additional Secretary, a Joint Secretary, an Additional Joint Secretary, a Deputy Secretary or an Under-Secretary to the Government or such other officer as may be specially empowered in that behalf and such signature is to be deemed to be proper authentication of such order or instrument.

12. In the present case the impugned order has been signed by Shri G. M. Mir Secretary to Government, Industries and Commerce Department. It ex facie shows that it was issued for and on behalf of the Governor of the State. Having been so signed and issued, it has according to Rule 13 of the Jammu and Kashmir Government Business Rules to be deemed to have been properly authenticated and its validity cannot, in my opinion, be questioned.

13. In *State of Bombay v. Purushottam Jog Naik*, 1952 SCR 674 = AIR 1952 SC 317, where the order under consideration was expressed to be made in the name of the Governor because of its saying "by order of the Governor", their Lordships of the Supreme Court observed that the Constitu-

tion does not require a magic incantation which can only be expressed in a set formula of words, and what the Court has to see is whether the substance of the requirements is there.

14. Again in *P. Joseph John v. State of Travancore Cochin* 1955 SCR 1011 = AIR 1955 SC 160, the Supreme Court held that the notice signed by the Chief Secretary of the State and expressed to be on behalf of the Government, giving opportunity to the petitioner to show cause against the action proposed to be taken against him substantially complied with the provisions of Article 166 of the Constitution of India.

15. In *State of Bihar v. Rani Sonabati Kumari*, AIR 1961 SC 221, where an order of the Government namely a notification under Section 3 (1) Bihar Land Reforms Act, was expressed to be made "in the name of the Governor" and was authenticated by the Additional Secretary to Government as prescribed by Article 166 (2) of the Constitution of India the Supreme Court observed that the validity of the order or instrument could not be called in question on the ground that it was not an order or instrument made or executed by the Governor.

16. Again in *Mohamad Yakub v. State of Jammu and Kashmir*, AIR 1968 SC 765, where the order in question was in the form required by Section 45 of the Constitution of Jammu and Kashmir their Lordships of the Supreme Court held that the presumption must be made that the order was validly passed unless the petitioners could show that it was not passed as required by law.

17. The rulings namely 1959 SCR 1424 = (AIR 1959 SC 65), AIR 1963 SC 395, and AIR 1964 Cal 265, cited by the learned counsel for the petitioner in support of his contention are all distinguishable.

18. In *Ghaiomall and Sons v. The State of Delhi*, 1959 SCR 1424 = (AIR 1959 SC 65) the order in question did not purport to be made in the name of the Chief Commissioner and could not therefore be treated as a properly authenticated order to which the presumption raised by Article 166 of the Constitution of India could validly attach. Further in that case the letter under consideration was only a communication of the sanction and could not be equated with the sanction. Moreover in that case the records produced before the Supreme Court revealed that the application for grant of license for vending liquor had never been placed before the Chief Commissioner, nor any order granting the said licence was ever made by him.

19. In *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395, it was merely emphasized that before something amounts to an order of the State Government, two things are necessary viz. the order has to be expressed in the name of the Governor as required by Clause (1) of Article 166 of the

Constitution of India and then it has to be communicated.

20. In the last case namely *Ram Chandra v. Secy. to Govt. of West Bengal*, AIR 1964 Cal 265 in which an inter-departmental letter issued by the Under-Secretary to the Government without mentioning the name of the Governor at all was sought to be utilized as a valid order, it was observed that an order of the Governor in view of Art. 166 (1) of the Constitution of India can be valid only if it is expressed in the name of the Governor, by the use of such words as "by order of the Governor" and not being so expressed it could not be treated as valid.

21. The impugned order satisfies, as already indicated, the requirements of Sec. 45 of the Constitution of Jammu and Kashmir and Rule 13 of the Jammu and Kashmir Government Business Rules. The first contention of the learned counsel for the petitioner is, therefore, rejected.

22. I am also unable to appreciate the second ground of attack levelled by Mr. Chatterjee. The impugned order does not cast any stigma on the petitioner and does not terminate his service forthwith but says that his service would stand terminated at the expiry of three months from its receipt by him. The order or notice also does not say that the petitioner will not be entitled to the salary for the period of three months or any other allowance which he might have earned. As the impugned order or notice which was admittedly received by the petitioner on 12th May, 1969, does not take away any of the benefits which had accrued to the petitioner and does not cast any aspersion on him the same cannot be said to be by way of penalty. Clause 3 (4) of the petitioner's contract of service dated 13th June, 1968, expressly authorised the Government to terminate the petitioner's service giving him three months' notice without cause assigned. In these circumstances the petitioner was not entitled to the protection of Section 126 of the Constitution of Jammu and Kashmir.

23. In *Ram Gopal Chaturvedi v. State of Madhya Pradesh*, AIR 1970 SC 158, where the impugned order on the face of it did not cast any stigma on the appellant's character or integrity nor did it visit him with any evil consequences nor did it deprive him of any vested right to any office, their Lordships of the Supreme Court held that it was not passed by way of punishment and provisions of Article 311 of the Constitution of India were not attracted.

24. Again in *State of Nagaland v. G. Vasantha*, AIR 1970 SC 537, where the services of the respondent had been terminated according to the terms of the contract of service and the order terminating the service was one simpliciter and not by way of punishment, it was held that Article 311 of the Constitution of India had no application.

25. In *Satish Chandra Anand v. Union of India*, AIR 1953 SC 250, where a civil servant who had been engaged on the basis of a special contract for a certain term, was, on the expiry of the term re-appointed by a further contract on temporary basis and was discharged from service after notice in accordance with the Government Rules which formed part of his contract, it was held that Article 311 of the Constitution of India had no application because there was neither a dismissal nor a removal from service nor a reduction in rank.

26. In *Hartwell Prescott Singh v. Uttar Pradesh Govt.*, AIR 1957 SC 886, it was held:—

"In the case of a person employed in a temporary capacity on probation and whose services could according to the conditions of service contained in the service rules, be terminated by a month's notice if he failed to make sufficient use of his opportunities or to give satisfaction, the termination of his services according to the Rules does not amount to dismissal or removal from service within the meaning of the Article. In principle there can be no distinction between the termination of his services in accordance with the conditions of his service and the termination of the services of a person under the terms of a contract governing him."

In *P. L. Dinghra v. Union of India*, AIR 1958 SC 36, it was held that if the termination of service is founded on the right flowing from contract or the Service Rules then, *prima facie*, termination is not a punishment and carries with it no evil consequences and so Article 311 of the Constitution of India is not attracted.

27. In *Ranendra Chandra v. Union of India*, AIR 1963 SC 1552, where a termination of service in accordance with the terms in the letter of appointment was brought about during the probationary period without any notice and without any reasons being assigned, it was held that it did not amount to dismissal or removal and the Civil servant was not entitled to the protection of Article 311 (2) of the Constitution of India.

28. In *State of Punjab v. Sukhraj Bahadur*, AIR 1968 SC 1089, their Lordships of the Supreme Court after an exhaustive review of the case law on the matter observed:—

"On a conspectus of these cases, the following propositions are clear:—

(1) The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

(2) The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

(3) If the order visits the public servant with any evil consequences or casts an as-

persion against his character or integrity it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

(4) An order of termination of service in exceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

(5) If there be a full-scale departmental enquiry envisaged by Article 311 i. e. an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered any order of termination of service made thereafter will attract the operation of the said Article."

Keeping in view the principles laid down in the above noted authorities, I hold that as the employment of the petitioner was on condition that his service could be terminated without assigning any reasons by giving him three months' notice and it was terminated in accordance with this condition and not for any misconduct, the termination cannot be challenged as illegal or unconstitutional. The second ground of attack, therefore, fails.

29. I may also at this stage deal with another contention of the learned counsel for the petitioner to the effect that the impugned order is *mala fide*. In the absence of sufficient material on the record I find it difficult to accede to the contention. The mere fact that the petitioner might have pointed out certain flaws in the proposals and plans of respondent No. 3 is not enough to hold that the order issued over the signature of Shri G. M. Mir Secretary to Government, Commerce and Industries Department suffers from the taint of *mala fides*. That apart, it is also well settled that the termination of services of a temporary servant which in form and in substance is no more than his discharge effected under the terms of the contract or the relevant rule cannot in law be regarded as his dismissal because the appointing authority was actuated by the motive that the said servant did not deserve to be continued for some alleged misconduct.

30. The third contention of the learned counsel for the petitioner that the petitioner had acquired a permanent or quasi permanent right to the post of Deputy Director, Geology and Mining, is wholly devoid of substance. The petitioner was initially appointed on the said post for a period of three years by virtue of Government order No. 126-MNG-61 dated 17th April, 1961 and the terms and conditions of his service were incorporated in the agreement dated 11th April 1961. On the expiry of his specified term he was reappointed for another term of three years vide Government Order No. 44/MNG-67 dated 18th March, 1967 on the same terms and conditions on which he was initially appointed. Ultimately his services were continued on the terms contained in the

agreement executed on 13th June, 1968, pursuant to Government Order No. 125-MNG of 1968 dated 14th May, 1968. In all these orders and agreements the words "regular temporary basis" have not at all been used. The petitioner was also not employed on permanent basis. Accordingly the question of his continuing in service after the period of probation or his being regarded as a permanent servant without an order of confirmation cannot also arise.

The petitioner cannot also take advantage of order No. 35-MNG-65 of 1965 dated 17th February, 1965. A plain reading of the order would show that it applied to those non-permanent residents who were selected on the advice of the Public Service Commission for technical posts under the Directorate of Geology and Mining. The petitioner admittedly not having been selected on the advice of the Public Service Commission but directly by the Government could not avail of the benefit of this order.

31. The transmission by the State Government to the Government of India of the petitioner's questionnaire in connection with his training in France in which he had described himself as regular-temporary is also of no avail to him. It is clearly mentioned in Note 2 of that questionnaire that it was only for the purpose of evaluation of the technical assistance programme and would not be used for any other purpose. The petitioner cannot, therefore, bank upon his own recitals in the questionnaire.

32. The Jammu and Kashmir Civil Services (Temporary Service) Rules, 1961, on which reliance is placed by the learned counsel for the petitioner have also no application to the present case. In the first place it is clearly provided in sub-rule (3) of Rule 1 of these rules that they shall not apply to Government servants engaged on contract. Moreover according to Rule 3 of the said Rules a Government servant can be treated to be in quasi-permanent service if he fulfils each one of the following conditions:—

(i) If he has been in continuous Government service for more than three years.

(ii) If the appointing authority being satisfied as to his suitability in respect of age, qualification, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect in accordance with such instructions as the Government may issue from time to time, and

(iii) If he has entered government service in temporary capacity at the time of his first appointment within the age limits prescribed for entry into permanent Government service. If this condition is not fulfilled a declaration can be issued under this rule only if the age bar is relaxed by the competent authority. Thus for a person to acquire the status of quasi-permanent government servant, it is necessary that he should not have only continued in Government Service for more than

three years, but it is further necessary that he should have entered government service within the prescribed age limit and a declaration regarding his suitability in respect of his age, qualification, work and character for employment in quasi-permanent capacity, should also have been issued. As no such declaration is alleged to have been issued in respect of the petitioner, he cannot claim to be in quasi-permanent service. I am fortified in this view by the observations of their Lordships of the Supreme Court in *Champaklal v. Union of India*, AIR 1964 SC 1854 and AIR 1970 SC 537. The third contention of the learned counsel for the petitioner is also, therefore rejected.

33. The fourth contention of the learned counsel for the petitioner that the contract of service is to be read with the bond given by the petitioner on the eve of his training in France and the petitioner had a right to serve the State for a full period of three years commencing from 13th June, 1968, is also devoid of force. The agreement dated 13th June, 1968, which is later in date than the bond and contains the terms and conditions on which the petitioner was to continue in service does not support the submission made on behalf of the petitioner. On the other hand, it clearly authorised the State Government to terminate the services of the petitioner at any time by giving him three months' notice.

34. The agreement cannot also be held to be invalid on the ground of its being unilateral as urged by the petitioner. A reference to Clause 3 (4) of the agreement would show that it is not unilateral but bilateral. It also gave an option to the petitioner to leave the service of the Government by giving three months' notice.

35. All the grounds of attack made by Mr. Chatterjee, therefore, fail.

36. For the foregoing reasons. I find no merit in this petition which is accordingly dismissed but without any order as to costs.

Petition dismissed.

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(V 57 C 47)

S. MURTAZA FAZL ALI, C. J. AND
JASWANT SINGH, J.

The J. and K. Co-operative Bank, Appellant v. Shams-ud-din Bacha, Respondent.

Letters Patent Appeal No. 7-C of 1970
D/- 9-6-1970 from order of Jalal-ud-din J.,
D/- 31-12-1969.

(A) Letters Patent (Jammu and Kashmir), Cl. 12 — Clause excludes appeal from orders passed by single judge in exercise of his revisional jurisdiction or in exercise of his powers of superintendence — Order under Section 104, Constitution of J. and K., which corresponds to Article 227, Con-

IN/IN/E248/70/LGC/T

stitution of India is nothing but an order made in exercise of supervisory jurisdiction and hence not appealable. AIR 1953 Cal 636 and AIR 1955 Mad 287 and AIR 1962 Punj 467 and AIR 1967 J and K 98 (FB), Followed. (Paras 3, 5)

(B) Constitution of Jammu and Kashmir (1957), S. 104 — Jurisdiction conferred under, is not an original jurisdiction.

(Para 3)
Cases Referred: Chronological Paras
(1967) AIR 1967 J and K 98 (V 54) =
1967 Kash LJ 368 (FB), T. C.
Kotwal v. State of Jammu and
Kashmir 8
(1962) AIR 1962 Punj 467 (V 49),
Hudi Goshaoon v. Sudi Goshaoon 4
(1955) AIR 1955 Mad 287 (V 42) =
ILR (1955) Mad 1033, In re V.
Tirupuliswamy Naidu 4
(1953) AIR 1953 Cal 636 (V 40) =
57 Cal WN 692, Sukhendu Bikash
Barua v. Hare Krishna De 4
Isher Singh, for Appellant; K. N. Raina,
for Respondent.

JUDGMENT: This is an appeal against an order passed by Jalal-ud-din J. sitting singly exercising jurisdiction under Section 115 of the Code of Civil Procedure read with Section 104 of the Constitution of Jammu and Kashmir.

2. Mr. Raina appearing for the respondent has raised a preliminary objection that the appeal is not maintainable. In support of his objection the learned counsel for the respondent has submitted that no appeal under the Letters Patent lies from an order made under the revisional jurisdiction exercised by a Single Judge of the High Court under Section 115 of the Code of Civil Procedure or from an order made by him in exercise of his supervisory jurisdiction under Section 104 of the Constitution of Jammu and Kashmir. In our opinion the contention raised by Mr. Raina is well founded and must prevail.

3. A perusal of Section 104 clearly shows that the power of superintendence and control over the subordinate courts conferred on the High Court is merely in the nature of a supervisory jurisdiction. This Section corresponds to Article 227 of the Constitution of India as held in a Full Bench decision of this Court reported in AIR 1967 J. & K. 98 (FB). It has been consistently held in a number of cases that the jurisdiction conferred by this provision is not an original jurisdiction.

4. In Hudi Goshaoon v. Sudi Goshaoon, AIR 1962 Punj 467, it was observed:

"Article 227, which is for all practical purposes a revival of Section 107 of the Government of India Act, 1915, is not an Article which in terms provides for writs etc; in this respect it is distinguishable from Article 226 of the Constitution which alone provides for writs etc.

Proceedings under Article 227 are not original proceedings for orders passed in these proceedings are not even amenable to Letters Patent appeals, as has been held by this court in more cases than one." In Sukhendu Bikash Barua v. Hare Krishna De, AIR 1953 Cal 636, it was held:—

"The relevant expression in CL 15 of the Letters Patent excludes a judgment pronounced by a single Judge in exercise of the powers of revision or in exercise of the powers of superintendence under Article 227 of the Constitution." Again in re V. Tirupuliswamy Naidu, AIR 1955 Mad 287, it was held:—

"Whether the jurisdiction that was invoked fell under Civil P. C. Section 115 or Constitution Article 227, it was revisional jurisdiction and no appeal lay under the Letters Patent against the order of the Single Judge. The jurisdiction under Constitution Article 227 is revisional jurisdiction within the meaning of Letters Patent Cl. 15."

5. A perusal of the Letters Patent of this court would also show that no appeal is contemplated against an order of the present nature which is passed by a Single Judge. Clause 12 of the Letters Patent runs thus:—

"And we do further ordain that an appeal shall lie to the said High Court of Judicature from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence) of one Judge of the said High Court or one Judge of any Division court and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one judge of the said High Court or one Judge of any Division Court, consistently with the provisions of Civil P. C. made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court where the judge who passed the judgment declares that the case is a fit one for appeal but that the right of appeal from other judgments of the judges of the said High Court or of such Division Court shall be to us, Our Heirs or successors and be heard by our Board of Judicial Advisers for report to us."

The above provision of the Letters Patent clearly excludes an appeal from an order made by a single judge of the court in exercise of his revisional jurisdiction, as also an appeal from a sentence or order passed or made by him in exercise of his

power of superintendence. An order passed under S. 104 of the Constitution of Jammu and Kashmir is nothing but an order made in exercise of the supervisory jurisdiction conferred on the court by the Constitution. In these circumstances, Cl. 12 of the Letters Patent excludes appeals from such orders. The learned counsel for the appellant has not been able to cite any authority taking a contrary view. In these

circumstances, we are satisfied that the present appeal is not maintainable and on this ground alone the appeal is liable to be dismissed.

6. For the foregoing reasons, the appeal is dismissed as not maintainable, but in the *circumstances without any order as to costs.*

Appeal dismissed,

END

MADHAVAN NAIR, J.— In these appeals preferred by kanam tenants governed by the Travancore-Cochin Kanam Tenancy Act, 1955, the only controversy is of the correctness of calculation of Jenmikarams payable by them to their jenmis under the Act. It has been ruled by Krishnamoorthy Iyer, J., in S. A. Nos. 1150 and 1151 of 1962 (Ker) and by Narayana Pillai, J., in S. A. Nos. 1533 and 1534 of 1965 (Ker) that neither land revenue, nor a remission allowed for natural vicissitudes, can be deducted in the calculation of 'michavaram' within the meaning of the abovesaid Act. Counsel for appellants here challenges the correctness of those dicta.

2. Jenmikaram is defined in the Act as the sum total of michavaram and fractional fee. The fractional fees fixed by the Court below are not disputed: the controversy here is only as to the correctness of michavarams found.

3. Michavaram is defined in Section 2 of the Act thus:

"'Michavaram' means the balance of money or produce or both payable periodically under the contract of tenancy to the jenmi after deducting from the pattam the interest due on the kanam amount and puramkadam, if any."

'Pattam' is also defined therein as meaning

"the jenmi's share as fixed by the contract of tenancy of the produce of the holding whether in money or in kind or both, but does not include renewal fee."

Obviously, 'pattam' is what has been stipulated as pattam in the document of tenancy; and 'michavaram' is such pattam minus the interest due on the kanartham (i.e., the kanam amount plus puramkadam, if any). Counsel for appellants urges that as the documents of tenancy oblige the tenants to pay land revenue and provide for reimbursement thereof by deduction of part of the pattam in terms of paddy, only the net amount after such deduction can be taken as the pattam for purposes of calculation of michavaram under the Act. We are afraid that this contention is not one of construction of the definition in the Act, but for an improvement thereof. Under the law of property, in the absence of a contract to the contrary, the liability to pay revenue is on the jenmi or landlord. When the contract of tenancy has fixed the pattam as so many paraahs of paddy and directed the tenant to pay the land revenue and for that to deduct so many paraahs of paddy out of the pattam payable, the jenmi is only honouring his liability to pay the revenue, constituting the tenant as his agent for its remittance and compensating him therefor. A significant change has been made in the law by the Act, the Travancore-Cochin Kanam Tenancy Act, 1955, which conferred ownership of the land on the kanam-tenant, and limited the jenmi's right to receipt of jenmikaram thereon. Section 16 (5) of the Act has provided that 'notwithstanding any usage or contract

to the contrary, the kanam-tenant shall be liable to pay all Government and local taxes in respect of the land comprised in his holding whether existing at the time of the demise or imposed afterwards' and defined michavaram as pattam minus interest on kanartham. The contention that land revenue which is payable to the State by the tenant must also be deducted from the jenmi's dues or michavaram ignores the law in Section 16 (5) of the Act and cannot be accepted.

4. The contract of tenancy concerned in S. A. No. 574 of 1964 provides also a remission for natural vicissitudes ('Kedupizha'). Such vicissitudes cannot in the nature of things be regular; and if they were regular with the concerned land, rent (pattam) would have been fixed low and not a provision made for remission out of the rent. Disallowance thereof in the calculation of michavaram by the Courts below appears right. There is no evidence of any such vicissitude in recent years on the land in question, either.

5. In the result, we affirm the dicta in the aforesaid decisions and find no error in the calculation of jenmikarams made by the Courts below in these cases. The appeals fail and are hereby dismissed, with costs.

Appeals dismissed.

AIR 1970 KERALA 289 (V 57 C 48)

BALAKRISHNA ERADI, J.

(On difference of opinion between M. U. Isaac and P. Narayana Pillai JJ.)

Kunjayamma Kartaiyayani Amma, Appellant v. Kunchali Karthiyayani Madakkavil, Veedu and others, Respondents.

A. S. Nos. 690, 691 and 692 of 1963 and 23 of 1964 and S. A. No. 1170 of 1964, D/- 31-7-1969.

(A) Travancore-Cochin High Court Act (5 of 1125), Section 23 — Finality as regards matter on which judges of Division Bench are in agreement — Difference as to reasons not material.

When the Judges constituting the Division Bench have agreed as to the ultimate decree to be passed, their decision is declared by Section 23 to be final and hence any difference of opinion between them as to the reasons on which such conclusion should properly be based is of no consequence.

(Para 11)

(B) Transfer of Property Act (1882). Section 92 — Equitable doctrine of subrogation — Applicability — Mortgage amount wiped off by adjustment against arrears of michavaram — Plaintiff-mortgagor not required to make any payment to mortgagee — Doctrine does not apply — Plaintiff-mortgagor gets no right to be reimbursed by other co-mortgagors.

The equitable doctrine of subrogation applies to cases in India not covered by the

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provisions of the Transfer of Property Act. But unless there has been a payment by a party in discharge of the obligation of another and consequently a right to reimbursement has accrued to him, there cannot be any scope at all for his invoking the equitable principle of subrogation. Where the suit for possession is instituted and the decree is passed on the basis that the entire mortgage amount had become wiped off by adjustment against arrears of *michavaram* it is not a case where the plaintiff-mortgagor had made any payment in discharge of the proportionate mortgage liability of other mortgagors and thereby acquired a right of reimbursement. The equitable doctrine of subrogation cannot apply to such a case. AIR 1953 SC 1, Rel. on. (Paras 13, 14)

(C) Transfer of Property Act (1882), Section 60 — Right of redemption — Mortgagee in possession to pay *michavaram* — Non-payment — Mortgage debt wiped off — Suit by mortgagor is not suit for redemption.

Under terms of mortgage, mortgagee put in possession with stipulation that he was to pay certain amount by way of *michavaram* and appropriate balance towards interest on mortgage amount — Held, when the stipulated *michavaram* remained unpaid, the mortgagee must be taken to have had in his hands at the end of each year an equivalent amount which really represented the surplus profits realised from the property — Interest due under the mortgage having been already realised by him by appropriation of the balance profits, the mortgagee was bound in law to apply the portion of the profits represented by the unpaid *michavaram* in reduction of the principal amount of the mortgage debt — Mortgage-debt becoming completely wiped off by adjustment against arrears of *michavaram* — Subsequent suit by mortgagor against mortgagee could not be regarded as one for redemption there being no subsisting mortgage on date of institution of such suit — AIR 1943 Bom 191 held no longer good law in view of AIR 1963 SC 1041. (Paras 17, 20)

(D) Travancore Limitation Act (1100 ME), Article 136 — Applicability — Mortgage amount wiped off by adjustment against arrears of *michavaram* in the hands of mortgagee — Redeeming co-mortgagor is not subrogated to the position of mortgagee — Suit by some of the co-mortgagors claiming recovery of their share in the suit property in such a case from redeeming co-mortgagor cannot be regarded as suit for redemption — Article 136 does not apply. (Para 21)

(E) Limitation Act (1908), Article 144 — Suit for possession against redeeming co-mortgagor barred by limitation — Plaintiffs however claiming to be in possession of a house on a portion of suit property — If the plaintiffs succeed in establishing that they were actually in possession of the house as on the date of the institution of the suit, they are entitled to the relief of injunction

notwithstanding that their suit for recovery of possession of the remaining portion of the suit property is barred. (Para 22)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1041 (V 50) = 1963-3 SCR 302, Prithi Nath Singh v. Suraj Ahir 29

(1953) AIR 1953 SC 1 (V 40) = 1953 SCR 213, Ganeshi Lal v. Joti Pershad 12, 14

(1950) AIR 1950 FC 1 (V 37) = 1949 FCR 434, Thota Chuna Subba Rao v. Mattapalli Raju 16

(1946) AIR 1946 All 400 (V 33) = 1946 All LJ 175, Ram Prasad v. Bishambhar Singh 23

(1943) AIR 1943 Bom 191 (V 30) = 45 Bom LR 253, Raghavendracharya Appacharya Katti v. Vaman Srinivas Deshpande 20

(1930) AIR 1930 Mad 160 (V 17) = 57 Mad LJ 800, Seshayya v. Lakshminarasimha Rao 19

(1887) 36 Ch D 545 = 57 LJ Ch 230, Ashworth v. Lord 17

(1884) ILR 6 All 303 = 1884 All WN 92, Jajit Rai v. Gobind Tiwari 18, 19

(1826) 1 Russ 530 = 39 ER 204, Wilson v. Metcalfe 17

A. S. No. 690 of 1963:

P. Krishnamoorthy and P. C. Chacko, for Appellant; K. N. Narayanan Nair, for Respondents Nos. 1 to 4.

A. S. No. 691 of 1963:

P. Krishnamoorthy and P. C. Chacko, for Appellant; K. N. Narayanan Nair, for Respondents Nos. 1 and 3.

A. S. No. 692 of 1963:

P. Krishnamoorthy and P. C. Chacko, for Appellant; K. N. Narayanan Nair, for Respondents Nos. 1 to 3.

A. S. No. 23 of 1964:

S. Narayanan Potti, for Appellant; K. N. Narayanan Nair, for Respondents Nos. 1 to 8.

S. A. No. 1170 of 1964:

T. S. Venkiteswara Iyer, for Appellants; K. N. Narayanan Nair, for Respondents Nos. 1 to 3.

BALAKRISHNA ERADI, J. (agreeing with Isaac, J. (31-7-69)): These appeals which raise common questions and were heard together by a Division Bench consisting of my learned brothers Isaac and Naravana Pillai, JJ. have come up before me on a reference by my Lord the Chief Justice under Section 23 of the Travancore-Cochin High Court Act, 1125 (Act V of 1125) in view of the different opinions expressed in the separate judgments delivered by the two learned Judges constituting the Division Bench. Under the terms of Section referred to above the scope of enquiry before me is limited to a consideration of those matters on which the learned Judges have disagreed.

2. A. S. 690 of 1963 arises out of O. S. 83 of 1120 of the Munsiff's Court, Quilon

and the appellant before this Court is the plaintiff. A. S. 691 of 1963 arises out of O. S. 1096 of 1120 of the Munsiff's Court, Quilon and the second plaintiff is the appellant. A. S. 692 of 1963 arises out of O. S. 710 of 1121 on the file of the Munsiff's Court, Quilon and the legal representative of the original plaintiff is the appellant. A. S. 23 of 1964 arises out of O. S. 79 of 1120 of the Munsiff's Court Quilon and here also the legal representative of the deceased plaintiff is the appellant. S. A. 1170 of 1964 arises out of O. S. 681 of 1957 on the file of the Munsiff's Court, Quilon and the plaintiffs are the appellants.

3. The common subject-matter of all these appeals is a plot of land 42 cents in extent situated in Quilon. Admittedly, this property belonged to one Kurumpa. She had two sons Kesavan and Narayanan and four daughters Kunchekki, Lakshmi, Parvathi and Nangeli. The parties belong to the Kammala community and are admittedly governed by Hindu Law as modified by custom. On the 6th Edavam, 1062 a mortgage was executed as per Ext. C by Kesavan, Narayanan, Kunchekki and Nangeli jointly along with Appili, daughter of Lakshmi who was by then dead, and Unichekki, daughter of Parvathi who was also deceased by that time. The mortgagee was one Muhammed Kunju and the amount borrowed was 1100 fs. The mortgage was for a term of 5 years and there was a stipulation for an annual payment of 40 fs. only by way of michavaram. On 20-9-1065 four udampadies were executed by Kesavam as per Exts. B, D and E and Ext. P1 (marked in O. S. 681 of 1957 only) in favour of Kunchekki, Appili, Unichekki and Nangeli respectively, giving to each of them a 1/6th share in the equity of redemption of the property covered by Ext. C reciting that these documents were being executed in implementation of a partition arrangement which had been already entered into between the parties. The remaining 2/6th share in the equity of redemption was reserved for Kesavan and Narayanan.

4. In 1116 Kesavan's son Kunju Pillai and his children instituted a suit O. S. 639 of 1116 on the file of the Munsiff's Court, Quilon for recovery of possession of the suit property from the possession of the mortgagee contending that the mortgage debt had become discharged by set off against large arrears of michavaram due from the mortgagee, that in spite of demand having been made on the mortgagee to surrender possession of the property along with the balance amount which was due to the mortgagor by way of arrears of michavaram after effecting a set off of the mortgage amount the mortgagee had not surrendered possession of the property and that therefore the plaintiff should be given a decree for recovery of possession of the property with arrears of michavaram amounting to 846 fs.

and future mesne profits from the date of suit.

That suit was decreed as per Ext. H. judgment dated 29-12-1118 upholding the claim of the plaintiffs that the entire mortgage amount had become wiped out by set off against the arrears of michavaram. The Court found that the contention of the plaintiffs that 846 fs. remained payable by the mortgagee by way of arrears of michavaram even after adjustment of the entire mortgage debt was true, but, nevertheless, held that under the law of limitation the plaintiffs could legally recover such arrears only for a period of six years immediately preceding the suit. Accordingly the plaintiffs were granted a decree for recovery of 240 fs. from the assets of the defendants by way of arrears of michavaram and in addition future mesne profits from the date of suit at the rate of Rs. 25 per year. Kunju Pillai had died during the pendency of the aforesaid suit. His widow and sons obtained delivery of possession of the property in execution of the above decree on 30-12-1119.

5. The suits which have given rise to these appeals have been instituted by the legal heirs of the other five children of Kurumpa, namely Narayanan, Kunchekki, Lakshmi, Parvathi and Nangeli claiming to recover the 1/6th share belonging to each of the five branches on the basis of the udampadies Exts. B, D, E and P1 executed by Kesavan. O. S. 79 of 1120 which has given rise to A. S. 23 of 1964 is the suit by Narayanan's son for recovery of his half share in the 2/6th part which had been jointly set apart for Kesavan and Narayanan after making the four dispositions as per Exts. B, D, E and Ext. P1. O. S. 83 of 1120, O. S. 1096 of 1120 and O. S. 710 of 1121 have been instituted by the respective representatives of the branches of Parvathi, Lakshmi and Kunchekki each claiming an 1/6th share on the strength of the udampadies Exts. E, D and B respectively. In all these suits the widow and children of Kunju Pillai (son of Kesavan) have been impleaded as defendants 1 to 4 and the relief of recovery of possession has been claimed against them. O. S. 681 of 1957 out of which S. A. 1170 of 1964 has arisen is a similar suit filed by the children of Nangeli claiming recovery of 1/6th share of the property from the same defendants.

6. O. S. Nos. 79 of 1120, 83 of 1120, 1096 of 1120 and 710 of 1121 were tried jointly. The common contentions taken by the defendants were that the udampadies relied on by the plaintiffs had not taken effect and that the plaintiffs had not derived any valid right to the plaint property under the documents evidenced by Exts. B, D and E, that in any event the defendants having redeemed the mortgage evidenced by Ext. C had been subrogated to the position of the mortgagee under that document and that the present suits which have been instituted be-

yond the period of 50 years after the expiry of the term fixed in Ext. C are barred by limitation. The trial court rejected these contentions of the defendants and decreed the suits as prayed for.

On appeal therefrom by the defendants, the Subordinate Judge set aside the decision of the trial court and allowed the appeals holding that the suits were barred under Article 136 of the Travancore Limitation Act, 1100. Second appeals were filed before this court by the plaintiffs in all the four suits challenging the correctness of the Subordinate Judge's decision. Velu Pillai, J. by judgment dated 28-8-1963 dismissed the second appeals upholding the view taken by the Subordinate Judge that the suits were barred by time under Article 136 of the Travancore Limitation Act. The learned Judge, however, granted the prayer of the appellants for leave to file appeals before a Division Bench. A. S. Nos. 690 to 692 of 1963 and A. S. No. 23 of 1964 have accordingly been preferred by the respective plaintiffs challenging the aforesaid decision of Velu Pillai, J.

7. When O. S. 681 of 1957 was instituted by the representatives of Nangeli the appeals filed by the defendants before the Subordinate Judge's Court challenging the decision of the Munsiff's Court in the earlier suits were pending. But by the time this suit was taken up for hearing, the Subordinate Judge had disposed of those appeals upholding the defendants' contention that the suits were barred under Article 136 of the Travancore Limitation Act. In the light of that decision, the Munsiff dismissed this suit also on the ground that it was barred by limitation under Article 136 of the Limitation Act. It was further held that even if for any reasons there was no bar under Article 136 of the Limitation Act and the suit was to be regarded as one not for redemption but only for recovery of possession, the plaintiffs had still to be non-suited on the ground that the defendants had perfected their title to the plaint property by adverse possession under Article 144 of the Limitation Act inasmuch as the suit had been filed after the lapse of 12 years from the date of delivery of possession of the property in execution of the decree in O. S. 639 of 1116. This decision of the trial court was confirmed on appeal by the Subordinate Judge and hence the plaintiffs have preferred S. A. 1170 of 1964. In view of the common questions involved, this second appeal was heard by the Division Bench along with the four other appeals and, as already noticed, the two learned Judges have disagreed and delivered separate judgments.

8. Isaac, J. has taken the view that since the mortgage debt due under Ext. C had become discharged by its being set off against the arrears of *michavaram*, there was no subsisting mortgage to be redeemed when O. S. 639 of 1116 was instituted and that

therefore the decree passed therein cannot be regarded as one for redemption but only as one for recovery of possession of the property from the erstwhile mortgagee. Accordingly, the learned Judge has held that the present defendants 1 to 4 who took delivery of possession of the property in execution of the decree in O. S. 639 of 1116 cannot be regarded as co-mortgagors who have redeemed the entire mortgage and that they are not therefore entitled to invoke the principle of subrogation in their favour. In this view, the learned Judge held that the present suits claiming recovery of the plaintiffs' shares in the suit property from defendants 1 to 4 are not governed by Article 136 of the Travancore Limitation Act since they cannot be regarded as suits for redemption filed against a redeeming co-mortgagor who has become subrogated to the position of the mortgagee.

Accordingly, the learned Judge has expressed the conclusion that the first four suits namely O. S. 79 of 1120, O. S. 83 of 1120, O. S. 1096 of 1120 and O. S. 710 of 1121 which were instituted well within 12 years, whether the said period be calculated from the date of discharge of the mortgage debt or from the date on which defendants 1 to 4 obtained delivery of possession in execution of the decree in O. S. 639 of 1116, are not barred by limitation and that the contrary view taken by Velu Pillai, J. is not correct. In regard to O. S. No. 681 of 1957 out of which S. A. 1170 of 1964 has arisen, the learned Judge held that the plaintiffs' claim for recovery of possession of their shares in the suit property is time-barred since this suit has been filed only after the expiry of 12 years even from the date of recovery of the property by defendants 1 to 4. But, with respect to the prayer of the plaintiffs in this suit for a permanent injunction restraining the defendants from interfering with the plaintiffs' possession of a house in the suit property, the learned Judge held that notwithstanding the circumstance that their suit for recovery of possession is time-barred, they would be entitled to a decree for injunction in respect of the house in case they are found to have been residing therein at the time of institution of the suit.

The learned Judge, however, felt that there has not been a proper investigation by the courts below of the factual question as to whether the plaintiffs were actually in possession of the said house as on the date of the institution of the suit and hence considered that a remand of the suit is necessary for determining this question afresh. The learned Judge, has, therefore, expressed the conclusion that the decree passed by the courts below dismissing the suit in toto should be set aside and the matter remitted to the Subordinate Judge's Court for the limited purpose mentioned above.

9. Narayana Pillai, J., on the other hand, has taken the view that the mortgage Ex. C cannot be regarded as a "self-redeeming mortgage" and that the mortgage debt did not therefore automatically get extinguished on non-payment of michavaram. According to the learned Judge, the mortgage became extinguished only by virtue of the decree for redemption in O. S. 639 of 1116 the debt having become wiped off only when the court allowed the set-off of the mortgage amount against the arrears of michavaram, and that hence the defendants should be regarded as co-mortgagors who have obtained possession of the property after redeeming the entire mortgage.

The learned Judge has further expressed the view that even though the defendants had not to pay anything to the mortgagee for effecting redemption, they were, nonetheless, entitled to invoke the doctrine of subrogation and to retain possession of the property as mortgagees until they were properly redeemed by the other co-mortgagors. Accordingly, he has held that Article 136 of the Travancore Limitation Act is applicable to the case and that since all the suits have been instituted only after the expiry of the period of 50 years prescribed by the said Article, the plaintiffs' rights to recover possession of their respective shares in the suit property had become barred and the suits had been rightly dismissed.

In regard to the prayer of the plaintiffs in O. S. 681 of 1957 for a permanent injunction restraining the defendants from interfering with their possession of the building on the suit property, the learned Judge has held that the plaintiffs would not be entitled to the relief of injunction unless they establish their title to the said building and in view of his having found that the right of the plaintiffs to recover possession of the property had become extinguished under Article 136 of the Travancore Limitation Act, the plaintiffs' claim for the relief of injunction was also negated. In the result the learned Judge has expressed the conclusion that all the appeals should be dismissed.

10. Thus, the two learned Judges constituting the Division Bench have come to divergent conclusions on the following two questions.

1. Whether the four suits which have given rise to A. S. Nos. 690, 691 and 692 of 1963 and 23 of 1964 are barred by Article 136 of the Travancore Limitation Act?

2. Whether the plaintiffs in O. S. 681 of 1957 (out of which S. A. 1170 of 1964 has arisen) are entitled to the relief of permanent injunction in respect of the building on the suit property notwithstanding the fact that their claim for recovery of possession or rest of the property has become barred by limitation?

Both the learned Judges have concurred in holding that the claim of the plaintiffs in O. S. No. 681 of 1957 to recover possession

of the suit property is barred by limitation and that the said suit in so far as it seeks that relief has been rightly dismissed by the courts below. Counsel appearing for the appellants in S. A. 1170 of 1964 contended that the two learned Judges have disagreed even in regard to this matter since Isaac, J. has held the suit to be barred only by applying Article 144 of the Indian Limitation Act whereas Narayana Pillai, J. has treated the suit as one for redemption and held it to be barred under Article 136 of the Travancore Act.

11. Section 23 of the Travancore-Cochin High Court Act, 1125 under which these appeals have been referred for my opinion, is in the following terms:

"Where two Judges forming a Division Bench agree as to the decree, order or sentence to be passed, their decision shall be final. But if they disagree, they shall deliver separate judgments and thereupon the Chief Justice shall refer, for the opinion of another Judge, the matter or matters on which such disagreement exists, and the decree, order or sentence shall follow the opinion of the majority of the Judges hearing the case."

Under this Section, that part of the subject-matter of the appeal respecting which the two learned Judges forming the Division Bench are in agreement "as to the decree to be passed" is outside the scope of the reference and it is only in respect of those matters on which there has been a disagreement between them that the third Judge to whom the reference is made is called upon to state his opinion. Inasmuch as both the learned Judges have agreed as to the decree to be passed in the suit O. S. 681 of 1957 in so far as it relates to the plaintiffs' prayer for the relief of recovery of possession of the property, I do not think it is open to the learned counsel for the appellants to re-agitate that question before me. When the Judges constituting the Division Bench have agreed as to the ultimate decree to be passed, their decision is declared by Section 23 to be final and hence any difference of opinion between them as to the reasons on which such conclusion should properly be based is of no consequence. I have not, therefore, permitted the learned counsel for the appellants in S. A. 1170 of 1964 to re-argue before me the contentions of his clients that their suit for recovery of possession of the suit property is not barred by limitation. The scope of the further discussion in this judgment will be limited to a consideration of the two questions mentioned supra on which the learned Judges have come to different conclusions.

12. The answer to the first question will depend on whether the suit O. S. 639 of 1116 can be regarded as a suit for redemption of a subsisting mortgage and, even if so, whether the principle of subrogation would apply in the circumstances of the case

so as to entitle the defendants to retain possession of the property with all the rights of the mortgagee as against their co-mortgagors.

13. The Transfer of Property Act had no statutory force in the erstwhile Travancore State at the relevant time. Hence Sections 92 and 95 of the said Act are not applicable in terms to the present case, and the question has to be decided in accordance with principles of justice, equity and good conscience. It therefore becomes necessary to examine the true scope and content of the equitable doctrine of subrogation, the purpose and principle behind it and the conditions for its applicability in cases, like the present, not governed by a statute.

14. The law on the subject as laid down by the decisions of English and American Courts has been succinctly summarised by Sheldon in his well-known treatise on the Law of Subrogation and it is worthwhile extracting the following passage which deals with the aspects relevant to the present discussion.

"Subrogation is a doctrine primarily of equity jurisprudence . . . It is a substitution, ordinarily the substitution of another person in the place of a creditor, so that the person in whose favour it is exercised succeeds to the rights of the creditor in relation to the debt. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter. . . . It is a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another. . . Subrogation is an exercise of the equitable powers of the court, to relieve a meritorious creditor, who might otherwise be subjected to loss by his funds being applied to pay another's debt. . . . Subrogation to the rights of a creditor differs from an assignment of the debt, in that the latter assumes the continued existence of the debt, while the former follows only upon its payment. Before the right of subrogation accrues, the legal obligation resting upon the ultimate debtor must be discharged. . . . And the party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted; if the latter had not a right of recovery, the former can acquire none".

In Pomeroy's Equity Jurisprudence, Volume V, the principle of subrogation is explained at page 5183 in these terms:

"When an obligation is discharged by one not primarily liable for it, but who believes himself to be acting either in performance of a legal duty, or for the protection of a legal right, or at the request of the party

ultimately bound, and even in certain other cases favoured by public policy, where none of the above circumstances may be present, the party thus discharging the obligation is entitled in equity to demand, for his reimbursement, and subject to any superior equities, the performance of the original obligation, and the application thereto of all securities and collateral rights held by the creditor. The same equity which seeks to prevent the unearned enrichment of one party at the expense of another, by actions for reimbursement, contribution, and exoneration, operates here, by creating a relation somewhat analogous to a constructive trust, in favour of the subrogee, or party making the payment, in all legal rights held by the creditor, and the subrogee may proceed to enforce the trust. Whenever a party discharges an obligation in performance of a legal duty — that is, an obligation for the performance of which he was legally bound — but for which his liability was subsequent to that of another party, he is entitled to be subrogated to, and to have the benefit of, all rights of the creditor and all securities which may at any time have been put into the creditor's hands by a party whose liability is prior to his own, or which the creditor may have obtained from such party. The most conspicuous example of this class is the ordinary surety on an obligation for the payment of money, who has become such at the request of the principal debtor. . . . Other cases where the liability of a party making a payment is considered subsequent to that of some other party to the obligation, and in which, therefore, the former is entitled to subrogation, are cases of payment of more than his fair share by one of several joint debtors or co-sureties. In these cases, each party is considered, as against the others as primarily liable for his own proportionate share of the obligation, and as subsequently liable for the shares of the others. The subrogee is, in general, entitled to stand in the shoes of the creditor, and to enforce every right which the creditor himself could have enforced so far as necessary to secure reimbursement of contribution."

In Jones on Mortgages, 7th Edition, Volume II at page 407 the learned author, while discussing the conditions for the applicability of the doctrine of subrogation, has stated the legal position as follows:—

"In general it may be said that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety having paid the debt, or one having made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security; or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. . . . It only applies in favour of one who has bought the debt either expressly, or by paying it under circum-

stances which render the payment equivalent to a purchase."

The principles stated in the passages extracted above are fully applicable in this country also and will govern the decision of cases, like the present one, not covered by the provisions of the Transfer of Property Act. This is placed beyond doubt by the decision of the Supreme Court in *Ganeshi Lal v. Joti Pershad*, AIR 1953 SC 1 where their Lordships had occasion to consider the scope of the equitable doctrine of subrogation in a case arising from the State of East Punjab where the Transfer of Property Act was (not—Ed.) in force at the relevant time. The following observations occurring in para 9 of the judgment may usefully be extracted:—

"If we remember that the doctrine of subrogation which means substitution of one person in place of another and giving him the rights of the latter is essentially an equitable doctrine in its origin and application, and if we examine the reason behind it, the answer to the question which we have to decide in this appeal is not difficult. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognised that where there are several joint debtors, the person making the payment is a principal debtor as regards the part of the liability he is to discharge and a surety in respect of the shares of the rest of debtors. Such being the legal position as among the co-mortgagors, if one of them redeem a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to reimburse himself for the amount spent in excess by him in the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share. This proposition is postulated in several authorities."

The position is therefore well established that the doctrine of subrogation is only a rule evolved by equity by which a surety paying a debt of the principal debtor, or a co-mortgagor who is compelled to pay more than his share of the common debt, is allowed to stand in the place of the original creditor and have the benefit of the securities which the creditor had, for the limited purpose of obtaining reimbursement from the persons whose liability he has discharged. It is undoubtedly of the essence of this doctrine that the benefit of the equity can be availed of only by one who has actually performed the obligations of another and has thereby become entitled to a right of reimbursement, for the protection of which right alone the security will be treated as kept alive for his benefit by a legal fiction. Hence, unless there has been a payment by a party in discharge of the obligation of another and consequently a right to reimbursement has accrued to him, there cannot be any scope at all for his in-

voking the equitable principle of subrogation.

14A. Tested in the light of the legal principles stated above, I have no hesitation to hold that in the present case defendants 1 to 4 are not entitled to claim the benefit of the principle of subrogation as against their erstwhile co-mortgagors, namely the plaintiffs. It is not contended that they had to pay any amount whatever to the mortgagee under Ext. C before recovering possession in execution of the decree in O. S. 639 of 1116. A reference to Ext. P-5 which is a copy of the plaint filed in that suit shows that the suit had been instituted by the present defendants on the specific allegation that no amount remained due under the mortgage and that, on the other hand, after setting off of the entire mortgage amount against the arrears of michavaram, a substantial amount was due to them from the mortgagee by way of such arrears. Ext. H is a copy of the judgment rendered in that suit and it is seen therefrom that the Court held that the entire mortgage amount had become wiped off by adjustment against arrears of michavaram and a decree was passed in favour of the plaintiffs in that suit for recovery of 240 fs. being michavaram for 6 years prior to suit, and also future mesne profits at the rate of Rs. 25/- a year from the date of institution of the suit. If the mortgage was treated as subsisting till the date of institution of the suit there would have been no question of the bar of limitation in the matter of taking accounts, nor would the mortgagee have been made liable for mesne profits from the date of suit.

This is not, therefore, a case where defendants 1 to 4 have made any payment in discharge of the proportionate mortgage liability of the present plaintiffs and thereby acquired a right to reimbursement. The equitable principle of subrogation being intended only for protecting a right to reimbursement it cannot have any application to the present case. I am supported in this view by the observations of their Lordships of the Supreme Court in the decision already cited AIR 1953 SC 1 (*supra*), where it has been pointed out that to compel the co-debtors or co-mortgagors to pay more than their share of what was paid to the creditors or mortgagee would be to perpetrate an inequity or injustice and that such a result will not be countenanced by equity. Their Lordships have observed as follows at p. 4:

"If it is equitable that the redeeming co-mortgagor should be substituted in the mortgagee's place, it is equally equitable that the other co-mortgagors should not be called upon to pay more than he paid in discharge of the encumbrance."

Further, as pointed out by Sheldon, the party for whose benefit the doctrine of subrogation is applied can acquire no greater rights than that of the party in whose place he is substituted and if the latter had not a right of

recovery the former can acquire none. In the present case, as on the date of institution of O. S. 639 of 1116 no amount whatever was due to the mortgagee and he had no right to hold the property by way of security. In these circumstances the defendants cannot claim to have acquired a right to retain possession of the property as security by virtue of any principle of substitution. I therefore hold that, irrespective of the question as to whether or not the suit O. S. 639 of 1116 can be regarded as an action for redemption of a subsisting mortgage, defendants 1 to 4 cannot claim the benefit of the equitable principle of subrogation and had derived no right to retain possession of the property as mortgagees.

15. In view of my having come to the conclusion that defendants 1 to 4 are not entitled to claim the benefit of the doctrine of subrogation, it is really unnecessary for me to consider the further question as to whether the suit O. S. 639 of 1116 can be regarded as an action for redemption and whether defendants 1 to 4 are co-mortgagors who have come into possession of the property on redeeming the entire mortgage. However, since this question was argued before me at considerable length by the learned counsel appearing on both sides I shall proceed to state my opinion on this point as well. According to the appellants the mortgage debt under Ext. C had become automatically wiped off by adjustment against the arrears of michavaram and therefore there was no subsisting mortgage at all to be redeemed as on the date of institution of O. S. 639 of 1116. On the other hand, it is contended on behalf of the defendants that the set off was effected only as per the decree passed in that suit and hence the mortgage became extinguished only on the passing of the said decree.

16. As pointed by the Federal Court in *Thota China Subba Rao v. Mattapalli Raju*, AIR 1950 FC 1 at p. 6:

"The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists".

If a mortgage has been discharged by payment or in any other manner recognised by law the right of the mortgagee to hold the property as security for the debt ceases to exist and the mortgagor becomes entitled to recover possession of the property from him without any necessity to "redeem". Since the present case is not governed by the provisions of the Transfer of Property Act it has to be decided only on the general principles of law relating to mortgage. It is worthwhile in this connection to extract the following passage from "The Law of Mortgages of Real and Personal Property" by Francis Hullah, Volume I, page 480:—

"From the intimate connection between the debt secured by the mortgage and the mortgage itself, which has been already ex-

plained, it of course results as a general proposition, that whatever extinguishes the former, puts an end to the latter also..... A mortgage is but a security for the payment of the debt, and when that is paid or extinguished, it can never be resuscitated. By payment, the whole mortgage is extinct; as much so as if released or paid and cancelled of record. It ceases to operate either at law or in equity, and the whole title reverts in the mortgagor. To call it a mortgage would be an abuse of the word. It is no more than a blank."

Such being the legal position, I shall proceed to examine whether the debt secured by Ext. C was subsisting on the date of institution of O. S. 639 of 1116 or whether it had become extinguished at any time prior thereto. It is contended on behalf of the respondents that the mere circumstance that the mortgagee had kept the michavaram in arrears ever since the commencement of the transaction and that the accumulated arrears of michavaram due by the mortgagee far exceeded the amount due under the mortgage, will not have the effect of extinguishing the mortgage as there cannot be said to have been any 'payment' of the debt by the mortgagor.

17. Under the terms of Ext. C the mortgage was put in possession of the property with the stipulation that from out of the rents and profits he was to pay annually to the mortgagor 40 rs. by way of michavaram and appropriate only the balance towards the interest on the mortgage amount. When the stipulated michavaram remained unpaid, the mortgagee must be taken to have had in his hands at the end of each year an equivalent amount which really represents the surplus profits realised from the property. Interest due under the mortgage having been already realised by him by appropriation of the balance profits, the mortgagee was bound in law to apply the portion of the profits represented by the unpaid michavaram in reduction of the principal amount of the mortgage debt. As stated in *Jones on Mortgages*, 7th Edition, Volume II, at page 733 "A mortgagee in possession whether in person, by trustee, receiver, or by a tenant, is in equity accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt. After paying the interest of the debt any balance of receipts is applicable to reduce the principal". To the same effect are the following observations at page 835 in *Coote's Treatise on the Law of Mortgages*, 9th Edition, Volume II:—

"A mortgagee, as soon as he is paid off, became before 1926 a mere trustee, holding the legal estate for the benefit of the mortgagor or the next pious incumbrancer of whose charge he has notice, who may require the reconveyance of the estate accordingly. After 1925, however, mortgagee, having no longer the legal estate in fee sim-

ple, but only a term of years in the land will have no legal estate or interest in the land after payment off, because under Section 116 of the Law of Property Act, 1925, the term will automatically cease. A mortgagee, who had entered into possession, must therefore, so soon as the rents and profits received by him have fully satisfied the moneys due under his mortgage, including principal, interest, and costs, deliver up the property to the person entitled to possession of it."

In *Ashworth v. Lord*, (1887) 36 Ch D 545, it was contended on behalf of the mortgagor that the mortgagees who were in possession of the mortgaged property and realising the rents and profits had been overpaid and that they should be charged with liability to account for rents and profits with interest by applying the principle of annual rests for the period subsequent to the date on which the mortgage debt was paid up in full by appropriation of rents and profits. North J. upheld this contention and stated thus at p. 551:

"But, after they have been paid in full, they are, as was pointed out by the Master of the Rolls in *Wilson v. Metcalfe*, (1826) 1 Russ. 530, persons who are, in receiving the rents after their debt has been fully paid, availing themselves of another man's money for their own use and benefit, and they ought to be charged with interest. In that case annual rests were directed to be made from the time at which the mortgage debt was fully paid, and that is what I have always understood to be the practice in the few cases in which the point has arisen. It seems to me that annual rests are in the present case a matter of course."

18. A similar question arose in an early case before the Allahabad High Court reported in *Jajit Rai*, by His Guardian Parbati Kuar v. Gobind Tiwari, (1884) ILR 6 All 303. There, by the terms of a usufructuary mortgage it was provided that the annual profits of the mortgaged property should be taken to be Rs. 65-10-6 out of which the mortgagee was to appropriate Rs. 42.6.6 as interest on the mortgage money and to pay Rs. 23.3.0 as the amount of jama payable as revenue to the Government on land. The mortgage was executed in 1864. The plaintiff obtained an assignment of the equity of redemption in 1869 and instituted the suit for recovery of possession of the mortgaged property alleging that the mortgage amount had become completely discharged because the mortgagee had not paid any revenue since 1869 and the plaintiff had been compelled to pay it. According to the plaintiff, by adjustment against the mortgage debt of that portion of the rents and profits of the mortgaged property as represented by the amounts reserved annually for payment of revenue, but not utilised for that purpose, the entire mortgage money had been paid

and amounts were due to the plaintiff from the mortgagee by way of such profits.

In his defence to the action the mortgagee contended, inter alia, that the terms of the mortgage did not entitle the plaintiff to set off the annual sum of Rs. 23.3.0 against the mortgage debt and that the plaintiff's claim that the mortgage debt had become discharged and that he was entitled to recover surplus profits from the mortgagee, was therefore untenable. Mahmood, J. who delivered the judgment on behalf of the Division Bench rejected this plea of the mortgagee. Upholding the plaintiff's contention that the mortgage debt became discharged by set off against the amounts reserved for payment of revenue and that the mortgagee was, therefore, liable for profits calculated with annual rests, His Lordship stated thus at p. 308:—

"By a long course of decisions it has been settled in India that even a special agreement to the effect that the mortgagee shall remain in possession until payment of the debt is made in one sum, does not prevent the mortgage from being at an end whenever the mortgagee has realised both principal and interest from the usufruct..... This rule, though it probably originated in the exercise (express—Ed.) provisions of the old regulations, is so consonant with equity that it deserves recognition by the Courts, even irrespective of statutory provisions".

19. The above decision was followed by a Division Bench of the Madras High Court consisting of Venkatasubba Rao and Reilly, JJ. in *Seshayya v. Lakshminarasimha Rao*, AIR 1930 Mad 160. In that case, the mortgagee who was put in possession of the mortgaged property, the profits wherefrom were estimated to be Rs. 240, was required annually to pay Rs. 100 towards revenue and village expenses, appropriate Rs. 80 towards the mortgage debt and pay over the balance of Rs. 60 to the mortgagor. The mortgage amount was Rs. 2,200 and it was provided in the mortgage document that the debt was to be discharged in 55 years by the above process of appropriation, the interest for that period being stipulated to be an amount equal to the principal, namely Rs. 2,200. The mortgagee was to surrender possession of the property only thereafter. It was further provided that if the mortgagee failed to pay the amount of Rs. 60 he would be bound to relinquish a part of the holding in proportion to that sum. The mortgage was of the year 1865. From 1882 onwards the annual payment of Rs. 60 was never made to the mortgagor.

The question arose whether the mortgagee who thus retained in his hands the sum of Rs. 60 payable every year during the period subsequent to 1881 was bound to apply that sum annually in reduction of the mortgage debt. If that was done the mortgage debt would have become discharged long prior to 1920 in which year alone the stipulated term of 55 years was to expire. The Division

Bench upheld the claim of the mortgagor that it was the bounden duty of the mortgagee to apply the amount of Rs. 60 retained with him annually in reduction of the mortgage debt and that therefore the debt became wiped out long before 1920.

Venkatasubba Rao, J. observed thus at p. 163:—

"A portion (Rs. 60) was by agreement of parties excluded from the usufruct for a specific purpose. If the purpose failed or the term was not carried out, what was the result? The part excluded reverted without any further act or agreement and became again profits. The mortgagee would then be liable to apply it in reduction of the debt. Section 78 (h) enacts that the mortgagee shall apply the usufruct, first in reduction of the interest, then of the principal. This, he is bound to do under the law, so that, a part of the profits initially excluded was not applied as directed, it became usufruct as a matter of course, and without a special contract to that effect.

The proper way then of viewing the question is, has the part excluded, in the events that have happened, regained, its character of rents and profits? If so the mortgagee has no option but to appropriate it to the mortgage debt. (1884) 6 All 303, is a very instructive case on the point and gives effect to the principle as I have stated it. . . . I am, therefore, of the opinion that the plaintiff's contention must prevail, namely, that the sum of Rs. 60 should be debited against the mortgage debt and the account taken accordingly. It is obvious that in that event, the debt became wiped out long before 1920, that is, before the expiry of the period fixed."

Reilly, J. in his concurring judgment has stated as follows at page 165:—

"But on what principle could a mortgagee in possession be heard to say that he had in his hands money belonging to the mortgagor, which he had received in his capacity as mortgagee out of the income of the mortgaged property in his possession but that he refused to adjust that against the mortgage debt and that he would hold it until the mortgagor sues him for it in some proceedings unconnected with the mortgages. I do not think it is necessary in this connexion to drag in the idea that in those circumstances the mortgagee would be trustee for the mortgagor in respect of the mortgagor's money which he kept in his hands, though no doubt he would be so. It is enough, I think, to remember that the essence of a mortgage transaction is that the mortgage is security for the mortgage debt. When the mortgagee has obtained payment of his debt, the security is done with; there is no purpose left in it. Let us suppose that we reach a stage where the mortgage debt except Rs. 480 has been paid off by the application of Rs. 80 a year out of the income and at the same time by his failure to pay the Rs. 60 a year to the mortgagor the mortgagee has

Rs. 480 out of the income from the mortgaged property in his hands. It appears to me almost absurd to suggest that in such circumstances the mortgagee could say:

"The mortgage debt still remains to the extent of Rs. 480. I have got the mortgagor's money to that amount in my hands; but I intend to keep that entirely separate. It has been suggested that the mortgagee could do that because he could have got the Rs. 60 a year in his hands not in accordance with the terms of the contract between the parties but in violation of the terms. Surely, we cannot allow a party to plead his own wrong in that way. In my opinion it is clear on principle that, when the mortgagee has paid himself the mortgage debt out of the mortgaged property in his possession, he cannot maintain that the mortgage is still in force. That principle is recognised in Section 62-A, T. P. Act and it was enforced in (1884) ILR 6 All 303. . . . The decision in (1884) ILR 6 All 303, has never been overruled, nor has dissent ever been expressed from it.

Now does the fact that in this case a term of 55 years is mentioned make any difference in the application of this principle? We are not concerned in this case with any question of redemption, because in this transaction the mortgagor could never redeem by paying the balance of the mortgage debt to the mortgagee; his right was only to recover possession when the mortgage debt was satisfied. For myself I doubt whether in these documents, Exts. A and B any term of years in the strict sense was really intended. I doubt whether the meaning is more than that the Rs. 4,400 was to be paid off out of the income of the property at the rate of Rs. 80 a year and so would be cleared of in 55 years ending with Siddarti. But, even if the mention of the term of 55 years ending with Siddarti means more than that, how does it really affect the mortgagee's position in the circumstances that have arisen? If the amount of the mortgagor's money which the mortgagee retained in his hands has to be adjusted against the mortgage debt then at a time long before the expiry of the 55 years the mortgage debt must have been satisfied. From that time, until the end of the 55 years in what capacity would the mortgagee claim to remain in possession? Obviously not as a mortgagee to whom any part of the mortgage debt was still due. I think the result of that is, that, if this transaction is a mortgage and nothing else, the Rs. 60 must clearly be adjusted as it fell due against the mortgage debt until it was discharged and that the plaintiff must be held to have been entitled to recover possession from the date on which the debt was so discharged."

In the light of the principles enunciated in the above decisions with which I am in respectful agreement, I have no hesitation to hold that the mortgage debt under Ext. C

had become completely wiped off by 6-10-1090 by adjustment against arrears of michavaram.

20. Counsel appearing on behalf of the respondents relied very strongly on a decision of the Bombay High Court reported in *Raghavendracharya Appacharya Katti v. Vaman Shriniwas Deshpande*, AIR 1943 Bom 191; the facts of that case may be briefly stated. In 1931 one of the co-mortgagors in respect of a usufructuary mortgage brought a suit for redemption of the mortgage claiming the benefit of the Dekkhan Agriculturists' Relief Act. On an application of the provisions of the said Act it was found that the entire mortgage amount had become wiped off and that nothing remained due to the mortgagee. Accordingly a decree was passed directing the mortgagee to deliver possession of the property free from the mortgage and the decree-holder accordingly obtained possession. Subsequently, the assignees from two of the other co-mortgagors instituted a suit in April 1937 to recover their half share in the property and it is from that suit that the second appeal arose before the High Court. One of the questions to be decided was whether the co-mortgagor who had earlier sued and obtained possession in execution of the decree could claim the right of subrogation. The Division Bench which decided the case rejected the contention of the plaintiffs that the defendant could not be regarded as a co-mortgagor who had redeemed the mortgage and observed as follows at page 192:—

"It has been argued on behalf of the plaintiffs that no question of subrogation arises because in fact in the circumstances of this case there has been no redemption. The basis of that argument is that when accounts were taken under the Dekkhan Agriculturists' Relief Act it was found that the mortgagee had recovered not only the principal money but also a fair rate of interest on it out of the income, and therefore by reason of the provisions of the Act the plaintiffs were not liable to pay anything. Mr. Belvadi referred us to the terms of Section 60 T. P. Act, which provides, that at any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money to get a reconveyance. He argues that redemption implies payment of the mortgage debt, and if there is no mortgage debt to pay, there is no redemption. In our view this is not a correct statement of the position. No doubt the mortgagor cannot redeem without paying or tendering whatever amount may be due. But that does not mean that there is no such thing as redemption if in the circumstances it turns out that there is nothing to pay. It was only as the result of the application of the Dekkhan Agriculturists' Relief Act that nothing was found due. According to the terms of the mortgage itself, the mortgagee was entitled to remain in possession in lieu

of the interest only, and however long he remained in possession he was entitled to receive the principal amount. Defendant 3, the plaintiff in the suit, was enabled to get those favourable terms because he established that he was an agriculturist. It does not follow that the other co-mortgagors would have been able to get redemption on the same terms. Apart from that, however, the suit brought by defendant 3 was undoubtedly a suit for redemption and the decree, the terms of which have already been given, was nothing less than or different from a decree for redemption."

These observations do, no doubt, support the contention advanced before me on behalf of the respondents. But, as I will presently show, this decision cannot now be regarded as laying down correct law. In *Ram Prasad v. Bishambhar Singh*, AIR 1946 All 400, a similar question arose for consideration before a Division Bench of the Allahabad High Court, though in slightly different circumstances. There, the suit was instituted by the representatives of the mortgagor for recovery of possession of the mortgaged property on the strength of the provisions contained in Section 2 (9) of the U. P. Debt Redemption Act and the question arose whether the suit was barred under Article 148 of the Limitation Act which Article would apply, if the suit were to be regarded as one for redemption. The contention of the plaintiff was that the mortgage debt had become completely wiped off by virtue of the provisions of the U. P. Debt Redemption Act and hence there was no necessity for redeeming the mortgage and that the suit should not, therefore, be regarded as one for redemption falling within the scope of Article 148 of the Limitation Act. This contention was upheld by the Division Bench consisting of Braund and Yorke, JJ.

Braund, J. who delivered the judgment held thus at pp. 402 and 403:—

"Now, the question is whether this suit—being a suit to recover possession of the mortgaged property after (according to the law as it stood at the date the suit was begun) it had been paid off—is a suit 'against a mortgagee to redeem' or 'to recover possession of immovable property mortgaged'. The learned Civil Judge of Patehpur has dismissed the matter a trifle summarily by saying that 'in the present case right to recover possession accrued on the passing of Act 13 (XIII) of 1940 and as such the suit is within limitation. Before going further with this question, we think it right to refer shortly to those two sections of the Transfer of Property Act which are the statutory sources of the right to redeem or to recover possession at the instance of a mortgagor in this country. Section 60 says (paraphrasing it) that at any time after the principal money has become due the mortgagor may require the mortgagee to re-

convey 'on payment or tender at a proper time and place of the mortgage money....' and it is that right that the section expressly describes as the 'right to redeem'. Now, it is quite obvious that that section can only refer to a case in which a mortgagor under a subsisting mortgage approaches the Court to establish his right to redeem and to have that redemption carried out by the process of the various declarations and orders of the Court by which it effects redemption. In other words, Section 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain the Return of his property on repayment of what is still due. Section 62, on the other hand, is in marked contrast to Section 60. Section 62 says that in the case of a usufructuary mortgage the mortgagor has a right to 'recover possession' of the property when (in a case in which the mortgagee is authorised to pay himself the mortgage money out of the rents and profits of the property) the principal money is paid off. As we see it, that it is not a case of redemption at all. At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor 'to recover possession of the property'. The framers of the Transfer of Property Act have clearly recognised the distinction between the procedure which follows a mortgagor's desire to redeem a subsisting mortgage and the procedure which follows the arising of a usufructuary mortgagor's right to get his property back after the principal has been paid off."

In *Prithi Nath Singh v. Suraj Ahir*, AIR 1963 SC 1041, their Lordships of the Supreme Court have expressly approved the above statement of the law contained in the judgment of Braund, J. In view of this pronouncement of the Supreme Court, the contrary view expressed in AIR 1943 Bom 191, can no longer be accepted as correct. It must then follow that the suit O. S. 639 of 1116 cannot be regarded as one for redemption since there was no subsisting mortgage on the date of its institution.

21. In the light of the discussion in the preceding paragraphs I hold that the defendants cannot be regarded as co-mortgagors who have obtained possession of the property on redemption of the whole mortgage and that in any event they have no right to claim the benefit of the equitable doctrine of subrogation since they have not paid any portion of the liability of the plaintiffs and had therefore no right to obtain any reimbursement from them. I, therefore, agree with the view taken by Isaac, J. that Art. 138 of the Travancore Limitation Act has no application and that the suits which have given rise to A. S. Nos. 690, 691 and 692 of 1963 and 23 of 1964 are not barred by time.

22. It now only remains for me to consider the subsidiary question raised in S. A. No. 1170 of 1964 relating to the plaintiffs' claim for the relief of permanent injunction in respect of the building on the property. If the plaintiffs succeed in establishing that they were actually in possession of the building as on the date of the institution of the suit, they are, in my view, entitled to the relief of injunction notwithstanding the circumstance that their suit for recovery of possession of the remaining portion of the suit property is barred under Article 144 of the Limitation Act. The question as to whether or not the plaintiffs were actually in possession of the building as claimed by them has not been properly investigated by the lower Courts. I am, therefore, in agreement with Isaac, J. that it is necessary in the interests of justice to have the suit remanded to the lower court for the limited purpose of investigating this question and that the decree passed by the courts below dismissing the suit in toto should, therefore, be set aside. The second question is also answered accordingly.

23. In the result, I hold that the first four suits, namely O. S. No. 79 of 1120, O. S. No. 83 of 1120, O. S. No. 1096 of 1120, and O. S. No. 710 of 1121 are not barred by limitation and that the appeals A. S. Nos. 690 to 692 of 1963 and A. S. No. 23 of 1964 should be allowed and the cases should be remitted to the Subordinate Judge for fresh disposal in the light of the directions contained in the judgment of Isaac, J. I also hold that the decree dismissing in toto O. S. 681 of 1957 has to be set aside and that the case should be remanded to the Subordinate Judge for the limited purpose of considering only the plaintiffs' claim for the relief of permanent injunction in respect of the building on the suit property in the light of the observations and directions contained in this judgment and in the judgment of Isaac, J.

M. U. ISAAC AND P. NARAYANA PILLAI, JJ. (11-8-69): 24. In accordance with the opinion of the majority, we hold that O. S. 79, 83 and 1096 of 1120 and O. S. No. 710 of 1121 are not time-barred, and that the plaintiffs in these suits are entitled to get from 30-12-1119 M. E. mesne profits of the properties, which they seek to recover, subject to their claim to the ownership of the said properties is being upheld. We also hold that O. S. No. 681 of 1957 is time-barred in respect of the relief claimed for recovery of the plaint schedule property; but the plaintiffs will be entitled to an injunction restraining the defendants therein from interfering with the plaintiffs' possession of the house, in case they are found to be residing therein at the time of institution of the suit. Accordingly all the appeals are allowed, and the cases are remitted to the Subordinate Judge,

who will take up all the appeals and dispose of them in the light of the opinion of the majority and the findings and observations contained therein.

25. The appellants in A. S. Nos. 690, 691 and 692 of 1963 and 23 of 1964 will get their costs from the respondents. The costs of the appeals in the Subordinate Judge's Court hereafter and the costs in the trial court will abide the result of the said appeals, and the Subordinate Judge will pass necessary orders in that respect. The parties in S. A. No. 1170 of 1964 will suffer their respective costs hitherto in all the courts. The Subordinate Judge will pass necessary orders regarding the costs of appeal incurred by the parties hereafter.

Appeals allowed.

AIR 1970 KERALA 301 (V 57 C 49)

FULL BENCH

P. T. RAMAN NAYAR, C. J., M.
MADHAVAN NAIR AND T. S. KRISHNA-
MOORTHY IYER, JJ.

The Special Tahsildar for Land Acquisition, Kozhikode-I and others, Appellants v. M/s. F. Shamsudin and Bros., Respondents.

Writ Appeal No. 625 of 1969 and Original Petn. No. 5201 of 1968, D/- 5-12-1969.

(A) Kerala Land Acquisition Act, 1961 (21 of 1962), Section 62 — Acquisition proceedings commenced under replaced Acts can be continued under the Act — Kerala Interpretation and General Clauses Act (7 of 1125), Sections 4, 23. 1968 Ker LJ 1 and 1969 Ker LJ 389, Overruled.

The land acquisition proceedings commenced either under the Travancore Land Acquisition Act (1089) or the Cochin Land Acquisition Act or the Central Land Acquisition Act (as amended by Madras Acts (21 of 1948 and (22 of 1953) (in force in Malabar area can be continued under the Kerala Act (21 of 1962) in view of Sections 4 and 23 of the Kerala Interpretation and General Clauses Act. 1968 Ker LJ 1 and 1969 Ker LJ 389, Overruled; ILR 1966 (2) Ker 631, Approved. (Para 5)

(B) Kerala Interpretation and General Clauses Act (7 of 1125), Sections 2 (2) and 23 — Word "Act" must mean any Act which Kerala Legislature has power to replace — Definition of "Act" so far as it excludes Central Act would be repugnant to subject and context of Section 23. (Para 8)

(C) Kerala Interpretation and General Clauses Act (7 of 1125), Section 23 — "Repeal" — Meaning — Includes supersession of one Act by another.

Whether what has happened is strictly speaking a repeal or not in the context of Section 23, the word "repeal" must be regarded as wide enough to include the supersession, at any rate the deliberate and con-

scious supersession of one Act by another Act. In the case of a replacement it does not matter what the replacing Act call the process by which the operation of the replaced Act is notionally determined. AIR 1961 Ker 154 and AIR 1967 SC 1541, Rel. on. (Para 10)

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State of Bombay 9, 11

(1896) 1896 AC 348 = 65 LJPC 26,

Attorney General for Ontario v.

Attorney General for the Dominion 12

In W. A. No. 625 of 1969

Govt. Pleader, for Appellant; Mathew

Muricken, for Respondents.

In O. P. No. 5201 of 1968

Joseph Augustine, for Petitioners; Govt.

Pleader, for Respondents.

RAMAN NAYAR, C. J.: The Kerala Land Acquisition Act, 1961 (Act 21 of 1962) which came into force on the 1st April, 1963, replaced the laws till then in force in this State regarding the acquisition of property, namely, the (Travancore) Land Acquisition Act, 1089 in force in what we might call the Travancore area, the (Cochin) Land Acquisition Act, 1070 in force in the Cochin area, and the (Central) Land Acquisition Act, 1894 (as amended by Madras Acts XXI of 1948 and XII of 1953) in force in the Malabar area. (We shall refer to the first mentioned Act as the Kerala Act; to the second as the Travancore Act; to the third as the Cochin Act; and to the last as the Central Act). Section 62 of the Kerala Act says that the Travancore and Cochin Acts are repealed; with regard to the Central Act it

says that that Act shall cease to apply to the Malabar area. The question in these cases is whether land acquisition proceedings commenced under the replaced enactments can be continued at all, whether under the replaced or the replacing enactment, or have to be begun afresh.

2. In *Gopinatha Pillai v. The State of Kerala*, 1969 Ker LJ 1 a single judge of this Court held that such proceedings could not be continued either under the replaced enactment or under the replacing enactment. That was with regard to a case where proceedings had been begun under the Travancore Act and were continued, at any rate purported to be continued, under the Kerala Act. On appeal—See *State of Kerala v Padmanabhan Asari Kunju*, 1969 Ker LJ 389, a division bench of this Court affirmed that the proceedings could not be continued under the replacing enactment, namely, the Kerala Act, but left open the question whether they could be continued under the replaced enactment, namely, the Travancore Act, although it appears to us that that question really fell to be decided having regard to the contention taken and repelled by the learned single judge that the further proceedings taken in that case though purportedly taken under the Kerala Act were in accord with the provisions of the Travancore Act under which they could have been continued, and should be regarded as having been really taken under that latter Act, the mistaken references to the provisions of the Kerala Act notwithstanding. However, in the earlier case of *Anthony v. State of Kerala*, ILR (1966) 2 Ker 631 which dealt with a case where proceedings were begun under the Cochin Act, a single judge of this Court had held that the proceedings could be continued under the provisions of the Kerala Act, although we should think that, having regard to the fact that this conclusion was reached by an application of Section 4 only of the (Kerala) Interpretation and General Clauses Act and not of Section 23 as well (Sections 6 and 24 respectively of the General Clauses Act, 1897) the decision should have been that they could be continued under the provisions of the Cochin Act.

3. It is because of these conflicting views that the present cases have come up before us—it would appear that ILR (1966) 2 Ker 631 was not taken to the notice of the judges who decided the later cases of 1968 Ker LJ 1 and 1969 Ker LJ 389.

4. It would be an unsatisfactory state of affairs, hardly in consonance with practical commonsense, or what one must presume to be the legislative intent, if proceedings commenced under the replaced enactments could not be continued either under those enactments or under the Kerala Act. The Kerala Act does not take away any rights or affect any of the safeguards conferred by the replaced enactments; and the petitioners in the cases before us have not been able to show

that the continuance of the proceedings (instead of their being begun afresh under the provisions of the Kerala Act) prejudices them in the least. Of course, like most persons whose land is being acquired they do not like the acquisition and would like to keep their land. That however, is a grievance against the very idea of compulsory acquisition which can hardly face a valid law for acquisition; and counsel have been frank enough to own that the petitioners are seeking to place every legal obstacle they possibly can in the way of an acquisition which they do not relish so as to delay if not to defeat it altogether. That is certainly not an object to be encouraged; and, that object apart, to require that the proceedings should be begun afresh would mean a purposeless duplication of work with consequent delay and unnecessary expense. That in times of rising prices or fall in the value of money like the present, the landowners will get higher compensation (with corresponding prejudice to the public purse) if proceedings are begun afresh is no more a relevant consideration than that in times of falling prices — and there were such times in living memory—the landowners would get lower compensation (with corresponding benefit to the public purse). If there be a prejudice at all it is a prejudice occasioned by the compulsory acquisition, not by the continuance of the proceedings begun under the replaced enactments.

5. In our view, sections 4 and 23 of the (Kerala) Interpretation and General Clauses Act meet the situation and allow of the proceedings being continued under the Kerala Act. Section 4 which applies as much to a repeal and re-enactment as to a mere repeal (see *State of Punjab v. Mohar Singh*, AIR 1955 SC 84 and *Baliah v. Rangachari*, AIR 1969 SC 701) preserves rights accrued under the repealed enactment, and, in the case of a mere repeal enables the prosecution of a proceeding in respect of any such right as if there had been no repeal. But, where the repeal is accompanied by a re-enactment, section 23 also applies, and, by providing that certain things done under the repealed Act shall be deemed to be done under the corresponding re-enacted provisions enables pending proceedings to be continued under the re-enacting Act. We are here more concerned with section 23 which reads:

“23. Continuation of orders, etc., issued under enactments repealed and re-enacted.—Where any Act is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme,

rule, form or bye-law made or issued under the provisions so re-enacted."

6. When a temporary Act is allowed to expire, or when the Legislature repeals an Act without re-enacting it, it means that the Legislature considers that the law in question is no longer necessary. Therefore, it can reasonably be assumed that the Legislature intends that the law should thereafter be regarded as non-existent although its previous operation in respect of matters and transactions past and closed is not to be affected. But, when an Act that was not intended as a purely temporary measure is repealed, it would be equally reasonable to assume, unless a different intention appears, that there was no intention to affect rights and liabilities already accrued or the remedies for their enforcement. That is the rule embodied in Section 4 of the (Kerala) Interpretation and General Clauses Act (Section 6 of the General Clauses Act, 1897) which, apart from saving the past operation of a repealed statute, saves also accrued rights and liabilities as also the remedies for their enforcement. But, what happens when an Act is repealed and re-enacted, in other words when an Act is replaced by another in substantially the same terms, is altogether different. It must be regarded as the intention of the Legislature (unless, of course, it expressly states the contrary) that the law should continue in force without interruption except to the extent that it has been modified. The intention is really to amend the replaced Act so as to conform with the replacing Act—the repeal and re-enactment is no more than a convenient device for achieving this object where the changes are numerous. (We are thinking only of an express and deliberate replacement—the presumption of an intention to merely amend might not be so readily available in the case of the unconscious displacement of one law by another of superior force). That being so, it should follow that the intention of the Legislature could only be that things done under the replaced Act should be deemed to have been done under the replacing Act and that proceedings commenced under the replaced Act should be continued under the replacing Act. Hence the rule of construction embodied in Section 23 of the (Kerala) Interpretation and General Clauses Act which can be displaced only by express provision to the contrary whereas that in Section 4 can be displaced by the mere appearance of a different intention. And it should be of no consequence by what name you call the process by which the operation of the replaced Act is notionally determined—we say notionally because, in truth, the replaced Act continues in force without interruption except to the extent that it has not been re-enacted—whether you call it a repeal, a cessation or a suspension.

7. We might perhaps mention that it is not disputed that the Kerala Act confers

jurisdiction on the very authorities as the replaced Acts did. Nor is it claimed that "a different intention appears" in the Kerala Act within the meaning of Section 4 of the (Kerala) Interpretation and General Clauses Act or that it "otherwise expressly provides" within the meaning of Section 23. And we might add that if that question arose we do not think we would have had much difficulty in holding that the right conferred on the appropriate Government by sub-sec. (3) of Section 6 of the Central Act to acquire the land concerned in manner thereafter appearing, in other words, for the amount of compensation fixed by the award, a right akin to a right of pre-emption or that conferred by an agreement to buy, is an accrued right.

8. This we think should suffice to surmount the two impediments which the petitioners herein would place in the way of practical good sense. The first impediment is founded on the definition of the word, "Act" in Section 2 of the (Kerala) Interpretation and General Clauses Act:

2. Definitions. — In this Act, and in all enactments now in force or passed after the commencement of this Act, unless there is anything repugnant in the subject or context—

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(3) Act. — "Act" shall mean a Proclamation or Act of Travancore or Cochin, an Act or Ordinance of Travancore-Cochin, an Act passed by the Legislature of the State of Kerala, an Ordinance promulgated by the Governor under Article 213 of the Constitution, or where with respect to the State of Travancore-Cochin or Kerala the power to make laws is vested in the President or other authority under sub-clause (a) of Clause (1) of Article 357 of the Constitution, any law made in exercise of such power.

It is pointed out that, while the Travancore and Cochin Acts are included in this definition of "Act", the Central Act is not, and that, therefore, Section 23 which opens with the words "Where any Act is repealed and re-enacted with or without modification" cannot apply to the repeal and re-enactment (assuming there was that) of the Central Act. But it could not possibly have been the intention of the Legislature that while proceedings begun under the Travancore and Cochin Acts could be continued under the Kerala Act, proceedings begun under the Central Act could not be so continued but must be begun afresh. This is a result which in its practical consequences could well be characterised as absurd, and, therefore, we think that, in the context of Section 23 of the (Kerala) Interpretation and General Clauses Act the word, "Act" must be read as meaning any Act which the Kerala Legislature has the power to replace. The definition given in Section 2 (3), in so far as it excludes the Central Act would be repugnant to the subject and context of Section 23.

9. The other impediment is based on the observation in *Zaverbhai v. State of Bombay*, AIR 1954 SC 752 at p. 756 to the effect that a State Legislature has not the power to repeal an existing law on a concurrent subject and that Parliament itself is given this power only by the proviso to Clause (2) of Article 254 of the Constitution. Therefore, it is said, that, whatever Section 62 of the Kerala Act might say, none of the Acts which it replaced was in fact repealed, all of them being existing laws in the concurrent field. At best it can only be said that the assent of the President having been given to the Kerala Act, it prevails over the Acts it replaced by virtue of the provisions of Clause (2) of Article 254 of the Constitution. The replaced Acts might have ceased to be in force—that indeed is what Section 62 of the Kerala Act says with reference to the Central Act—but they have only been eclipsed or suspended. They have not been repealed within the meaning of Section 23 of the (Kerala) Interpretation and General Clauses Act.

10. This contention, we think, can be met in the same way as we have met the first. Whether what has happened is strictly speaking a repeal or not, in the context of Section 23 of the (Kerala) Interpretation and General Clauses Act the word, "repeal" must be regarded as wide enough to include the supersession, at any rate the deliberate and conscious supersession, of one Act by another Act—as we have already remarked, in the case of a replacement, it does not matter what you (or the replacing Act) call the process by which the operation of the replaced Act is notionally determined. Authority for this proposition can be found in *State of Orissa v. M. A. Tulloch and Co.*, AIR 1964 SC 1284 and in *Ekambarappa v. E. P. T. Officer*, AIR 1967 SC 1541 which lay down that when one Act ceases to have effect by reason of the enactment of another, the former Act is repealed within the meaning of Section 6 of the General Clauses Act, 1897. If that be a repeal within the meaning of Section 6 of that Act it should a fortiori be a repeal within the meaning of Section 24, in other words, within the meaning of Section 23 of the (Kerala) Interpretation and General Clauses Act.

11. For the "Collector" it is contended that the observation in AIR 1954 SC 752 is but a casual observation and our attention has been drawn to what has been said in *Saraswathi Amma v. Bhaskara Menon*, 1960 Ker LT 1227 = (AIR 1961 Ker 151) and in *Zoolficar Ali v. Official Trustee*, (1967) 69 Bom LR 326. Also to the commentary by Seervai.* It is said that the power to amend or repeal a law stems from the power to make; indeed an amendment or a repeal is itself a law. That power is conferred on

the Legislatures in India not by Article 25 of the Constitution but by Article 246 read with Article 245. Article 254 only provides for a reconciliation of conflicting laws made by Parliament and by a State Legislature in the concurrent field, and the proviso to Clause (2) of the Article presupposes the existence of a power in Parliament to repeal any law in the concurrent field and only says, by way of abundant caution, that the power remains notwithstanding that a State law in that field has received the assent of the President and therefore prevails over an existing law or a law previously made by the Parliament regarding the same matter. Where two Legislatures are given concurrent powers regarding a matter, each has the power to repeal a law made by the other. Art. 254 only regulates the consequences of the exercise of this power in order to avoid manifestly undesirable results. And, so far as existing laws, including existing laws in the concurrent field, are concerned, Art. 37 speaks of their supersession by a competent Legislature—the State Legislature would be a competent Legislature—as a repeal.

12. So runs the argument. It is also pointed out that the observation in question was based on an observation by Lord Watson in *Attorney-General for Ontario v. Attorney General for the Dominion*, 1890 AC 348 made, it is said, not in the context of two Legislatures exercising concurrent powers but of one Legislature exercising power in respect of a matter within the province of another.

13. There is one other observation of the Supreme Court on which some reliance has been placed by the petitioners. That occurs in *Harish Chandra v. State of Madhya Pradesh*, AIR 1965 SC 932 at p. 938 and seems to be to the effect that the principle underlying Section 24 of the General Clauses Act cannot be extended to cases where that section does not in terms apply. This it is contended on behalf of the "Collector" was made not in the context of a Legislature expressly and deliberately replacing an Act by another similar in character, but in the context of a subordinate legislation made by one authority being displaced by a subordinate legislation made by another. The observation must be confined to its context; if it is given a wider application it would be contrary to what was held in AIR 1964 SC 1284.

14. In the view we have taken regarding the ambit of the word "repeal" in Section 23 of the (Kerala) Interpretation and General Clauses Act, neither observation of the Supreme Court affects our conclusion. The words, "repeal and re-enactment" are wide enough to cover what has happened here and we are applying the section itself, not extending the principle underlying it. Therefore we do not feel called upon to consider whether the observations in question are, as it is contended they are, mere casual observations not laying down the law.

*Constitutional law of India by Seervai 1968 Edn. Paragraphs 5.15 & 5.16 and Page 5-7.

15. In Writ Appeal No. 625 of 1969 the acquisition was on behalf of a registered society (and therefore a company within the meaning of the Central Act as also of the Kerala Act) and was for the purpose of running an educational institution. The proceedings were commenced under the Central Act, and, in view of what we have said, we hold that they can be continued, as was done, under the provisions of the Kerala Act. However, the learned single Judge who heard the writ petition brought by the owner of the land (a person who, we might observe, brought it in the course of the proceedings for acquisition, encouraged by the circumstance that similar petitions brought by other persons had been admitted and stay of proceedings granted) following the Division Bench ruling in 1969 Ker LJ 389 as he was bound to do, allowed the petition and quashed the proceedings purported to have been taken under the Kerala Act. In the light of our holding we allow this appeal by the "Collector" and dismiss the writ petition with costs both here and before the Single Judge.

16. We might perhaps add that the other contentions raised before the learned Single Judge, namely, that Section 17 of the Central Act was wrongly applied and that the consent under Section 40 (1) was wrongly given in the absence of a report by the Collector under Section 5-A, have been rightly repelled by the learned Single Judge in the light of the provisions of Section 17 as amended by Madras Act XXI of 1948 and in the light of the provisions of Section 40 itself. Indeed nothing has been said before us to suggest that he was wrong.

17. In O. P. No. 5201 of 1968, the land acquisition proceedings were commenced under the Cochin Act, and, after its replacement by the Kerala Act, have been continued under the Kerala Act. They have been rightly so continued and we dismiss this petition but make no order as to costs.

18. The petitioner in this petition has the complaint that orders passed by this Court in a previous writ petition filed by him have been disobeyed by the respondents. But a writ petition is not a means of enforcing previous orders of the Court or of dealing with such disobedience.

Order accordingly.

AIR 1970 KERALA 305 (V 57 C 50)

FULL BENCH

P. T. RAMAN NAYAR, C. J., P. GOVINDAN NAIR AND K. K. MATHEW, JJ.

K. Gopalan Thanthri, Appellant v. Ittira Kelan and others, Respondents.

Appeal Suit No. 237 of 1964, D/- 9-12-1969, from judgment of High Court of Kerala in S. A. No. 181 of 1960.

HN/HN/D798/70/VBB/C

1970 Ker./20 XII G—32

Limitation Act (1963), Article 61 — Invalid transfer by Karnavan of equity of redemption in tarwad property to mortgagee in possession — Possession by mortgagee becomes adverse to tarwad — Suit for redemption barred after 12 years — (Travancore-Ezhava Act (3 of 1100 M. E.) S. 21) — (Travancore Nayar Act (2 of 1100 M. E.) Section 25).

Per Full Bench:

The sale of tarwad property by the karnavan of the tarwad to a mortgagee in possession alters the character of the latter's possession so as to include within its scope of interest of the mortgagor tarwad with the result that, (notwithstanding that the sale was an invalid sale not binding on the tarwad), a suit for redemption would be barred after twelve years of such altered possession. AIR 1962 Ker 164 (FB), Approved; AIR 1963 SC 70, Distinguished. Case law Ref. (Para 2)

Per Raman Nayar, C. J. and P. Govindan Nair, J.:—

It has always been recognized that the karnavan of a tarwad effectively and completely represents the tarwad in dealings with the outside world. When he deals with tarwad property it is as if all the members of the tarwad (all being sui juris) had joined in the transaction. Statutes like Section 21 of the Travancore-Ezhava Act and Section 25 of the Travancore Nayar Act recognize this, for they pre-suppose that the karnavan, and (short of every member of the tarwad joining the transaction, all being sui juris) the karnavan alone, has the capacity to deal with the tarwad property. These statutes only place curbs on the exercise of this power by the karnavan but do not affect his inherent capacity. If he breaks the rules, he acts in excess of authority and not with lack of inherent capacity that is why the transaction he so effects is voidable and not void. (Para 4)

As the karnavan has the capacity to represent the tarwad in its dealings with the outside world, it follows that he has the capacity to consent to a possessory mortgagee so changing the character of his possession as to comprise within its scope the equity of redemption as well, i.e., to put him in possession of the equity of redemption. And, if the transaction by which this is done is not effective to convey title to the mortgagee, then the possession of the equity of redemption by the mortgagee becomes adverse to the tarwad. Case law Ref. (Para 6)

Per Mathew, J., (agreeing):—

Whatever might be the relevancy of the concept of adverse possession of equity of redemption as an intangible right in the case of a third party claiming adversely to the mortgagor by receiving rent or michavaram from the mortgagee in possession under a claim of right, it is doubtful whether a mortgagee in possession to whom an invalid sale of the property was executed by the mortgagor, should show that he has been in adverse possession of the intangible right of the

equity of redemption vesting in the mortgagor as a separate right in order to prescribe for title to the full interest of the property. What happens is only that the mortgagee being in exclusive physical control of the property with the limited animus to possess as a mortgagee enlarges his animus to possess the full interest in the property with the consent of the mortgagor, implied in the agreement to terminate the mortgage, and to hold the property as owner. Case law Ref. (Para 12)

Cases Referred: Chronological Paras

- (1964) AIR 1964 Andh Pra 21 (V 51) =
(1963) 1 Andh LT 274, Venkata-
subbamma v. Subbaya 10
(1963) AIR 1963 SC 70 (V 50) =
(1963) 3 SCR 229, Padma Vithoba
v. Mohd. Multani 1, 2, 8
(1962) AIR 1962 Ker 164 (V 49) =
1962 Ker LT 61 (FB), Mathew v.
Ayyappankutty 1, 2, 12
(1959) AIR 1959 Raj 218 (V 46) =
ILR (1958) 8 Raj 572, Bhanwar
Lal v. Dhulilal Lal 10
(1939) AIR 1939 Bom 31 (V 26) =
ILR (1939) Bom 71, Tukaram v.
Atmaram 10
(1937) AIR 1937 Pat 178 (V 24) =
ILR 15 Pat 772, Pheku Mian v.
Syed Ali 10
(1928) AIR 1928 All 726 (V 15) =
ILR 50 All 986 (FB), Sohan Lal v.
Moban Lal 10, 11
(1921) AIR 1921 Mad 82 (V 8) =
ILR 44 Mad 253, Kandasami Pillai
v. Chinnabba 8
(1914) AIR 1914 Mad 489 (V 1) =
ILR 37 Mad 423, Ariyaputhira v.
Muthukumaraswami 8
(1905) ILR 32 Cal 296 = 32 Ind App
23 (PC), Khairajmal v. Daim 8, 8
(1901) ILR 21 Mad 449, Ramasami
Pattar v. Chinnan Asari 10

P. C. Chacko, for Appellant; M/s. C. K. Sivanankara Panicker and P. G. P. Panicker, for Respondents.

RAMAN NAYAR, C. J. (on behalf of himself and P. Govindan Nair, J.):— In Mathew v. Ayyappankutty, 1962 Ker LT 61 = (AIR 1962 Ker 164) (FB), a Full Bench of this Court held that the sale of tarwad property by the karnavan of the tarwad to a mortgagee in possession alters the character of the latter's possession so as to include within its scope the interest of the mortgagor tarwad with the result that, notwithstanding that the sale was an invalid sale not binding on the tarwad, a suit for redemption would be barred after twelve years of such altered possession. That is precisely the case here. It was in 1926 that the karnavan of the tarwad to which the property in suit belonged sold the property to the 1st defendant mortgagee who was in possession. The sale was invalid for want of the written consent of all the other adult members of the tarwad as required by Section 21 of the Travancore Ezhava Act by which the tarwad was gov-

erned and which had come into force a few months before the sale — only the senk anandaravan had given his written consent by subscribing to the sale deed and they were admittedly two other adult members of the tarwad at the time. It was only in 1952 twenty five years later, that the plaintiff brought his suit for redemption on the strength of a purchase a few months earlier from the then surviving members of the tarwad.

It is not disputed that if 1962 Ker L 61 = (AIR 1962 Ker 164) (FB) was rightly decided, the learned Single Judge who heard the second appeal from which this appeal has been preferred was right in setting aside the decree for redemption passed by the lower appellate Court and restoring the decree of the trial Court dismissing the suit. But the Division Bench which heard this appeal in the first instance thought that the decision in 1962 Ker LT 61 = (AIR 1962 Ker 164) (FB) required reconsideration in the light of the decision in Padma Vithoba v. Mohd. Multani, AIR 1963 SC 70 and held in that view, referred the case to a Full Bench. That is how the case has come up before us.

2. With great respect we think that 1962 Ker LT 61 = (AIR 1962 Ker 164) (FB) was rightly decided and we are able to see nothing in AIR 1963 SC 70 (which has been distinguished by the learned Single Judge) that calls for a reconsideration thereof.

3. When an interest is carved out of property, as, for example, by the grant of a mortgage or a lease or other restricted interest therein, two distinct and separate interests come into being, each by itself a distinct subject of property which can be the subject-matter of independent possession. (See Khairajmal v. Daim, (1905) ILR 32 Cal 296 at pp. 311 and 312 (PC)). True, in the case of a possessory mortgage, the mortgagee is in possession of the tangible property. But that means no more than that he is in possession of the mortgage interest; the mortgagor owner continues in possession of what remains after the transfer effected by the mortgage, namely, what is usually and conveniently called the equity of redemption just as the landlord continues in possession of the reversion notwithstanding that the tenant is in possession of the tangible property.

That is why a person who obtains possession of tangible property under an invalid lease or mortgage prescribes only for a tenant's or mortgagee's title as the case may be. He is regarded as in possession of only that interest in the property to which his animus is directed — the owner is regarded as in possession of the rest, namely, the reversion, or the equity of redemption; and that again is why, generally speaking, a trespasser on tangible property is regarded as in possession of only that interest therein that the person entitled to present possession thereof has — a person trespassing on pro-

perty in hands of the owner of a restricted interest therein entitling him to present possession thereof, is regarded as in possession only of that restricted interest and not of the whole. He prescribes only for the restricted interest and not for full ownership.

At the same time, it is settled law — AIR 1963 SC 70 is itself sufficient authority for the proposition — that where, by a sale or other transaction, the mortgagor consents to the possessory mortgagee being in possession not merely of the mortgage interest but also of the equity of redemption, he, in effect, delivers possession of the equity of redemption to the mortgagee so that thereafter the possession of the tangible property by the mortgagee involves possession not merely of the mortgage interest but of the equity of redemption as well. And, if the transaction does not effect a valid transfer of title to the equity of redemption, the mortgagee's possession thereof would be adverse to the mortgagor and, by remaining in possession beyond the statutory period, he would prescribe title thereto. The same result would follow in the case of a landlord selling the reversion to the tenant in possession of the tangible property.

What the Supreme Court emphasized in AIR 1963 SC 70 was that the consent necessary to put the possessory mortgagee in possession of the equity of redemption as well so as to prescribe for title thereto, must be by a person competent to give consent, not by a person like a minor who has not the capacity to do so. The question then is not so much whether the transaction by which the consent is given is void or voidable — even a void transaction like a written unregistered sale can put the mortgagee in adverse possession of the equity of redemption: nor even whether the person effecting the transaction had the capacity to do so; but whether he had the capacity to give consent.

4. It has always been recognized that the karnavan of a tarwad effectively and completely represents the tarwad in dealings with the outside world. When he deals with tarwad property it is as if all the members of the tarwad (all being *sui juris*) had joined in the transaction. Statutes like section 21 of the Travancore-Ezhava Act and Section 25 of the Travancore Nayar Act recognize this, for they pre-suppose that the karnavan, and (short of every member of the tarwad joining the transaction, all being *sui juris*) the karnavan alone, has the capacity to deal with the tarwad property. These statutes only place curbs on the exercise of this power by the karnavan but do not affect his inherent capacity. If he breaks the rules, he acts in excess of authority, not with lack of inherent capacity — that is why the transaction he so effects is only voidable and not void.

5. This much we think is clear from a plain reading of Section 21 of the Travancore-Ezhava Act:

“21. Sale or mortgage with possession or lease for more than twelve years. — Except for consideration and Tarwad necessity and with the written consent of all the major members of the tarwad, no karnavan or other managing member shall sell Tarwad immovable property, or mortgage it with possession for a period of more than twelve years, or lease it for a period of more than twelve years”.

As we have said it pre-supposes that the karnavan has the capacity to sell the property of the tarwad.

6. If the karnavan has the capacity to represent the tarwad in its dealings with the outside world, it follows that he has the capacity to consent to a possessory mortgagee so changing the character of his possession as to comprise within its scope the equity of redemption as well, in other words, to put him in possession of the equity of redemption. And, if the transaction by which this is done is not effective to convey title to the mortgagee, then the possession of the equity of redemption by the mortgagee becomes adverse to the tarwad.

7. We affirm the decision of the learned Single Judge and dismiss this appeal by the plaintiff with costs.

MATHEW, J.:— 8. In (1905) ILR 32 Cal 296 (PC) the Judicial Committee of the Privy Council observed:

“Their Lordships are satisfied that the possession has been that of the mortgagee throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem.”

On the basis of these observations the High Court of Madras in *Ariyaputhira v. Muthukomaraswami*, ILR 37 Mad 423 = (AIR 1914 Mad 489), held that where a person's possession commenced as an usufructuary mortgagee, and subsequently the mortgagor sold the equity of redemption to him, but the sale proved abortive, (for want of registration) and the mortgagee thereafter continued in possession as absolute owner under the purported sale, the possession of the mortgagee must be referred to his possession as mortgagee and cannot in law be deemed as possession as owner adverse to the mortgagor. Sadasiva Iyer, J., on behalf of the Bench said:

“If the original mortgagee continued to hold possession as mortgagee owing to the alleged sale (of the equity of redemption) being invalid and ineffective to convey to him the ownership in the equity of redemption, he cannot by merely asserting possession as owner under the in-

valid sale convert his possession as mortgagee into possession as owner even granting that the mortgagor knew and acquiesced in his assertion."

The Privy Council decision in *Khia Rajmal v. Daim*, (1905) ILR 32 Cal 296 (PC) does not seem to extend beyond this, namely, that a mortgagee cannot by his adverse assertion acquire title to the property mortgaged even if the mortgagor knowing such assertion acquiesced in it unless such acquiescence amounts in some way or other to a release of the equity of redemption. The Privy Council, no doubt, said that mere acquiescence by the mortgagor would not be enough to convert the possession of a mortgagee as mortgagee into possession as owner. But where a change in the character of possession of the mortgagee is brought about by an agreement between the mortgagor and the mortgagee the case would be different. Whereas neither assertion by itself nor assertion with acquiescence is sufficient to alter the nature of the mortgagee's possession, the consent of the mortgagor implied in an agreement between the mortgagor and the mortgagee that the mortgagee may hold the property as owner would be sufficient to alter the character of the possession of the mortgagee. In other words, the mortgagor, if sui juris, will be competent to agree to treat the mortgage as terminated and the mortgagee's possession thereafter as that of an owner; in such a case the possession of the mortgagee would become adverse to the mortgagor.

The decision in ILR 37 Mad 423 = (AIR 1914 Mad 489) has been dissented from in *Kandasani Pillai v. Chinnabba*, ILR 44 Mad 253 = (AIR 1921 Mad 82). The decision of the Supreme Court in AIR 1963 SC 70 is clear that it is by virtue of the change in the animus of the mortgagee as a consequence of the consent of the mortgagor implied in the purported sale of the property, that the possession of the mortgagee becomes adverse.

9. The interest which resides in the mortgagor before foreclosure is generally described as equity of redemption, an expression borrowed from the English law. The expression would suggest that the interest of the mortgagor is a bare equity, something different from what we call ownership. But we know that this is not so, for, the ownership continues with the mortgagor notwithstanding the mortgage, the mortgagee acquiring by virtue of the mortgage only a *ius in re aliena*. The introduction of the expression into our system was regretted by Dr. Rasbehari Ghose. He said:

"I have been induced to make these observations, not because I have any wish to be hypercritical, but simply because I know of instances in which the whole discussion has been materially coloured by notions, which would scarcely have suggested themselves to any lawyer, if the argument had not been conducted in the technical language

of the English law". (See *Law of Mortgages in India* by R. Ghose, 5th Edn. Vol. I, page 210.)

The right to redeem in Section 60 of the Transfer of Property Act is not the same thing as 'equity of redemption'. In India a host of people besides the mortgagor can redeem. (See Section 91 of the Transfer of Property Act). When a property is mortgaged for a second time by the mortgagor some people would say that the equity of redemption has been mortgaged. This may be a proper way of talking under the English system of the law of mortgage, but is not so in this country. It is the property and not the 'right to redeem' that is mortgaged. The 'property subject to a mortgage' and the 'right to redeem' are not really the same thing. The latter is the right to get back the property on repayment of the mortgage money, and the former, is the property itself, with a liability to discharge a prior mortgage. If what the mortgagor retains after the creation of a mortgage, be the property itself but subject to a liability to make good a loan, it is clear that the mortgagor would be entitled to transfer what he retains, viz., the property. If the ownership remains with the mortgagor, why speak of his possessing merely an equity of redemption?

10. Ownership denotes the relation between a person and an object forming the subject-matter of his ownership. It consists of a complex of rights all of which are rights in rem being good against the whole world and not merely against specific persons. Pollock in his 'First Book of Jurisprudence,' 5th Edn., at page 179 says:

"We must not suppose that all the powers of an owner need be exercisable at once or immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment and suspend his power of disposal, provided that he reserves for himself or his successors the right of ultimately reclaiming the thing and being restored to his power."

Salmond in his *Book on Jurisprudence*, 12th Edn., at page 250 says:

"Nevertheless to speak as if what is owned is always a right runs counter to law and legal usage. It is natural to talk of owning land and chattels, and this usage serves to mark the special relationship existing in such cases between the owner and the material object owned."

(See also 'Elements of Jurisprudence', 13th Edn., page 207 by Holland, and 'Elements of Law', 6th Edn., page 159 by Markby). If the ownership remains with the mortgagor, and what he owns is a thing in law, I am not sure whether there is any justification in treating the thing as intangible. In the Full Bench decision in *Sohan Lal v. Mohan Lal*, ILR 50 All 956 = (AIR 1928 All 726) (FB), Mukerji, J., observed:

"In the case of a simple mortgage the mortgagor retains possession; in the case of a usufructuary mortgage he parts with possession. In either case he is the mortgagor and, one would expect, his interest is the same. We cannot therefore say that in the case of a simple mortgage, the mortgagor being in possession, his interest is a tangible immovable property, while in the case of an usufructuary mortgage the mortgagor's interest is an intangible property, because he is out of possession. Yet, in some cases it has been decided that such is the case. In my opinion, on principle, there can be no distinction made between the two cases of simple and usufructuary mortgages."

In the same case Kendall, J., after referring to the following observations of the Madras High Court in *Ramaswami Pattar v. Chinnan Asari*, (1901) ILR 24 Mad 449,

"The equity of redemption in a usufructuary mortgage is only an intangible thing like a reversion and it can be transferred by sale only by a registered instrument and not by delivery of the property" observed:

"This view is supported by a reference to Williams on 'Real Property'. With all respect to the learned Judges who expressed this opinion, I would remark that in English law "what is generally understood by the term mortgage is a conveyance of land or other property as security for the payment of money", and the mortgagee has been held to be in law the owner of the mortgaged property".

Sulaiman, Ag. C. J., took a different view. The majority view has been followed in *Pheku Mian v. Syed Ali*, ILR 15 Pat 772 = (AIR 1937 Pat 178), *Venkatasubamma v. Subbayya*, AIR 1964 Andh Pra 21, *Tukaram v. Atmaram*, AIR 1939 Bom 31 and *Bhanwarlal v. Dhulilal*, ILR (1958) 8 Raj 572 = (AIR 1959 Raj 218).

II. The possession of the property mortgaged is delivered or contracted to be delivered to the mortgagee in an usufructuary mortgage. (See Section 58 of the Transfer of Property Act). It is the possession of the property mortgaged that is delivered or contracted to be delivered, and not the possession of any restricted interest in the property. The mortgagee gets the property under his exclusive physical control. But his animus is to possess the property not as full owner but only for the purpose of taking the usufructs and appropriating them in accordance with the stipulations in the mortgage deed. In other words, although the mortgagee has exclusive physical control of the property, his animus is to possess it only as mortgagee. The mortgagor having lost possession of the property by the mortgage, when he later on sells the equity of redemption to the mortgagee, what he really sells is the property. If the sale is ineffective to convey the property for any reason other than want of capa-

city of the mortgagor, the consent of the mortgagor implied in the agreement of sale which precedes the sale will terminate the relationship of mortgagor and mortgagee, and operate as a permission to the mortgagee to hold the property as owner.

The principle is analogous to the one underlying the concept of *traditio brevi manu*, that is, by virtue of the agreement, the mortgagee who is in physical control of the property with a limited animus to possess it as mortgagee is permitted to hold it as owner. What happens is only a change in the animus of the mortgagee by virtue of the consent implied in the purported sale. If by the agreement, the mortgagee's right in the property came to an end, the mortgagor would become entitled to possession at once, and if the mortgagor does not enter into possession, the mortgagee's possession would become adverse to the mortgagor. Sulaiman, Ag. C. J., said in ILR 50 All 986 = (AIR 1928 All 726) (FB).

"The case, however, is different where a change in the character of the possession is brought about by an agreement between the parties or with their express consent, as distinguished from a mere acquiescence. I do not see why, if both parties agree and intend that from a particular date the possession of the mortgagee over the property should cease to be that of a mortgagee and be adverse as against the mortgagor, such a change cannot be recognised or be effectual."

It is fictitious to talk of a delivery of possession of an intangible right like the equity of redemption. Incorporeal possession of a right by a person other than the owner of the right means the *de facto* exercise by the person of the *de jure* right inhering in the owner. In the case of coporeal possession, one must actually enjoy or exercise the right in order to possess it.

"But there is a sense in which possession of a right necessarily involves the exercise of the right in question. In this sense I can be said to possess a right where I exercise a claim as if it were a right. There may be no right in reality; and when there is a right, it may be vested in some other person, and not in the possessor. If I possess a way over another's land, it may or may not be a right of way; and even if it is a right of way, it may be owned by some else, though possessed by me." (See 'Salmond on Jurisprudence', 12th Edn., pages 291, 292.)

12. Whatever might be the relevancy of the concept of adverse possession of equity of redemption as an intangible right in the case of a third party claiming adversely to the mortgagor by receiving rent or *michayaram* from the mortgagee in possession under a claim of right, I am not sure that a mortgagee in possession to whom an invalid sale of the property was executed by the mortgagor, should show that he has been in adverse possession of the intangible right of the equity of redemption vesting in the mortga-

gor as a separate right in order to prescribe for title to the full interest of the property. I think, what happens is only that the mortgagee gains in exclusive physical control of the property with the limited animus to possess as a mortgagee enlarges his animus to possess the full interest in the property with the consent of the mortgagor, implied in the agreement to terminate the mortgage, and to hold the property as owner.

I agree with My Lord the Chief Justice that 1962 Ker LT 61 = (AIR 1962 Ker 164) (FB) was correctly decided, and would dismiss the appeal with costs.

Appeal dismissed.

AIR 1970 KERALA 310 (V 57 C 51)

M MADHAVAN NAIR, J.

Thiruvanchan Sankaran, Appellant v. Kunjipillai Amma Gouri Amma and others, Respondents.

Second Appeal No. 280 of 1966, D/- 16-1-1970

Evidence Act (1872), Section 114 — Presumption that possession goes with title — Applies to all kinds of land.

The presumption that possession goes with title is not limited to particular kinds of cases where proof of actual possession is impossible on account of the nature of land such as boundary land, forest land or submerged land. The presumption applies to all kinds of land and where the plaintiff proved his title but not any act of possession and the defendant did not prove possession except at some intervals within 12 years of suit, the presumption that possession follows title will come into play. (1873) 20 WR 25 (PC) & AIR 1958 SC 434 & 1962 Ker LT 577, Relied on; 1966 Ker LT 86 & 1966 Ker LT 93, Held no longer good law. (Paras 2, 6)

Cases Referred:	Chronological	Paras
(1966) 1966 Ker LT 86 = ILR (1966) 1 Ker 653, Pennamma Vaidy v. Achuthan Unni		7
(1966) 1966 Ker LT 93 = 1966 Ker LR 183, Varkey v. Joseph		7
(1962) 1962 Ker LT 577 = ILR (1962) 2 Ker 456, Vaidhyathanaswamy v. Lakshmi Amma		2, 7
(1958) AIR 1958 SC 434 (V 45) = 1958 SCR 1102, Kashi Bai v. Sudha Rani Ghose		5, 7
(1948) AIR 1948 PC 76 (V 35) = 1948 All LJ 221, Hafiz Mohammed Fateh Nasib v. Sir Swarnup Chand Hukum Chand		7
(1934) AIR 1934 PC 77 (V 21) = 61 Ind App 50, Mt. Alla Rakhi v. Shah Mohammad Abdur Rahim		7
(1873) 20 WR 25 = 14 Moo Ind App 203 (PC), Runjeet Ram Panday v. Goburdhun Ram Panday		8

S. Bhoothalinga Iyer, for Appellant.

JUDGMENT:— This appeal is in a suit for recovery of landed property with incidental reliefs. The Munsif dismissed the suit finding the plaintiff to have failed to prove possession with herself or her predecessor within 12 years of the suit. The Subordinate Judge, on appeal, decreed the suit holding her to have given sufficient evidence to show her possession within 12 years prior to the suit. Hence this second appeal by the 1st defendant.

2. Though the finding of the Subordinate Judge that "there is sufficient evidence to show that the plaintiff has been in possession within 12 years prior to the date of the suit" was sufficient for decreeing the suit, he has cited Vaidhyathanaswamy v. Lakshmi Amma, 1962 Ker LT 577 and observed "if the oral evidence on both sides is to be treated as equally unsatisfactory, the case should have been decided on the basis of the presumption arising from title". Counsel for appellant challenged that proposition and canvassed its reconsideration. Counsel is not prepared to deny existence of a legal presumption of possession going along with title, but urges that such presumption would arise only in cases where proof of actual possession is impossible on account of the nature of the property as a forest land or a submerged land. To me it appears that if there exists a presumption of law that possession goes with title it must apply to all kinds of land. That legal presumption cannot be limited to lands of particular kinds any more than the legal presumption of paternity under Section 112, Evidence Act, can be limited to people of particular communities.

3. The evidence of a legal presumption that possession goes along with title cannot now be seriously doubted. It was ruled by the Judicial Committee of the Privy Council as early as in 1873 in Runjeet Ram Panday v. Goburdhun Ram Panday, (1873) 20 WR 25 at p. 30 (PC).

"Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary;

4. The function of a presumption in law is stated in Salmond on Jurisprudence, 12th Edn., page 73, thus:

"This discordance between law and fact may come about in more ways than one. Its most frequent cause is the establishment of legal presumptions, whereby one fact is recognised by law as sufficient proof of another fact, whether it is in truth sufficient for that purpose or not. Such legal presumptions — Presumptiones juris — are of two kinds, being either conclusive or rebuttable. A presumption of the first kind, sometimes called a praesumptiones juris et de jure, constrains the Courts to infer the existence of

one fact from the existence of another, even though this inference could be proved to be false. A presumption of the second kind requires the Courts to draw such an inference even though there is no sufficient evidence to support it, provided only that there is no sufficient evidence to establish the contrary inference."

Proof of title is the condition when only the presumption of possession can come to play and when it thus comes to play it requires the Court to find possession with the legal owner unless there is sufficient evidence before it to find contrariwise. It follows that if neither party has adduced any evidence as to possession, then the presumption stands uncontroverted and must govern decision on possession.

5. The above proposition appears well affirmed in the decision of the Supreme Court in *Kashi Bai v. Sudha Rani Ghose*, AIR 1958 SC 434, which concerned a suit for recovery of landed property after fixation of intermediate boundary where there was no proof of the plaintiff's possession, and all the evidence was that in the period 1917 to 1945 the defendant, the neighbouring owner, had been in possession and enjoyment of the land, by working a coal mine therein, in the years 1917/1918, 1923 to 1926, 1931 to 1933, 1939 to 1944 to date of suit in 1945. Title to the land was found with the plaintiff. The Supreme Court observed that during the intervals that the defendant did not show physical possession with himself, possession must be held to have reverted to the owner, and therefore the plaintiff has to succeed. The facts of the case and the inference drawn thereon, which are material for understanding the decision, are at paragraphs 4 and 7 of the judgment, which may be quoted with advantage here.

"(4) On 24th March, 1945 Brojendra Nath Ghose, Vishwa Nath Prasad and Nagendra Nath Bose respondents 1-3 as plaintiffs 1-3 brought a suit (Suit No. 16 of 1945) against Sreemathi Kashi Bai, defendant 1, now appellant and against Manilal Becharlal Sengvi defendant 2 now respondent 10 for fixation of the intermediate boundary and for possession of the area trespassed upon by the defendants and for compensation for coal illegally removed by the latter and also for an injunction. They alleged that the defendants had wrongfully taken possession of the area in dispute shown in the map attached to the plaint and had illegally removed coal from their mine. The defendants in their written statement of 29th June, 1945, denied the allegations made by the plaintiffs. They pleaded that the area in dispute was acquired by Nanji Khongarji and Lira Raja and had been worked by them and they had been in sole, exclusive, uninterrupted and undisturbed possession of the area openly to the knowledge of the plaintiffs in that suit and had therefore acquired title by adverse possession.

The claim of ownership which they had set up as a result of acquisition from Bennett and Bellwood was negatived by the Courts below and is no longer in dispute before us, the sole point that survives being one of adverse possession.

(7) On behalf of the appellant the learned Attorney-General submitted that the carrying on of the mining operations in the area in dispute even though intermittent as found by the Courts below could only lead to one inference that the possession of the area as well as of the mine was of the appellant and as she had prescribed for the requisite period of 12 years, her possession had matured into ownership by adverse possession. In our opinion the operations carried on by the appellant were inconsistent with the continuous, open and hostile possession or with the assertion of hostile title for the prescribed period of 12 years necessary to constitute adverse possession. It was contended that for the purpose of adverse possession in regard to a coal mine it was not necessary that it should have been worked for 12 years continuously and it was sufficient if the appellant had carried on mining operations for a period of 12 years even with long stoppages as in the instant case. But we are unable to accept this contention. Even though it may not be necessary for the purpose of establishing adverse possession over a coal mining area to carry on mining operation continuously for a period of 12 years, continuous possession of the mining area and the mine would be a necessary ingredient to establish adverse possession. What has been proved by the appellant is that the two inclines opened by Bennett were worked in 1917 or 1918 by the predecessor in interest of the appellant, there were no mining operations till 1923 when they were restarted and were continued till 1926. The operations ceased in 1926 and were recommenced in 1931 and carried on till 1933 when they ceased again till 1939 and whether they were carried on in 1939 or not is not quite clear but there were no operations from 1939 to 1944 when they were recommenced by the appellant. During the period when there were no mining operations no kind of possession of the appellant has been proved and thus the presumption of law is not rebutted that during the period when the operations had ceased to be carried on the possession would revert to the true owner."

The above dictum shows clearly that, when the plaintiff has proved his title but has not proved any act of possession at any time within 12 years of the suit, and the defendant has not proved possession with himself except at some intervals within 12 years of the suit, the presumption that possession follows title comes into play in aid of the titleholder. It is as if the question is not whether the plaintiff who has proved his title has proved his possession also, but whether the

defendant had proved possession with himself for all the 12 years preceding the suit. In other words, the presumption acts as prima facie proof of possession of the person who has proved title to immovable property.

6. I am afraid that the contention that the presumption applies only to cases of impossibility of actual possession as with forests or submerged lands involves a fallacy. Law never insists or expects an impossible thing to be done. If, on account of the nature of the property, possession cannot be proved, it is too much to say that law expects any proof of actual possession, as would be the case when the presumption is drawn and onus is cast on the contestant to rebut it. It follows that in the case of such properties, possession is irrelevant and rights have to be adjudged only on the basis of title.

7. Counsel urged that the reversal in Ponnammal Vally v. Achuthan Unni, 1966 Ker LT 86 of my dictum in 1962 Ker LT 577 applying the presumption to cases of boundary disputes really amounts to a negation of the presumption to such and similar cases. The argument appears to have some force and merits examination. Though I have doubted in Varkey v. Joseph, 1966 Ker LT 93 the correctness of the abovesaid reversal, nothing further seems to have been said on the question, as no later pronouncement has been cited before me.

In the Limitation Act, 1908, Article 142 prescribed for a suit for recovery of immovable property a period of limitation of 12 years from date of dispossession or discontinuance of possession by the plaintiff, and Section 3 of the Act directed every suit instituted after the period of limitation to be dismissed although limitation has not been set up as a defence. On these provisions, the Courts held that the plaintiff in every suit is bound to show his suit to be within time and that Article 142 required the plaintiff in a suit for recovery of possession of land to show that he had possession of the land within 12 years of the suit. But there was nothing in the Section or the Article to indicate that, in the discharge of such onus, the plaintiff is not entitled to rely on the legal presumption that arises from proof of his title to the land. If on proof of title a legal presumption of possession with him arises, that is verily prima facie proof of possession. The boot will then be on the leg of the defendant to controvert it. This aspect appears to have been overlooked by many a learned Judge in decisions, and that, in spite of the pronouncement of the Privy Council in a suit to recover lands in Mt. Allah Rakhi v. Shah Mohammed Abdur Rahim, AIR 1934 PC 77 at p. 81 = 61 Ind App 50 that where there is no doubt that the title to the lands was in the plaintiff the onus was on the defendant to prove the adverse possession relied on. The following observation of the Privy Council in Hafiz Mohammed Fateh

Nasib v. Sir Swarup Chand Hukum Chand, AIR 1948 PC 76 at p. 80 is also pertinent here:

"The proper test to be applied in a case of this nature is whether the predecessors of the plaintiff, for a period of 12 years or more exercised such dominion over the property in suit as to justify the inference of fact that they were in possession of the whole. It was not necessary that they should prove affirmatively that their predecessors had actually been in physical possession of every square inch of his land, but it should have been considered whether the acts of possession which had been proved would legitimately show that the predecessors of the plaintiff had enjoyed dominion over this property in the manner in which such dominion is normally exercised. Their Lordships agree that this is the correct test to apply." In my opinion, the above observation of the Privy Council applies well to a suit to settle a boundary dispute, where title to the respective lands (survey numbers) is admitted or proved. The presumption of possession following title must discharge the onus, if at all, on the plaintiff to prove his possession and therefore the decision has to rest "on title unless the defendant proves his prescriptive title by adverse possession in regard to the encroached area." (See 1962 Ker LT 577 at p. 586). It is unfortunate that the above dictum happened to be reversed in 1966 Ker LT 86. It is fortunate that Article 142 of the Limitation Act, 1908, which gave rise to decisions that ignored the presumption of possession following title, has been omitted in the new Limitation Act, 1963. However, in the light of the clear pronouncement of the Supreme Court on the operation of the presumption in AIR 1958 SC 434, cited above, I do not see any ground for reconsideration of my views expressed in 1962 Ker LT 577.

8. In the result, I accept the decision of the Subordinate Judge as right. This second appeal fails and is dismissed hereby.

No leave.

Appeal dismissed.

AIR 1970 KERALA 312 (V 57 C 52)

M. MADHAVAN NAIR, AND
P. NARAYANA PILLAI, JJ.

Alex Beets, Petitioner v. M. A. Urmese and another, Respondents.

Original Petn. No. 4564 of 1963, D/- 5-8-1969.

(A) Constitution of India, Article 226 — Power to issue writs — Writ of quo warranto — Rules relating to appointment not having force of law — Violation of, cannot sustain writ — (Constitution of India, Article 162).

A motion for a writ of quo warranto to question the appointment of a Honorary

DN/EN/B794/70/MKS/C

Medical Officer on the ground that in making the appointment the Govt. had acted in violation of the Rules relating to such appointments appended to G. O. Ms. 665 dated 4-9-1953 (Kerala) cannot succeed because those rules which can be traced only to the executive power of the Government under Article 162 cannot be regarded as laws or to have the force of law. Since the Government by virtue of its powers under Article 162 read with List II, Entry 41 in the 7th Schedule is competent to create a post and to fill it by a competent person the appointment is not ultra vires. AIR 1967 SC 1753 & AIR 1966 SC 1942 & AIR 1955 SC 549, Rel. on. (Para 5)

(B) Constitution of India, Article 226 — Power to issue writs — Procedure — New grounds — Motion for writ of Quo Warranto — Illegality of appointment on the ground of contravention of Article 16 not put forward in the petition — It cannot be urged at the final hearing of the petition. AIR 1955 SC 785, Rel. on. (Para 6)

(C) Constitution of India, Article 226 — Power to issue writs — Quo Warranto — Person not an aspirant to the post cannot challenge appointment as contravening Article 16. AIR 1960 SC 384 and AIR 1962 SC 1044, Rel. on. (Constitution of India, Article 16). (Para 6)

(D) Constitution of India, Article 226 — Power to issue writs — Quo Warranto — Order of appointment though violating Article 16 constitutes sufficient answer to motion for writ — Reason is possession of public office under government order is not usurpation of office for which alone Quo Warranto lies — Hence ground under Article 16, though it may be heard in motion for certiorari or prohibition cannot be heard in Quo Warranto. AIR 1969 SC 302, Rel. on; AIR 1963 Madh Pra 17, Disting. (Para 6)

Cases Referred:	Chronological	Paras
(1969) AIR 1969 SC 302 (V 56) =		
1969-1 SCR 351, Abdul Rahiman Khan v. Sadasiva Tripathi		B
(1967) AIR 1967 SC 1753 (V 54) =		
1967-3 SCR 636, G. J. Fernandez v. The State of Mysore		B
(1966) AIR 1966 SC 1942 (V 53) =		
1966-3 SCR 682, B. N. Nagarajan v. State of Mysore		B
(1965) AIR 1965 SC 491 (V 52) =		
1964-4 SCR 575, The University of Mysore v. C. D. Govind Rao		B
(1963) AIR 1963 Madh Pra 17 (V 50) =		
1963 Jab LJ 666, Narayan Keshav Dandekar v. R. C. Rath		B
(1962) AIR 1962 SC 1044 (V 49) =		
1963-1 SCJ 106, Calcutta Gas Co., Ltd. v. State of West Bengal		B
(1960) AIR 1960 SC 384 (V 47) =		
1960-2 SCR 311, All India Station Masters' and Assistant-Station Masters' Association v. General Manager, Central Railway		B

(1955) AIR 1955 SC 549 (V 42) =
1955-2 SCR 225, Ram Jawaya Kapur v. State of Punjab 5
(1955) AIR 1955 SC 789 (V 42) =
1955-2 SCR 517, The Tropical Insurance Co., Ltd. v. Union of India 6

M/s. Manuel T. Paikaday and A. C. Jose, for Petitioner; M/s. S. A. Nagendran and N. N. D. Pillai, for Respondent No. 1.

MADHAVAN NAIR, J.:— This petition has been moved by a medical graduate against an Honorary Medical Officer, and is for the reliefs:

“..... to issue a writ of quo warranto against the 1st respondent, and

(i) Declare that the post that the first respondent now claims to occupy in the General Hospital at Ernakulam is vacant;

(ii) Order the ouster of the first respondent from such office and restrain him from exercising any functions or duties relating to such office;

(iii)
(iv) all such other consequential or ancillary reliefs as may be deemed just and necessary in the circumstances of the case; and allow this writ petition with costs”.

Relief No. (iii) has been withdrawn and the State of Kerala, who was originally impleaded as the 2nd respondent to this motion, has been removed from the party array by the petitioner as per C. M. P. No. 46 of 1969, which was allowed by the Court on January 8, 1969. However, we have heard the learned Advocate-General as amicus curiae in the matter.

2. The allegations in the motion, relevant to the reliefs now urged, are thus:

“..... the Government had declared on September 24th, 1968, that the 'Part-time Honorary service is stopped altogether all over the State with effect from 1st October 1968 this ending of the part-time honorary service had long since become expedient in the light of the fact that it had been started for the sole reason that at the time there were no sufficient number of qualified medical personnel available for appointment in regular Government service This state of 'paucity of qualified medical personnel for appointment in Government service' however rapidly disappeared, and there are already more than 140 qualified medical graduates of the State waiting for appointment and a further about 60 more such hands would be finishing their 'House Surgeoncy' this month and joining this army of unemployed medical personnel. In the face of this situation the Government can have absolutely no just cause or lawful right or legal authority to appoint any more such honorary and part-time officers in any of its hospitals or medical institutions in the State. Any such appointment if made will therefore be illegal and ultra vires of its powers under law, as well as it would be mala fide, and a manifest abuse of, or fraud on power. Never-

theless it is seen claimed by the first respondent that he has again been re-appointed to continue for another term as a part-time honorary medical officer in the General Hospital Ernakulam. Indeed, apart from the position that the Government has now no authority under law to make such appointment as has already been indicated above, any such appointment could ever be validly and honestly made only in strict accordance with the existing rules and notifications expressly laying down the procedure governing such appointments, namely the rules published as appendix to G. O. MS 665 dated 4th September, 1963, of the Health and Labour (A) Department, Government of Kerala. This has not been done in the case of the 1st respondent's alleged appointment, although he appears to be still in actual possession of the office in question. He is therefore in such possession of the office illegally and as a mere usurper;

The respondent has produced the Government Order dated 18-10-1968 by which he has been appointed as Honorary Medical Officer at the General Hospital, Ernakulam. It is signed by the Deputy Secretary "By order of the Governor". That order shows that only two posts of Honorary Medical Officers have been created by Government in 1968, and the respondent and another, whose appointment is not in challenge here, were appointed thereto.

3. The scope of enquiry in a motion for quo warranto has been indicated by the Supreme Court in *The University of Mysore v. C. D. Govinda Rao*, AIR 1965 SC 491 thus:

"..... the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions, it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the Courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the Court, *inter alia*, that the office in question is a public office and is held by a usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not. In fact, in issuing the writ, the High Court has made certain

observations which show that the High Court applied tests which would legitimately be applied in the case of writs of certiorari. In the judgment, it has been observed that the error in this case is undoubtedly a manifest error. That is a consideration which is more germane and relevant in a procedure for a writ of certiorari. What the High Court should have considered is whether the appointment made by the Chancellor had contravened any statutory or binding rule or ordinance."

4. Quo warranto is only information as to the authority of the respondent to hold a substantive public office. When the respondent has produced in Court the Government Order appointing him to the office, the Court has only to enquire if the appointment is in violation of any statutory provision on the matter. It has been alleged by the petitioner that the respondent's appointment was not "in strict accordance with the rules published as Appendix to G. O. MS. 665 dated 4th September, 1963." These rules do not refer to applications being invited or entertained for appointment; but provide for recommendation by a committee for appointment as Honorary Medical Officers. The rules are published in the Kerala Gazette dated 10th September, 1963, along with G. O. MS. 665, to which it is appended, and a form of application. That G. O. invited applications in the form given for appointment as Honorary Medical Officers to be submitted before 15-9-1963 and it is stated at the bar that 99 inclusive of the present respondent were then appointed.

The question material is whether the rules appended to that G. O. detailing the terms and conditions of service of the Honorary Medical Officers are statutory Rules. Obviously, and admittedly, they are not. The contention is that the rules having been framed by the Government by virtue of its powers under Article 162 of the Constitution, must be taken to have the force of law, and therefore an appointment made without conformity therewith will entitle a writ of quo warranto.

We find little force in this argument. In *G. J. Fernandez v. State of Mysore*, AIR 1967 SC 1753 the Supreme Court has observed:

"Learned counsel for the appellant is unable to point out any statute under which these instructions in the Code were framed. But his contention is that they are rules issued under Article 162 of the Constitution. Now Article 162 provides that 'executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws'. This Article in our opinion merely indicates the scope of the executive power of the State; it does not confer any power on the State Government to issue rules thereunder. As a matter of fact wherever the Constitution envisages issue of rules it has so provided in specific terms. We may, for example, refer

to Article 309, the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions of service of persons appointed to services and posts under the Union or the State. We are therefore of opinion that Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. We are therefore of opinion that instructions contained in the Code are mere administrative instructions and are not statutory rules. Therefore even if there has been any breach of such executive instructions that does not confer any right on the appellant to apply to the Court for quashing orders in breach of such instructions."

5. Counsel for petitioner contends that the Government can act and therefore appoint respondent to a public office only under a law and that therefore the Rules under which the respondent is appointed must have been intended and must be reckoned to have the force of law. In *B. N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 the Supreme Court has observed:

"First it is not obligatory under proviso to Article 309 to make rules of recruitment etc., before a service can be constituted or a post created or filled. Secondly, the State Government has executive power, in relation to all matters with respect to which the legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. We see nothing in terms of Article 309 of the Constitution which abridges the power of the Executive to act under Article 162 of the Constitution without a law".

It is obvious that the Rules in question, which are not traced to any statute but only to the executive power under Article 162 of the Constitution, cannot be regarded as laws or to have the force of law. The allegation that the respondent's appointment is in contravention of rules having force of law has therefore to be overruled.

If the Rules have no force of law and are only administrative instructions, their violation will not sustain a writ motion under Article 226 of the Constitution. Ext. P-1 shows clearly that the Government had on October 16, 1968, sanctioned the appointment of the respondent as an Honorary Medical Officer in the General Hospital, Ernakulam. This petition is filed on 24th October, 1968, for information as to his appointment. The challenge delivered to the appointment

as not warranted by law fails. As the Government by virtue of its powers under Art. 162 read with List II, Entry 41 in the VII Schedule, is competent to create a post and to fill it by a competent person, it cannot be said that the respondent's appointment is ultra vires, and this motion for a writ of quo warranto has also to fail.

6. Counsel contended that whenever a post in public service is created and filled, the Government is bound to observe the provisions of Article 16 of the Constitution and advertise an invitation for applications thereto, which has not been done in this case and therefore the respondent's appointment is illegal. Such a case has not been put forth in this petition, and therefore cannot be urged at the final hearing thereon. Vide: *The Tropical Insurance Co. Ltd. v. Union of India*, AIR 1955 SC 789.

Secondly, a challenge to a particular appointment as contravening Article 16 of the Constitution cannot be urged by one who was not and is not an aspirant to the post. Referring to Article 16 of the Constitution, in *All India Station Masters' and Assistant Station Masters' Association v. General Manager, Central Railway*, AIR 1960 SC 384 the Supreme Court has held:

"Equality of opportunity in matters of employment can be predicated only as between persons, who are either seeking the same employment or have obtained the same employment".

In *Calcutta Gas Co., Ltd. v. State of West Bengal*, AIR 1962 SC 1044 the Supreme Court has pointed out:

"The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified". The petitioner wanted an appointment and has been appointed only as a regular Medical Officer in the Health Service, and not as an Honorary Medical Officer. He cannot claim to be personally aggrieved by the respondent's appointment to a post to which he was no aspirant.

Counsel for petitioner contends that the requirement of a personal interest to sustain a writ motion does not extend to motion for quo warranto, which is the case here. We are afraid that challenge of an order under Article 16 of the Constitution cannot be heard in a motion for quo warranto: it can be heard in a motion for certiorari or prohibition. The scope of a quo warranto is very limited, namely, whether the appointment of the respondent is by a proper authority and in accordance with law if there is an express statute governing such appointment. The argument that what cannot be urged for other writs can well be urged for a writ of quo warranto, and therefore the denial of equality under Article 16 which the petitioner

could not have urged in a motion for certiorari or prohibition can be urged in the present motion for a quo warranto, is not warranted by the nature of the procedure pointed out by the Supreme Court (AIR 1965 SC 491) and has to be rejected.

Counsel for petitioner cited Narayan Keshav Dandekar v. R. C. Rath, AIR 1963 Madh Pra 17 where reference has been made to a violation of Article 16 of the Constitution as a ground for issuance of a writ of quo warranto. In that case their Lordships of the Madhya Pradesh High Court have found the impugned appointment to have been made in contravention of "Section 58 of the Madhya Bharat Municipal Corporation Act," and that itself necessitated the issuance of a quo warranto. Their Lordships went further to point out other defects in the impugned appointment and observed that it violated Article 16 of the Constitution and ultimately concluded the judgment by issue of a quo warranto. In our opinion, that decision cannot be a precedent for issuance of a writ of quo warranto for mere contravention of Article 16 of the Constitution.

In Abdul Rahiman Khan v. Sadasiva Tripathi, AIR 1969 SC 302 the Supreme Court has held a contract with the State not complying with Article 299 of the Constitution and therefore unenforceable against the State to be a contract disqualifying the contractor from standing for election to the legislature. That is clear precedent that what is not in conformity with provisions of the Constitution cannot be ignored for all purposes. A Government Order not conforming with Article 16 of the Constitution may be quashed by a certiorari but may be a sufficient answer to a quo warranto. Possession of a public office under a Government order is not usurpation of office, for which alone quo warranto lies, and even if the Government Order is violative of fundamental rights it will not be void, though quashable by a writ of certiorari.

7. In view of our conclusions above, it is unnecessary to refer to the other citations made by the learned advocate for the petitioner for the proposition "that an executive action like an appointment to a new office made in violation of the guarantees of equal opportunity conferred by Article 16 of the Constitution is not in accordance with law and therefore illegal and void incapable of supporting the occupation of a public office lawfully."

8. The petition is found to be without force and is hereby dismissed. We make no order as to costs on this motion.

Petition dismissed.

AIR 1970 KERALA 316 (V 57 C 53)

MADHAVAN NAIR AND KRISHNA-MOORTHY IYER, JJ.

Madhavan Pillai, Appellant v. Mrs. Katherine M. Pillai, Respondent.

A. S. No. 108 of 1969, D/- 27-2-1970 against order of Addl. Dist. Court, Ernakulam in O. P. No. 1 of 1966.

Divorce Act (1869), Section 22 — Judicial separation — Decree for on ground of cruelty.

Where the husband deposed and proved that the wife attempted to stab him and on another occasion threatened to kill him by poisoning, that she attacked him with a bath stool at midnight and was saved by his driver, that she poured Kerosene oil on his trousers which were set fire to and thrown on him and that on one night he was locked out and compelled to go to a hotel with only the banian and underwear he was wearing:

Held the husband was entitled to a decree for judicial separation — Test laid down by Lord Pearce in Collins v. Collins, (1963) 2 All ER 966, adopted. (Para 24).

Cases	Referred:	Chronological	Paras
(1964) 1964-3 All ER 404 = 1961-1			
WLR 1085, Le Brocq v. Le Brocq			12
(1963) 1963-2 All ER 991 = 1964			
AC 698, Williams v. Williams			12
(1963) 1963-2 All ER 966 = 1964			
AC 644, Collins v. Collins			12, 13, 16
(1952) 1952-2 All ER 584 = 1953			
AC 124, King v. King			12
(1952) 1952 AC 525 = 1952-1 All			
ER 875, Jamieson v. Jamieson			12
(1950) 1950-2 All ER 398 = 1951			
P 38, Kaslefsky v. Kaslefsky			14
(1947) 1 All ER 379 = 176 LT 341,			
Buchler v. Buchler			17
(1897) 1897 AC 395, Russell v. Russell			14
T. N. Subramonia Iyer, for Appellant; K. Chandrasekharan, for Respondent.			

KRISHNAMOORTHY IYER, J.: The husband aged 62, who is a Hindu, petitioned for judicial separation against his wife aged 48, who is a Roman Catholic Christian, on grounds of cruelty and adultery. The wife denied the allegations. The additional District Judge, Ernakulam dismissed the petition finding that the husband has not proved both the grounds. The appeal is filed against the said decision.

2. The parties were married in Delhi on the 22nd day of April, 1918 before the Registrar of Marriages under the provisions of the Christian Marriage Act. There are three daughters born to them after their marriage and they are Sudha, Geeta and Uma aged 16, 14 and 8 years.

3. At the time of marriage, the husband was Deputy Controller of Rubber in the Government of India. Towards the end of

April, 1948, the wife left for her native place at Trivandrum. The husband was in Delhi till the beginning of 1949 when he was transferred to Calcutta where the wife joined him. They were residing in Calcutta as husband and wife till the end of 1951, when the husband resigned the Government job and joined Dunlop Rubber Company at Kottayam. The parties were residing in Kottayam till the middle of 1955. The office of Dunlop Rubber Company was thereafter shifted to Cochin and the parties were from 1956 residing in Ernakulam.

4. The husband's case is that from 1959 onwards the wife was conducting herself towards him with great harshness and cruelty and frequently abusing him in the coarsest and most insulting language, that she has on some occasions physically assaulted him, that on several occasions she had locked him out of the house compelling him to take residence in hotels at Ernakulam, that on account of her frequent violent outbursts he had to admit the children in St. Teresa's Convent in Ernakulam, that before the date of the petition she had left him and has been staying in Trivandrum where she is living in adultery, that her behaviour subjected to him to frequent emotional upsets which has caused an abnormal increase in his blood pressure and that it is not possible for him to endure her any more.

5. While denying the allegations of the husband, the wife stated that the husband is addicted to alcoholic drinks, he used to return home late hours in the night and abuse her and children and sometimes even beat her, that he used to stay on some nights in hotels for boozing and that the children have been admitted in the Convent to improve them in their studies. The wife would allege that the husband stayed with her in Trivandrum for three days in September, 1966 when he had sexual relationship with her.

6. In a rejoinder, the husband has denied his staying with the wife for three days in September, 1966 and stated further that normal marital life with the wife had been impossible since 1959.

7. The learned counsel for the husband fairly conceded before us that the evidence regarding the plea of adultery is very meagre and that he is withdrawing the said averment. He therefore confined his attack to the finding of the learned Judge that cruelty has not been proved.

8. Though there was some dispute in the trial court, it was agreed before us that the provisions of the Indian Divorce Act (IV of 1869) apply to the parties and the appeal was argued on that basis. Sections 22 and 23 are the relevant provisions.

9. Section 22 reads:

"No decree shall hereafter be made for a divorce a mensa et toro but the husband or

wife may obtain a decree of judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have effect of a divorce a mensa et toro under the existing law, and such other legal effect as hereinafter mentioned".

10. Section 23 reads:

"Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly."

11. Section 7 of the Indian Divorce Act requires Courts in India to give relief subject to the provisions of the Act on the principles and rules which are as nearly as may be conformable to the principles and rules on which the English Divorce Courts for the time being act and give relief.

12. No decided case either in England or in India has ever attempted to give a comprehensive definition of the term "cruelty" in Matrimonial cases. The word is not defined in the Indian Divorce Act. The term "cruelty" is a word which should take its meaning from the context. In *Jamieson v. Jamieson*, 1952 AC 525 Lord Tucker in the course of his speech pointed out:

"..... Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the wisdom of this course. It is in my view equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in the cases where no physical violence is averred."

Agreeing with the above passage Lord Pearce observed in *Gollins v. Gollins*, 1963-2 All ER 966 at p. 992:

"But cruelty is a question of fact and degree, and no legal formula can resolve its peculiar problems. It would no doubt simplify decisions in accident cases if the law evolved a legal principle that all driving over forty m. p. h. is negligent and that no driving under that speed could be negligence; but such a principle would be an evasion of the court's duty to decide the question of fact. So too with cruelty cases which depend on an even wider variety of matters than negligence cases. The particular circumstances of the home, the temperaments and emotions of both the parties and their status and their way of life, their past relationship and almost every circumstance that attends the act or conduct complained of may all be relevant."

Lord Reid in *King v. King*, 1952-2 All ER 584 at p 598 observed:

"I do not intend to try to define cruelty. I doubt whether any definition would apply equally well to cases where there has been physical violence and to cases of nagging, or to cases where there has been a deliberate intention to hurt and to cases where temperament and unfortunate circumstances have caused much of the trouble."

Harman, L. J., in *Le Brocq v. Le Brocq*, 1964-3 All ER 464 which is a decision of the Court of Appeal said:

"Counsel for the respondent husband ended his address with the words: 'Cruel' means 'cruel'. With that I agree. I think, moreover, that 'cruel' is not used in any esoteric or 'divorce court' sense of that word, but that the conduct complained of must be something which an ordinary man or a jury—I suppose this court sits as a jury—would describe as 'cruel' if the story were fully told. There need not be blows. (There is no question here now of blows). There need not be any physical force used (there can be words which would be much worse than blows with a saucepan) but there must be something as to which a jury would be able to say, when they heard it related, 'Well, that was cruel of him', before a husband can be branded with the serious charge of being cruel to his wife."

13. The whole of the law relating to legal cruelty in matrimonial cases is only Judge-made law and there has been considerable divergence of view revealed in the judgments of the Divisional Court, Court of Appeal and the House of Lords. The range of the reported decisions in cruelty cases is so large that any attempt to reconcile them will only be futile. In the recent case of *Gollins v. Gollins*, 1963-2 All ER 966 decided by the House of Lords the diversity of judicial opinion has been traced and it shows how uncertain the law is on the concept of legal cruelty in matrimonial cases.

14. *Russell v. Russell*, 1897 AC 395 with a powerful dissent took the view that to find cruelty it is necessary that the conduct complained of must be such as to cause danger to health—bodily or mental—or a reasonable apprehension thereof and the Court of Appeal in *Kaslefsky v. Kaslefsky*, 1950-2 All ER 398 held that the conduct on the part of the offending spouse must be in some sense aimed at or directed against the complaining spouse. But in 1963-2 All ER 966 the House of Lords though not unanimously disapproved the view in 1950-2 All ER 398 that intention to injure is necessary to establish cruelty. In the former case Lord Reid observed:

"If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind. That I shall develop in *Williams v. Williams*,

(1963) 2 All ER 991. In other cases the state of his mind is material and may be crucial."

Lord Pearce said in the same case:

"Allowances must always be made for temperament, and mere temperamental disharmony simpliciter is not cruelty. But if a temperament which naturally tends to unkindness or selfishness or callousness develops to a point at which its acts are cruel, whether intentionally or not, it cannot be right to say that the other spouse must endure it without relief. Nor can one helpfully say that development of character is within its own sphere if its emanations affect and cause injury to the other spouse."

The theory that law of Divorce is partly punitive and we should therefore look to criminal law for guidance is not being accepted as correct in recent times. In the course of his speech Lord Pearce in 1963-2 All ER 994 at p. 1022 said:

"I cannot accept the argument that divorce is partly punitive and should, therefore, look to the criminal law for guidance. The dissolution or permanent interruption of a union, which is in theory life-long and indissoluble, cannot be justified by any logic. But the frailties of humanity produce various situations which demand practical relief and the divorce Acts owe their origin to a merciful appreciation of that demand. Any extension of the area of relief has always been advocated on the ground that there are situations of hardship that must be, alleviated, and has been contested on the ground that to extend relief would create corresponding hardship to the other party and would weaken the important and sacred institution of matrimony. Never does an intention to punish enter into the debate; nor is an extension of the grounds of divorce ever advocated or opposed on the ground that it will extend the area of punishment of errant spouses. It is true that the divorce law of England, following the ecclesiastical law, is founded on the concept of the matrimonial offence. That concept is used to give some justification for breaking an indissoluble union against the will of the offending party. But in the Divorce Acts there is nothing that suggests an intention to punish. I do not find anything in the divorce Acts to justify a theory that the law is intended to punish. They appear to intend a practical alleviation of intolerable situations with as little hardship as may be upon the party against whom relief is sought."

On this subject A. L. Goodhart the Editor of the *Law Quarterly Review* has said in his Article on cruelty, desertion and insanity in Matrimonial Law, (1963) 79 *Law Quarterly Review* 98 at page 106:

"A century ago it may have been in accord with contemporary thought to speak of the respondent's guilt in all instances in which a marriage had so far broken down that the only solution was a divorce, but today the

point of view that divorce is founded on crime or even on constructive crime, to use that misleading word, is out of date both from the legal stand point and from that of the social sciences. This does not mean that there is a failure to recognise that the breakdown of a marriage is a misfortune both for the parties themselves, and especially for the children, but it is a recognition that to deal with such a situation as if it were criminal in nature is unrealistic, and, therefore, unhelpful. It is a hindrance to, rather than a support of, the institution of marriage."

15. In Halsbury's Laws of England the concept of legal cruelty with reference to matrimonial cases is summed up in Vol. 12, 3rd Edition, page 270, paragraph 516 in the following words:

"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion, the Judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

16. In this state of law, we will adopt the test laid down by Lord Pearce in 1963-2 All ER 966 as it appears to us a safe guide to understand the meaning of 'cruelty' in matrimonial cases. The learned Judge said:

"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it."

17. The above passage does not mean that judicial separation can be demanded for mere trivialities or incompatibility of temperament. The facts of the case should go well beyond 'the ordinary wear and tear of conjugal life', to adopt the words of Lord Asquith in *Buchler v. Buchler*, 1947-1 All ER 319 at p. 326. We do not think that the husband will be justified in pleading for judicial separation merely on the ground that the wife's conduct is highly irritating and exasperating to him.

18. Now we will examine the facts of the case. The husband as P. W. 1 has deposed:

(1) that the wife in 1960 and 1965 attempted to stab him. On the second occasion he sustained an injury on his finger,

(2) that the wife threatened to kill him by poisoning.

(3) that the wife attacked him with a bath stool on one mid-night in 1964 and P. W. 2 who was then his driver saved him.

(4) that on one night when he was asleep the wife poured kerosene oil on his trousers and the trousers were set fire to and thrown on him.

(5) that on one night he was locked out of the house and he was compelled to go to the Sea View Hotel in Ernakulam with only the banian and underwear he was then wearing.

Apart from the above specific acts, P. W. 1 has deposed in general terms to the reprehensible conduct of his wife which has made his life miserable.

19. As regards attempts at stabbing and the threat of poisoning there is no doubt only the uncorroborated testimony of P. W. 1. But to prove the other incidents the husband has examined P. Ws. 2 to 5. We are of the view that the evidence of P. Ws. 3 to 5 is too general to bring out any of the specific acts attributed to the wife.

20. The learned Judge has not found that the husband was addicted to alcoholic drinks or that he stayed with the wife in Trivandrum for three days in September, 1966. The counsel for the wife did not contend before us for the acceptance of those averments pleaded by his client.

21. The evidence of P. Ws. 1 and 2 is quite sufficient to grant the husband a decree for judicial separation. The learned Judge has observed:

"If the specific instances of cruelty spoken to by the petitioner's witnesses like locking out the petitioner, the throwing of burning trousers, the attempt to throw the stool and the frequent throwing of the vessels at the petitioner are taken as proved, their cumulative effect would be sufficient to substantiate the ground of cruelty."

22. P. W. 2 has been disbelieved by the learned Judge for two reasons. The first is that since he deposed that he was staying with P. W. 1 from 1957 he should have seen more incidents and he has not spoken to them. The second is that there is discrepancy between the evidence of P. W. 1 and P. W. 2. The discrepancy pointed out by the learned Judge is that while P. W. 2 said that when the wife was about to throw the bath stool he caught hold of the same and removed it while P. W. 1 said that P. W. 2 rushed in and pulled the wife down. We do not think that this discrepancy is sufficient to disbelieve P. W. 2. C. P. W. 1 the wife has admitted that P. W. 2 was in the employment of P. W. 1 from 1957 to 1964 and during this period he was staying in the same building. We have been taken through the evidence of P. Ws. 1 and 2 and we have no hesitation to believe them. The learned Judge would disbelieve P. W. 1 on

the ground that in respect of several incidents spoken to by him he did not take any action against C. P. W. I. The failure to take any immediate action cannot lead to the inference that the incidents narrated are false. P. W. I was holding a responsible post in the Dunlop Rubber Company in Cochin. He cannot be expected to go about tom-tomming the strained relationship between him and his wife. The attempt must have been to wait and see whether things would not improve.

23. It is rarely possible to prove the incidents spoken to by P. W. I through stranger witnesses. After all every person has his own self-respect to be preserved. Section 23 of the Divorce Act enables the court to allow judicial separation if it is satisfied of the truth of the statements and when there is no legal ground for not granting the same. There is no provision of law that the uncorroborated evidence of the spouse should not be accepted in matrimonial cases. According to Section 134 of the Evidence Act, no particular number of witnesses are required for the proof of any fact. But in view of Section 7 of the Indian Divorce Act, the uncorroborated evidence has to be scruti-

nised with care and received with caution.

24. It is necessary for us to observe that the married life of the wife and the husband was far from pleasant. The husband produced Exts. P1 to P11 letters received by him from Sri Pereira who is in Malaya, who is the uncle of the wife. No doubt, he has not been examined. The learned Judge has refused to go into these letters for reasons which do not appear to be convincing. We hold on the evidence of P. Ws. 1 and 2 that the allegations spoken to by P. W. 1 have been proved. We are satisfied that P. W. 1 cannot be left alone with our sympathy but he has to be granted judicial separation. In the circumstances of this case we think it unnecessary to wait for the last straw.

25. We therefore set aside the decision of the court below and allow the appeal. We make no order as to costs.

26. The husband has undertaken before us through his counsel that he will continue to maintain the children in the same way he is doing now.

Appeal allowed.

END

follow; and (ii) if, on the other hand, the provisions of Section 16 of the Act were merely directory and the decree passed in its contravention can be given effect to unless set aside, then also this Rule was redundant. No Court can arrogate to itself, nor can a superior Court confer on an inferior Court jurisdiction not vested in it by the legislature; nor can any Court validate a decree which is a nullity by reason of lack of jurisdiction. But by this extraordinary provision contained in R. 7, the High Court has been given large and discretionary power to make a fresh decree to do substantial justice to the parties, having regard to all the facts and circumstances and the material on record before it. See (1894) ILR 21 Cal 249; (1904) ILR 27 Mad 478; AIR 1915 Cal 619 and ILR 11 Pat 690 = (AIR 1933 Pat 31). As already pointed out, this extraordinary power has for its basis the two exceptional considerations which are attached to a suit of the nature cognizable by a Court of Small Causes. The High Court is not bound under Rule 7 to make a fresh decree when the one made by the subordinate Court is without jurisdiction and the High Court may leave the matter to follow the ordinary consequences; for instance, return of the plaint for presentation to proper Court. Rule 7 merely invests the High Court with jurisdiction but not necessarily directs the ordinary consequences to follow but to make a fresh decree as it thinks fit. But it must be well understood that the expression "the High Court may make such order as it thinks fit" does not mean that the High Court validates a decree which is a nullity, or condones or cures the defect of jurisdiction. What the expression does it to confer upon the High Court the large and discretionary power to pass a fresh decree of its own on the basis of the material on record and then it is the decree of the High Court which, by its own force, becomes executable or operative and not because the defect of jurisdiction is condoned or cured. Therefore, this Rule cannot be called in aid to hold that the provisions of Section 16 are directory.

85. In our opinion, it cannot be argued that where the consequences of non-compliance with a provision excluding the jurisdiction of a Court are not specifically provided in the law, such a provision excluding jurisdiction of a Court can be treated as directory. Where jurisdiction of a Court is excluded, that is, when there is want of jurisdiction, the well known consequence is that the decree rendered by it is a nullity. This principle has been called, by their Lordships of the Supreme Court, "a fundamental principle well established". See Kiran Singh's case, AIR 1954 SC 340 (supra).

86. The conclusions we have reached may now be summed up thus:— (1) There
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is no practical difference between a Court of Small Causes constituted under Section 5 of the Small Cause Courts Act and a Court invested with jurisdiction of a Small Cause Court; for instance, under Section 9 of the M. P. Civil Courts Act, 1958. (2) A Court so invested with jurisdiction of a Small Cause Court is to be deemed, for the purposes of the Small Cause Courts Act and of the Code of Civil Procedure to comprise of two different Courts; (i) a Court of Small Causes with respect to the exercise of jurisdiction of a Small Cause Court; and (ii) a Court with respect to the exercise of its jurisdiction in suits not cognizable by a Court of Small Causes. (3) When there is a Court of Small Causes which has jurisdiction to try a suit, the jurisdiction of all other Courts, which otherwise had jurisdiction to try it, is excluded by Section 16 of the Small Cause Courts Act. (4) The language of Section 16 is precise, unambiguous, emphatic and mandatory. (5) There is no difference between a Court which never had jurisdiction but it is excluded by a legislative provision. In either case, there is want of jurisdiction. And, the decree which is passed by a Court without jurisdiction is a nullity. Such a decree cannot be executed, nor can otherwise be given effect to. (6) Where jurisdiction of a Court has been excluded in respect of a specified subject-matter, no amount of acquiescence, waiver, consent, ignorance of law, inadvertence, error, bona fides, good faith, or any other consideration such (will-Ed) confer such jurisdiction on such Court. (7) When a suit is tried by a Court whose jurisdiction has been excluded, it is a case of jurisdictional want, not a mere procedural defect. A defect in the procedure is an irregularity which occurs in the course of a trial, while following a certain procedure, by a Court which has the initial jurisdiction to try it. (8) A legislative provision, which excludes jurisdiction of a Court, is necessarily imperative and cannot be treated as directory. The word "shall" in such a provision must be given its ordinary significance (that is, mandatory); it cannot be read as "may". (9) It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution and even in a collateral proceeding. (10) The provisions in the Small Cause Courts Act (for instance, Section 23) and those contained in any other enactment for the time being in force (for instance, Section 24, Civil P. C.; O. 46, Rr. 6 and 7, Civil P. C.; Section 15 of the M. P. Civil Courts Act) must be given effect to by virtue of the saving clause in Section 16 of the Small Cause Courts Act. (11) Under

O. 46, R. 7, Civil P. C., even if the High Court finds that a decree has been made by an ordinary Court in a suit cognizable by a Small Cause Court, the High Court has large and discretionary power to do substantial justice to the parties by making a fresh decree of its own, having regard to the entire facts and circumstances of the case and the material on record, and thus save the parties of the expense and botheration of a fresh trial. In doing so, the High Court does not validate a decree which is a nullity for want of jurisdiction, nor condones or cures the defect of jurisdiction. The decree which it makes in exercise of the large and discretionary powers under the Rule is a fresh one and shall operate and be given effect to by its own force.

87. I answer the reference thus:—

- (1) Where a suit of the small cause nature is instituted and tried as a regular suit by an ordinary Court in contravention of the provisions of Sec. 16 of the Small Cause Courts Act (No. 9 of 1887), the decree or order rendered in it is without jurisdiction and a nullity.
- (2) However, the provisions in the Small Cause Courts Act (for instance, Section 23) and those contained in any other enactment for the time being in force (for instance, S. 24, Civil P. C.; O. 46, Rr. 6 and 7, Civil P. C., Section 15 of the M. P. Civil Courts Act) must be given effect to by virtue of the saving clause in Section 16 of the Small Cause Courts Act. In these and such other cases, the decree passed by an ordinary Court is not in contravention of S. 16 of that Act.
- (3) When, by virtue of an order of the District Judge under S. 15 of the M. P. Civil Courts Act, 1958, any civil business cognizable by the District Judge and the Courts under his control is distributed among them and if because of such distribution any cases cognizable by a Court of Small Causes are assigned to ordinary Courts, then the decrees passed by the latter are not nullities; they are valid being within the saving clause of Section 16.
- (4) Once the High Court is seized of a case under O. 46, R. 7, Civil P. C., it has large and discretionary power to make such fresh decree as it may think fit, having regard to all the facts and circumstances of the case and the material on record, even though it finds that an ordinary Court has tried a suit cognizable by a Small Cause Court; and the decree or order passed by such Court is a nullity, being without jurisdiction. Such a decree made by the High Court is a fresh one and is execut-

able and given effect to by its own force, not because it validates, cures or condones the nullity.

TARE, J.: 88. Although, originally I proposed to concur with the opinion of my brother, Naik, J., on going through the opinion of my brother, Shiv Dayal, J., I think it necessary to express my own opinion by giving reasons as to why agreeing with the conclusion of Naik, J. and some observations of Shiv Dayal, J. I am unable to agree with certain observations made by my learned brothers in their separate opinions.

89. At the outset it may be observed that the present suit was not at all a suit triable by a Court of Small Causes, nor could it be said to be a suit of the nature of small causes, as has been rightly observed by Naik, J. in the concluding portion of his opinion. As, however, a reference was made by the learned Single Judge to this Full Bench probably without recording a finding whether the present suit was triable by a regular Court or by a Small Cause Court, it is necessary for the Full Bench to answer the reference and record its opinion, as the two Division Bench decisions of this Court in 1968 Jab LJ 566 = (AIR 1969 Madh Pra 56) and in 1968 Jab LJ 583 = (AIR 1969 Madh Pra 44) have created a lot of confusion and the decrees passed by the regular Courts in numerous cases have been rendered null and void on account of those two decisions.

90. The controversy arose initially when S. B. Sen, J. in *Mukund v. Firm Kashilal*, Civil Revn. No. 178 of 1965, D/-29-9-1965 (MP) expressed the view that a decree passed in contravention of Section 16 of the Provincial Small Cause Courts Act, was a nullity, which could be challenged in execution. The contrary opinion was expressed by Krishnan, J. in *Manakchand v. Rajmal*, Civil Revn. No. 377 of 1966, D/-29-3-1967 (MP) wherein he expressed the opinion that the trial of a case in contravention of Section 16 of the Provincial Small Cause Courts Act would be a matter relating to procedure and not relating to jurisdiction. Therefore, according to Krishnan, J. the decree passed would not be a nullity and the same could not be challenged in execution proceedings, if no objection be raised during the trial of the suit. It was on account of that conflict that the question was referred by Nevaskar, J. to a larger Bench in 1968 Jab LJ 566 = (AIR 1969 Madh Pra 56) (supra) and by Singh, J. in 1968 Jab LJ 583 = (AIR 1969 Madh Pra 44) (supra), and the Division Bench in both those cases, presided over by Dixit, C. J. and S. B. Sen, J., answered the reference by holding that such decrees would be nullities, which could be challenged not only in execution proceedings, but also in collateral proceedings, on the principle laid down by

their Lordships of the Supreme Court in AIR 1954 SC 340.

91. The relevant provisions have been reproduced by my learned brothers, Naik and Shiv Dayal, JJ. in their separate opinions. Therefore, I find it unnecessary to reproduce all those provisions. Section 16 of the Act which relates to exclusion of jurisdiction of other Courts provides as follows:—

“Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.”

My Brother, Naik, J. has given eight reasons for holding that a trial held in contravention of the said section would not affect the initial jurisdiction of a Civil Court to try a suit of civil nature and therefore the same would not be a nullity. Therefore, Naik, J. has opined that if no objection be raised during trial, the same cannot be raised in execution proceedings and the decree can in no case be challenged in collateral proceedings and the principle laid down by their Lordships of the Supreme Court in AIR 1954 SC 340 (supra) would not be attracted. On the other hand, my brother, Shiv Dayal, J. has expressed the opinion that as Section 16 provides for the exclusive jurisdiction of Small Cause Courts thereby excluding jurisdiction of the ordinary Courts, a trial in contravention of the said section would relate to a question of jurisdiction and as the regular Court would be lacking in initial jurisdiction, its decree in contravention of the said section would be a nullity so as to attract the dictum laid down by their Lordships of the Supreme Court in AIR 1954 SC 340 (supra). My learned brothers in their separate opinions differ only to this extent; while in respect of other matters, I find practically no conflict.

92. So far as the conclusions Nos. 2 and 3 mentioned by my brother, Shiv Dayal, J. are concerned, I do not find any difficulty in agreeing with them. From the separate opinion of my brother, Naik, J., I find that he has made observations which accord with the said conclusions of Shiv Dayal, J. But the only difference between the two is regarding the conclusion No. 1 and partly conclusion No. 4, and I propose to elaborate on that.

93. At this stage I might record my dissent with the observations made by my brother, Naik, J. to the effect that the same principle would be applicable to decree of regular Courts passed in contravention of Section 16 of the Provincial Small Cause Courts Act as to the decrees passed by a Small Cause Court in contra-

vention of Section 15 of the Provincial Small Cause Courts Act. With due respect to my learned brother, I may observe that the question whether a decree passed by a Small Cause Court in contravention of Section 15 of the Provincial Small Cause Courts Act, would be a nullity does not arise in the present case and I would reserve my opinion for some suitable occasion.

94. As regards proposition No. 1, propounded by my learned brother, Shiv Dayal, J., I may observe that Section 16 of the Act is no doubt framed in mandatory terms and on the face of it, it might suggest that the prohibition against trial of a suit of the nature of small causes by a regular Court would be absolute. If that be the interpretation, I would have no hesitation in holding that a decree passed in contravention of Section 16 of the Provincial Small Cause Courts Act would be a nullity.

95. But what prevents me from coming to that conclusion and instead persuades me in agreeing with the view expressed by my learned brother, Naik, J., is that Section 16 of the Act has made a provision for a saving clause. The Division Bench in 1968 Jab LJ 566 = (AIR 1969 Madh Pra 56) (supra) and 1968 Jab LJ 583 = (AIR 1969 Madh Pra 44) (supra) expressed its opinion without examining the implication and scope of the saving clause. If the implication and scope of the saving clause had been examined by that Division Bench in details, I am sure, the conclusion of the Division Bench would have been otherwise and in consonance with the view expressed by Naik, J. To illustrate it, I may observe that the Division Bench assumed that a trial of a suit of small cause nature by a regular Court would be in contravention of Section 16 of the Provincial Small Cause Courts Act. With due respect to the learned Judges constituting the said Division Bench, I may observe that it is not every trial that would be in contravention of Section 16 of the Act. A trial which is covered by the saving clause under Section 16 of the Act would be perfectly valid and to that extent I am in full agreement with the view expressed by my learned brother, Shiv Dayal, J. Further, I feel that the view as expressed in the said two Division Bench cases needs to be overruled by this Full Bench and accordingly agreeing with my brother, Naik, J., I would overrule the said two Division Bench decisions.

96. If we examine the scope of the saving clause of Section 16 of the Act, it would encompass cases which are mentioned in Section 102 of the Code of Civil Procedure; in Section 24(4) of the Code of Civil Procedure, in O. 46, R. 6, Civil P. C., in O. 46, R. 7, Civil P. C., in Section 23 of the Provincial Small Cause

Courts Act and also in Section 15 of the M. P. Civil Courts Act, 1958.

97. These provisions have been elaborately scrutinised and examined by learned brothers, Naik and Shiv Dayal, J.J. However, Section 15 of the M. P. Civil Courts Act, 1958, has an overriding effect over the provisions of the Code of Civil Procedure and the Provincial Small Cause Courts Act. It may be relevant to reproduce the said Section, which is as follows:

"S. 15. Power to distribute business.—Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or the law relating to Courts of Small Causes, in force for the time being in any area, the District Judge may, by order in writing direct that any civil business cognizable by it and the Courts under its control shall be distributed among those Courts in such manner, as he thinks fit.

Provided that, except in so far as it may affect the exclusive jurisdiction of a Court of Small Causes, or of a Court invested with the jurisdiction of a Court of Small Causes, a direction given under this section shall not empower any Court to exercise powers or deal with business beyond the limits of its proper jurisdiction."

Therefore, it is open to a District Judge to send a case of Small cause nature for trial by a regular Court, notwithstanding the provisions of Section 16 of the Provincial Small Cause Courts Act and if such a trial is held by a regular Court, it will not be vitiated, nor can that decree be attacked as a nullity. Of course, according to the proviso to the Section, the Court to which the case is sent for trial should not lack in inherent jurisdiction to try a case of that kind and it must not be beyond the limits of its proper jurisdiction. In that event if the trial is not vitiated, Section 102, Civil P. C. will be attracted, with the result that there will be one appeal under S. 96 of the Code of Civil Procedure, but there will be no Second appeal and the appellate decision, at the most, would be revisable by the High Court under Section 115, Civil P. C. Such a trial would be regularised by the saving clause contained in Section 16 of the Provincial Small Cause Courts Act.

98. Section 23 of the Provincial Small Cause Courts Act also provides for return of the plaint for presentation to a regular Court, where a question of title to immovable property or other title is involved, which a Small Cause Court cannot adjudicate upon. The trial of such a question by the regular Court would also be valid by virtue of the saving clause in Section 16 of the Provincial Small Cause Courts Act."

99. Furthermore Section 24(4) of the Code of Civil Procedure empowers the High Court or the District Court to transfer a case from a Small Cause Court to

regular Court. But the only provision is that for the purposes of such a suit, the transferee Court will also be deemed to be a Court of Small Causes.

100. Order 46, Rule 6, Civil P. C. provides for a reference by a regular Court or by a Small Cause Court to the High Court, where that Court is in doubt whether the suit is cognizable by a Court of Small Causes or is not so cognizable. Such a reference has undoubtedly to be made before the delivery of judgment. In that event the High Court can resolve the doubt and can order the trial of the case by a particular Court. A similar reference is provided for by R. 7, O. 46, Civil P. C. by subordinate Court. The District Court can make a reference to the High Court and on such reference, the High Court can pass an appropriate order. As has been pointed out by my learned brother, Shiv Dayal, J., the decree passed by the subordinate Court cannot be treated to be a nullity, because the High Court has not been given the power to validate a nullity, but only to pass an appropriate order as in the circumstances of a case may appear to the High Court to be just and proper. All these instances which come within the ambit of the saving clause of Section 16 of the Provincial Small Cause Courts Act, would make the decree valid. In my opinion, these are the eventualities in which the trial of a case would be saved by the saving clause and the trial in such cases, at least, cannot be said to be a nullity. I may further observe that if the matter comes to the High Court either on appeal or in revision, the matter can be set right in exercise of appellate or revisional powers. There is no bar to that course being adopted. In my opinion, it would be a matter relating to procedure only, as has been suggested by my learned brother, Naik, J. Under Section 9 of the Code of Civil Procedure, a Civil Court has the jurisdiction to try all causes of civil nature and as such it would have jurisdiction to try even a small cause suit or a suit of a small cause nature, but for the provisions of Section 16 of the Provincial Small Cause Courts Act, which, however, has provided for a very comprehensive saving clause so as to include many categories of cases, and moreover, Section 15 of the M. P. Civil Courts Act, 1958 having an overriding effect over the provisions of the Code of Civil Procedure and the Provincial Small Cause Courts Act, the trial of a case in contravention of Section 16 of the Provincial Small Cause Courts Act, can, in my opinion, not be said to be vitiated so as to be treated as trial without jurisdiction and to render the decree passed in such a trial an utter nullity. For this reason, I would agree with the view expressed by my learned brother, Naik, J. with due respect to my learned brother, Shiv Dayal, J. with whom

I am unable to agree with respect to conclusion No. 1 and conclusion No. 4 (partly) mentioned in the concluding portion of his opinion.

101. Therefore, I would answer the reference by agreeing with the view expressed by Naik, J. on the question referred to this Full Bench.

ORDER

102. In accordance with the opinion of the majority, it is held that the decisions of the Division Bench of this Court in 1968 Jab LJ 566 = (AIR 1969 Madh Pra 56) and 1968 Jab LJ 583 = (AIR 1969 Madh Pra 44) do not lay down the correct law and are, therefore, hereby overruled. In our opinion, where a suit of a small cause nature is instituted and tried as a regular suit in contravention of the provisions of Section 16 of the Provincial Small Cause Courts Act, the judgment so rendered in it is one which is not without jurisdiction and, therefore, not a nullity.

Reference answered accordingly.

and labour of author — Copyright Act (1957), Section 13.

Neither original thought nor original record is essential for a literary work to be original under Section 1, Schedule I of the 1914 Act. The real test in adjudging the originality of a work is whether it involved any skill, labour and knowledge of author. The originality in writing of a successful text book in a subject like arithmetic lies upon the skill of the author. The amount of originality may be small, but the extent of his thought, skill and labour may be tremendous and it is that which is protected by law. AIR 1924 PC 75, Foll. (Paras 11, 12)

(C) Copyright Act (1914), S. 5, Sch. I — Assignment of copyright — Instrument in writing — Court has to give effect to actual bargain unless words therein do not convey correct intention of parties. (Para 16)

(D) Copyright Act (1914), Sch. I, S. 5 — Assignment of copyright — Whether benami — Tests for determination.

The onus of establishing a transaction to be benami is on the person who asserts to it. This cannot be a matter of presumption and has not only to be averred in the pleadings but also must be proved by legal evidence. In absence of evidence, the apparent title prevails. The real criterion in cases of benami transactions is to consider the source of funds for the acquisition, motive, possession of property, custody of title-deeds etc. If in the nature of things, there is no scope for applying these tests, the burden of proving the transaction to be benami would be very much greater. In matters of assignment of copyright the decision of the Court must rest not on mere suspicion but only on legal evidence, including testimony of witnesses. AIR 1965 SC 1364 & AIR 1949 FC 88 & (1866-67) 11 Mob I A 28 (PC), Rel. on. (Para 18)

(E) Copyright Act (1914), Sch. I, S. 5 — Agreement between author and publisher — Copyright whether vests in publisher or he is only a licensee — Determination of — Copyright Act (1957), S. 18.

In the case of agreement between author and publishers, particularly as regards publishing agreement the most important point to determine is whether any copyright is to be vested in the publisher or whether a licence only is intended. In the former case, the publisher will enjoy the full legal title to the copyright and will alone be entitled to enforce the right against third parties. In the case of a licence which in a publishing agreement will normally be an exclusive licence, the grant is subject to certain conditions and on their non-fulfilment, the licence is capable of being revoked. (Para 21)

AIR 1970 MADHYA PRADESH 261 (V 57 C 46)

K. L. PANDEY AND A. P. SEN, JJ.

M/s. Mishra Bandhu Karyalaya and others, Appellants v. Shivratanlal Koshal, Respondent.

First Appeal No. 83 of 1964, D/- 29-4-1969 against decree of Vth Addl. Dist. J., Jabalpur, D/- 31-8-1964.

(A) Copyright Act (1914), Sch. 1, S. 1 — Copyright Act (1957), Ss. 13, 45 — Acquiring copyright in a book — Difference between two Acts — Under 1957 Act registration is a condition.

There was no provision for registration of copyright under the 1914 Act. A person had an inherent copyright in an original composition or compilation without registering it. AIR 1927 Mad 981, Rel. on. (Para 10)

Under the Act of 1957, the registration of the book with the Registrar of Copyrights is a condition for acquiring copyright with respect to it. A copyright in a book now is secured only if it is an original compilation and has been duly registered according to provisions of 1957 Act. Once it is so registered the author is deemed to acquire property right in it. The right arising from the registration of the book can be the subject-matter of civil or criminal remedy, so that, without it the author can have no rights nor remedies though his work may be original one. (Para 9)

(B) Copyright Act (1914), S. 1, Sch. 1 — Original work — Tests — Originality in text books on arithmetic lies in skill

(F) Copyright Act (1914), Ss. 1, 2 and Sch. I — Infringement of copyright — Tests to determine — Copyright Act (1957), Ss. 13, 51.

The laws of copyright do not protect ideas, but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether the work complained of is or is not a colourable imitation of another, is essentially a question of fact and the burden of proving that fact is undoubtedly on the person accepting it. Case law discussed. (Paras 31, 32)

(G) Contract Act (1872), Ss. 39, 73 — Copyright Act (1957), S. 55 — Agreement between author and publisher — Breach in respect of payment of royalties and rendition of accounts — Discharge by breach can be implied — Remedy after discharge is only for damages.

The breach of the fundamental obligation created by the contract is a cause of discharge of a contract. It may, indeed, be said, in general that any breach which prevents substantial performance is a cause of discharge. Whether performance is substantially prevented or only partially affected is, of course, a question that depends upon the circumstances of each case. To bring this principle into operation, the intention of a party not to proceed further with the contract need not be expressly stated. It may be inferred from his acts or omissions. But repudiation of a contract is a serious matter not to be found or inferred. (Paras 40, 41)

However a contract cannot be terminated unilaterally. A contract is not automatically discharged by breach but it only gives the injured party an option to treat the contract as at an end.

(Para 42)

In a publishing agreement between the author and publisher the non-remission of yearly accounts of royalties and the non-payment of the royalties which had accrued on sales, are breaches of the fundamental obligation as regards payment of royalty created by the contract, which entitles the author to treat the contract as discharged by breach. (Para 45)

The renunciation of a contract may take place either before its performance is due, or during the performance of the contract itself. Where the publishers had made it impossible by their own conduct

for the contract to go on; and, there was no other alternative left to the author than to treat the contract as at an end, by the acceptance of their repudiation as discharging it, they were absolved or discharged from any further performance thereof. (Para 45)

When there is a termination of a publishing contract occasioned by a breach of the fundamental obligations created by acceptance of the breach by the author in his notice of termination, he cannot fall back upon its terms for claiming any benefit like royalty on sale for the subsequent period, his right is only to sue for damages. (Para 47)

(H) Copyright Act (1914), Sch. I, Ss. 6 and 7 — Damages under are cumulative.

Damages for infringement under Section 6 and damages for conversion under Section 7 are cumulative but not alternative, and care must be taken to see that the damages awarded under the respective sections do not overlap. Case law discussed. (Para 49)

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- (1916) 1916-2 KB 325 = 85 LJ (KB) 1504, Cescinsky v. Routledge (George) and Sons 29
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- (1855) 6 De GM and G 223 = 3 Eg Rep 457, Stevens v. Benning 22
- (1806) 12 Ves 270 = 33 ER 103, Mathewson v. Stochdale 30
- Y. S. Dharmadhikari, for Appellants; J. V. Jakatdar, for Respondent.
- A. P. SEN, J.:— This is an appeal brought by the defendant No. 1, M/s. Mishrabandhu Karyalaya, Jabalpur and its partners, from the Judgment and decree of the 5th Additional District Judge, Jabalpur, dated 31st August 1964, decreeing against them, the plaintiff Sheoratanlal Koshal's claim (A) for recovery of Rupees 15,307.04 paise with interest @ 6% per annum thereon from the date of suit, i.e., from 1st January 1963 till realisation, due on account of the arrears of royalty payable to him on the sales effected upto the end of December 1959 of the book entitled 'Saral Middle School Ank Ganeet', written by his son-in-law Maniram Vishwakarma, the copyright of which had been assigned to him; (B) for rendition of account of the sales effected by them of the book in question and other allied publications thereof, as per the Hyderabad Syllabus or otherwise, during the years 1960, 61, 62 and until the date of accounting, so as to ascertain the amount of royalty which had accrued thereon and become payable to him @ 15% of the sale proceeds; (C) for interest @ 6% per annum on the amount of royalties due each year, payable from 1st January of the following year; (D) for declaring that they do not have any right, title and interest in the book in question, or, in any other publication thereof, as per the Hyderabad Syllabus, and that the plaintiff had the sole right to such publications; and (E) for perpetually restraining them from printing or publishing the book entitled 'Saral Middle School Ank Ganeet', as originally published, or, in any of its revised or amended forms according to the Hyderabad Syllabus or otherwise.
2. The relevant facts giving rise to this appeal, are these. Under Exception 2 to S. R. 2 below Fundamental Rule 47, the Director of Public Instruction Madhya Pradesh under Memo. No. 4257/S dated 9th November 1951 (Ex. P-1), had permitted the aforesaid Maniram Vishwakarma, Assistant Master, Government Multipurpose Higher Secondary School, Jabalpur, (hereinafter referred to as the "author") to undertake the work of writing a textbook on Arithmetic (in four parts) for use in Cls. V to VIII, subject to the condi-

tions, namely, that (i) he retained no interest in the sale of copyright, (ii) he disposed of the manuscript in lump sum not exceeding Rs. 1,500/-, and (iii) his legitimate work did not suffer on that account. In terms of that order, the author having written such a book on Arithmetic, effected an outright sale of its copyright in favour of his father-in-law Sheoratanlal Koshal, (hereinafter referred to as the "plaintiff"), in consideration of a payment of Rs. 1,200/- for such assignment under the terms of an agreement dated 9th March 1962 (Ex. P-4), executed between them, whereby the plaintiff became the assignee of the copyright having been conveyed all rights therein, including the rights of its publication, realisation of profits accruing therefrom and the right to royalty on all its sales, etc.

The defendant No. 1, M/s. Mishrabandhu Karyalaya, Jabalpur, a firm of printers and publishers, through Basant Kumar Mishra the defendant No. 3, a member of that firm who also happened to be in management of its business along with Jagdish Prasad Mishra the defendant No. 2, entered into a publishing agreement dated 13th March 1952 (Ex. P-5) with the plaintiff. That agreement granted to the defendants a right to publish the work in question, on the following conditions: (i) the right of publication was transferred to them in lieu of their paying to the plaintiff a royalty at 15% of all their sales, (Clause 1), (ii) an account of royalty had to be made annually, in the month of December each year, (clause 2), and (iii) the plaintiff was entitled to inspect the account of sales of the work in question effected by the defendants, (clause 3), (iv) the plaintiff had to get the book suitably altered to bring it in conformity with the syllabus in Arithmetic of any other State if prescribed in course of its studies, and for this he was not to be separately remunerated, (clause 4), (v) if any alteration in the syllabus was effected in the State of Madhya Pradesh, he was to have the book suitably altered by the author himself and the defendants, in that event, had to print its amended edition also on the aforesaid terms failing which he would be entitled to have it printed elsewhere (clause 6).

3. We regret to find that the defendants who claim to be publishers of some repute have throughout betrayed in this case a lack of business integrity by not adhering to their contractual obligations for personal gain. After having acquired the sole and exclusive right of publishing the work which has become a prescribed text-book in different States and, therefore, a source of considerable profit to them, the defendants have ever since displayed a callous indifference to fulfil their part of the contract in several ways, viz., (i) in submission or rendition of

Yearly accounts of royalties @ 15% of total sales as required to be furnished, in the month of December of each year, and (ii) in payment of such royalty on the sales, annually, as stipulated. After persistent demands, the defendants eventually rendered on 16th April 1960 an account (i) of the royalties which had accrued due up to the end of December 1959, and (ii) of the stock-in-trade in their hands as on 26th January 1960, whereby they unequivocally acknowledged their liability to pay Rs. 15,790.46 paise. Towards this, they only paid Rs. 2,000 on 18th April 1960, still leaving a balance of Rs. 13,790.40 paise in arrears. Apart from their admitted failure in making payment of Rs. 13,790.40 paise, the defendants have also failed to render an yearly account of the royalties, on sales effected in all the following years, nor have they paid the royalties which have become due thereon, i.e. for the entire period after the year 1959.

The plaintiff had by his 1st notice dated 27th February 1961 (Ex. P-27), called upon the defendants to render an account of the royalty which had become due for the year 1960, with a request for its payment, together with the arrears of royalties up-to-date within a week, failing which he threatened to take legal action for its recovery. Despite that notice, the defendants did not comply with the demand for payment of the amounts that had become due. The plaintiff, by his 2nd notice dated 25th April 1961 (Ex. P-28), pointed out that they had persistently failed to pay the royalties accrued due during the earlier years which were in arrears. The plaintiff further complained that they had also, in breach of the agreement between the parties, published another text-book on the subject called 'Purva Madhyamik Ank Ganeet' (in three parts) for use in the very same classes for which they had already undertaken to publish and sell the 'Sarat Middle School Ank Ganeet' and being interested in promoting the sales of that book in the market, had been acting in a manner detrimental to his interests. Therefore, by the same notice, the plaintiff revoked and terminated the publishing licence which he had created in their favour.

4. The plaintiff averred that by the agreement dated 13th March 1952 (Ex. P-5), he had not assigned the copyright in the book in favour of the defendants, but had merely created a licence authorising them to print, publish and sell copies thereof which however stands revoked as a result of his notice dated 15th April 1961 (Ex. P-28), and that after the revocation of that licence, the defendants had no right to pirate that work as originally published or in any other manner as they liked, nor had they any

right to appropriate to themselves the profits accruing from its sales. That profits have been earned by the defendants from such sales is an 'irrefutable' fact which is unmistakably clear from the facts on record which speak for themselves. The book 'Saras Middle School Ank Ganeet' was first published in or about 1952 and since then there were later editions of this work. Till about the years 1957-58, that book was in four parts; thereafter, it appeared in the Mahakoshal region in three parts, with the introduction of a unified syllabus; while it still appears in four parts in the old Vidarbha region as before. After publication of the first and subsequent editions, the book has been sold by the defendants ever since the year 1952. It appears that they have also, without reference to the plaintiff, had the book revised to bring it in conformity with the Hyderabad syllabus, and it has in that revised form been sold in the State of Andhra Pradesh.

Apart from this, they further published a "1962 edition" for use in Madhya Pradesh, after having it adapted to the metric system which has now been introduced in the course of studies under the instruction of the Director of Public Instruction, Madhya Pradesh issued to the Heads of all Educational Institutions. That revised edition of the original work was brought out by the defendants without reference to the plaintiff or the author who had a right to revise it. In Schedules 'A' and 'B' annexed to the plaint, the plaintiff had particularised the large number of mistakes which have crept in the "1962 edition" published by the defendants.

5. The defendants in denial of this claim, have raised different pleas in their written statement. First of all, they allege that the author was the real owner or beneficiary under the agreement dated 13th March 1952, (Ex. P-5); that they had directly entered into that agreement with him; and that the plaintiff was only a benamidar at whose instance a suit of this nature would not lie; that the name of the plaintiff had been nominally entered in that deed at the instance of the author himself who being in Government service did not want to figure in the transaction. In other words, they alleged that the plaintiff was neither a party to the real agreement which they had with the author nor did he ever come into the picture at the time of settlement of its terms; that the publication of the book was not in pursuance of the alleged agreement as set up by the plaintiff, but was in furtherance of a contract with the author himself; that there was no privity of contract between the parties, and that, therefore, the question of performance of any of the terms of the alleged agreement did not arise.

To sum up, the contentions of the defendants were: firstly, that they never

had rendered any account to the plaintiff as regards the royalty of the book in question; that the real fact was that the statements of accounts rendered on 16th April 1960 covering the period upto the end of December 1959 were delivered to the author but to retain a benami character of the transaction, as was mutually agreed upon, the name of the plaintiff had been nominally inserted therein; secondly, that there was no concluded contract which could be the foundation of a suit because the alleged agreement had yet to be finalised which was only of a tentative nature; thirdly, that they did not admit any liability for payment of Rs. 15,790.46 paise, as alleged; fourthly, that there being no privity of contract between the parties, there was no question of any breach of contract nor of rendition of accounts between them; fifthly, that there was no breach of the original contract with the author as he had been asked to bring the book in conformity with the changed syllabus after introduction of the metric system in academic session 1961-62; that he, on the contrary, neglected to carry out the required alterations in the book and, as a result, they were requested to get the book revised by one L. C. Jain, a lecturer of the Mahakoshal Mahavidyalaya, Jabalpur; that the inaccuracies, therein, if any, were not intentional or deliberate and had been rectified in the later editions; sixthly, that the agreement in question resulted in an absolute assignment of the copyright, and was not a mere licence to publish on certain terms; seventhly, that they had requested the author for a revision in the rate of royalties looking to the rise in cost of raw materials, and he agreed to their proposal by reducing the rate of royalty to 12.15 per cent, by his letter dated 16th April 1960 (Ex. D-6), and while effecting this revision, he had taken away the original agreement; the benami nature of the transaction, however, was retained by continuing the transaction in the name of the plaintiff; lastly, that the alleged agreement was for a consideration forbidden by law and, was therefore, legally not enforceable, besides being opposed to public policy and was, therefore, void and unenforceable under Section 23 of the Contract Act. Even otherwise, they alone had the right to print and publish the book in question, but in breach of that agreement, the author had given it for publication to M/s. Narbada Book Depot, Jabalpur, in the year 1960, and since then that concern was selling the book in the market, to their great detriment and in violation of their copyright in the work. For this, the defendants asserted "that they had reserved their right to sue for damages separately", but apparently no such suit has so far been filed. They had, instead, launched a prosecution against both the author

Maniram Vishwakarma and his assignee the plaintiff-Sheoratanlal Koshal, for alleged infringement of their copyright, which, however, ended in their acquittal.

6. The learned Judge has decreed the plaintiff's claim. His findings are that (i) the plaintiff has purchased the copyright in the book 'Saral Middle School Ank Ganeeet' from the author Maniram Vishwakarma, for a cash consideration of Rs 1,200/-, under the agreement dated 9th March 1952 (Ex. P-4); (2) the agreement was neither forbidden by law, nor opposed to public policy under Section 23 of the Contract Act, as the assignment of his rights was with the permission of the Director of Public Instruction; (3) there was a concluded contract between the plaintiff-Sheoratanlal and M/s. Mishrabandhu Karvalaya, through its managing partner Basant Kumar Mishra, on the terms embodied in the agreement dated 13th March 1952 (Ex. P-5); (4) that document was not merely a tentative draft, but represented the terms and conditions on which the defendant-firm was granted the sole and exclusive right of publication of the book in question; (5) on a true construction of the agreement in question, there was no assignment of any copyright in favour of the defendant firm but only a licence which was revocable on the breach of any of its conditions; (6) the defendant-firm had rendered an account on 16th April 1960, acknowledging its liability to pay Rs. 15,790 46 paise towards the arrears of royalty upto the end of the year 1959 and of the stocks-in-trade as on 26th January 1960; (7) by virtue of the copyright in his favour, the plaintiff became the owner of the book, and not a mere benamidar of the author, Maniram Vishwakarma and was, therefore, entitled not only to recover the amount of Rupees 13,790.46 paise remaining due, but also to rendition of accounts and to the grant of a perpetual injunction. Accordingly, the learned Judge has decreed the entire claim in suit.

7. Before the Copyright Act, 1957 (Act No 14 of 1957) was enacted by Parliament, the existing law relating to copyright in India, i.e., its statutory basis, was the British Parliamentary legislation to be found in the Imperial Copyright Act, 1911 (1 and 2 Geo. V, Ch. 46) as modified by the Indian Copyright Act, 1914 (Act No. 3 of 1914). Apart from the fact that the Imperial Act did not fit in with the changed constitutional status of India, it was necessary to enact an independent self-contained law on the subject of copyright in the light of growing public consciousness of the rights and obligations of authors and in the light of experience gained in the working of the law as in force during the last forty years. New and advanced means of communications like broadcasting, litho-photography, etc., also

called for certain amendments in the existing law, apart from making therein provision for the due fulfilment of international obligations in the field of copyright which India might accept. That was the object with which the Copyright Act, 1957, was enacted, and it attempted a complete revision of the law of copyright which appeared to be inevitable due to the changed circumstances.

8. We are, however, concerned with the state of things prevalent prior to 21st January, 1958, when the Copyright Act, 1957 (Act No 14 of 1957), was brought into force. The law then in force was the Imperial Copyright Act, 1911 (1 and 2 Geo. V, Ch. 46) which, with slight modification, was made applicable to this Country by the Indian Copyright Act (Act No. 3 of 1914). The Imperial Copyright Act, 1911, either as operating *proprio vigore* or as applied by the Indian Copyright Act, 1914, was "a law in force in the territory of India immediately before the commencement of the Constitution", and it, therefore, continued to be in force as the law of the land by virtue of Art. 372 (1) of the Constitution. We consider the following passage in Copinger and Skone James on Copyright, 9th Edn., pp 428-9, as describing the position correctly:

"The United Kingdom Copyright Act, 1911, extended to India as part of His Majesty's dominions, but certain modifications were introduced by the Indian Copyright Act, 1914 (No. 3 of 1914). The effect of Section 18 of the Indian Independence Act, 1947 (10 & 11 Geo. VI, C. 30) appeared to be that copyright protection both in India and with respect to works originating there remained unchanged." For a fuller discussion of this subject, see the decision of the Madras High Court in *M/s. Blackwood and Sons Ltd. v. A. N. Parasuraman*, AIR 1959 Mad 410.

9. Under the law then prevalent i.e., according to the provisions of the earlier enactments, the first owner of the copyright is the author and his right of assignment is dealt with in Section 5(2) and (3) of the Indian Copyright Act, 1914. We believe the law on that aspect still remains the same with some modifications, even under the new Copyright Act, 1957. The only change that is relevant for our purposes is, that under the old law, the non-registration of the copyright had not the effect of entailing the dismissal of an action in respect of infringement of copyright commenced when the Act of 1914 was in force see, *Balantrapu Venkata Rao v. Valluri Padmanabha Raju*, ILR 51 Mad 180 = (AIR 1927 Mad 981) Wallace, J., in that case, followed the view expressed in *N. V. Savory Ltd. v. World of Golf Ltd.*, 1914-2 Ch 566, under the allied Fine Arts Copyright Act, that mere failure to register does not deprive an artist of his

copyright. That appears to us to be a correct and reasonable view. The Indian Copyright Act, 1914, had nowhere made any provision for the registration of copyrights. Under the Copyright Act, 1957, it appears that under Sections 13 and 45, the registration of book with the Registrar of Copyrights, is a condition for acquiring copyright with respect to it. A plain reading of the several provisions of the Act, leaves no doubt in our minds that a copyright in a book now is only secured if it is an original compilation and has been duly registered according to the provisions of the 1957 Act. Once it is so registered, the author is deemed to acquire property rights in the book. The right arising from the registration of the book can be the subject-matter of civil or criminal remedy, so that, without it the author can have, no rights, nor remedies in spite of the fact that his work is an original one. We are, however, concerned with the state of law prevalent under the Imperial Copyright Act, 1911, enacted by the British Parliament, subject to such modifications as stated in the Indian Copyright Act, 1914. It is necessary for us to deal with this aspect because the learned counsel for the appellants, during the course of his arguments, obliquely suggested that the copyright of the book in question "Saral Middle School Ank Ganeet" not being registered, neither the author nor his assignee had any kind of right or remedy. The whole object of this discussion is to remove that misconception.

10. Under the law relating to copyright then prevalent, to which we have already referred, viz., the Imperial Copyright Act, 1911, as adopted or modified to suit Indian conditions by the Indian Copyright Act, 1914, a person had an inherent copyright in an original composition or compilation without the necessity of its registration. Under the English enactment (Sections 1 and 2) copyright may subsist subject to the provisions of the Act "in every original literary, dramatic, musical artistic work."

11. While we are dealing with this aspect, it is also necessary for us to dispel the doubt expressed by the learned counsel for the appellants that no copyright can be had in respect of a textbook on arithmetic like 'Saral Middle School Ank Ganeet', because it would necessarily be, in a different form, compilation of certain arithmetical problems originated by others. We are clearly of the view that the assumption of the learned counsel is wholly unfounded. Neither original thought nor original research is essential for a literary work to be original under Section 1, Schedule I, of the Indian Copyright Act, 1914. The Judicial Committee of the Privy Council in *Macmillan and Co. v. K. and J. Cooper*, AIR 1924 PC 75, while

interpreting Section 2 of the Imperial Copyright Act, 1911, had stated:

"The word 'original' does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of 'literary work' with the expression of thought in print or writing. The originality which is required relates to the expression of the thought; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author."

12. The real test in adjudging the originality of a work is whether it involved any skill, labour and knowledge of the author and that being fulfilled, he would be 'protected by law', and no one else was permitted to steal or appropriate to himself the result of his labour, skill and learning. As their Lordships have most appropriately stated, the provision of Section 2 of the Imperial Copyright Act was based on the moral principle resting on the Eighth Commandment, 'Thou shall not steal'. Apart from this, the originality in writing of a successful text-book in a subject like arithmetic lies upon the skill of the author. Some authors have not the art or the necessary skill to make a compilation nor are all compilations of the same nature or quality. That is the reason why one dictionary, gazetteer, grammar, map, almanac, encyclopedia, guide-book, etc., would sell and not the others. There lies the skill of the author of the work which brings to him commercial success. The contention that no originality can be claimed in such works can, therefore, hardly be accepted. For instance, a reference to the Shorter Oxford Dictionary or the Webster's New International Dictionary would plainly show the difference in treatment of the same words in contrasting ways. In *Copinger and James on the Law of Copyright*, 9th Edn., pp. 148-49, the law has been summarised as follows:

"In the case of compilations such as dictionaries, gazetteers, maps, arithmetics, almanacs, encyclopedias and guide books, new publications dealing with similar subject-matter must of necessity resemble existing publications, and the defence of 'common source' is frequently made where the new publication is alleged to constitute an infringement of an earlier one." Thus, it is clearly recognised that all such books are capable of having a copyright in them. In text-books on arithmetic or books of the above description, the amount of originality of the author may be small, but the extent of his thought, skill and labour may be tremendous, and it is that which is protected by law. We are, therefore, of the view that the book 'Saral

'Middle School Ank Ganeet' will certainly be an "original work", within the meaning of the English Copyright Act as applied to British India, and, therefore, the author and/or his assignee not only had or has a copyright therein but also had the right to enter into a publishing contract of any kind in respect thereof.

13. In this case we are concerned with the simplest type of literary copyright, namely, the right to print, publish and sell copies of the particular book in question, and in the case of a simple text-book on arithmetic, no complications as regards any dramatic or film rights can possibly arise. In determining the question whether a particular agreement relating to this was an absolute assignment or a mere licence, the effect of the opinion of Viscount Sumner delivered in the House of Lords in *Messenger v. British Broadcasting Co. Ltd.*, 1929 AC 151 (HL) seems to be that one has to look on the real meaning of an agreement rather than the particular, in that case unfortunate, choice of words of the parties. In other words, the real meaning of an agreement rather than the mere choice of words has to be looked into in deciding whether there was a complete or partial assignment of the copyright or a mere licence to print, publish and sell copies of the work in question. We would now refer to the contentions raised at the Bar.

14. The learned counsel for the appellants has assailed the decree under appeal on the following grounds:

- (1) The plaintiff being merely a benamidar was not entitled to sue for any of the reliefs asked for, since there was no privity of contract between the parties;
- (2) The document dated 13th March 1952 (Ex. P-5) was simply a "tentative draft" and not a "concluded contract" between the parties. At any rate, it was a "unilateral" document, executed by the plaintiff, and the mere addition of the word 'approved' by Basant Kumar Mishra, a partner of the defendant-firm could not mean its acceptance, and, therefore, the matter was still at the stage of negotiation between parties which had not matured into an enforceable contract;
- (3) Alternatively, on a plain reading of the said agreement, the copyright of the book had itself been transferred in favour of the defendant-firm and not merely a licence to publish on conditions; and, at any rate, it was an irrevocable licence which would not be terminated by notice;
- (4) The failure of the author to revise the book in question was itself a breach of covenant which disentitled him or his assignee from claim-

ing any equitable relief, for rendition of accounts, or, for grant of an injunction;

- (5) Having himself terminated the contract by his notice dated 25th April 1961 (Ex. P-28), the plaintiff could not fall back on its terms, for claiming any royalty for the period subsequent thereto; and his claim, if any, was to sue for damages; and
- (6) The claim for recovery of Rupees 13,790 46 paise, the alleged amount due, as per the Statements of account dated 16th April 1960 (Exs. P-6 to P-8), was barred by limitation.

None of these contentions is really well founded and they must all be rejected for reasons we shall presently state.

15. As to the first, the contention that the plaintiff Sheoratanlal Koshal was a benamidar of the author Maniram Vishwakarma and not the real owner of the copyright can hardly be accepted. The allegation in the written-statement that the author, being a Government servant, could not openly engage himself in any kind of business which yielded profit to him without permission of the Director of Public Instruction, or, that securing of such permission, besides entailing endless enquiries by Government, was also by no means easy, or that the author, being a Government servant, was precluded under the Government Servants Conduct Rules from effecting any assignment of his rights and had, therefore, nominally utilised the name of his father-in-law namely the plaintiff Sheoratanlal Koshal, stands falsified by the plea inserted by way of amendment showing that such permission to the author was duly accorded by the Director of Public Instruction to undertake the work of writing in four parts a text book on arithmetic for use in Cls. V to VIII by his Memorandum No. 4237/F dated 9th November 1951 (Ex. P-1).

Now, when a plea of this nature is raised, the onus probandi to substantiate the transaction to be benami must necessarily be on the person making the allegation, and it has to be established by strictest evidence. The defendants had, therefore, the burden of proving by cogent and convincing evidence that the alleged assignment of copyright in favour of the plaintiff was a colourable or fictitious transaction intended to defeat any provision of law. We, however, find no justification for this assumption. Indeed, there was no occasion for the author Maniram Vishwakarma to have adopted any device of this kind because he had been permitted by the Director of Public Instruction himself not only to undertake the work of writing a text book on arithmetic but also to make an outright sale of his copyright for a lump sum payment under Exception 2 to S.R. 2 below Fundamental

Rule 47. In pursuance thereof, he duly assigned his rights therein.

16. The Court's duty is to give effect to the actual bargain of the parties according to their intention, and when the transaction is in writing, the intention of the parties has to be gathered from the actual words used in the instrument unless they are such as not to convey their intention correctly. In *Copinger and Skone James on Copyright*, 9th edition, P. 376, the different forms in which such agreements in common use partake are set out thus:

"Agreements between authors and publishers fall roughly into four classes, namely:—

- (1) outright sales of copyright in consideration of a single payment;
- (2) licences for a period on royalty terms;
- (3) profit-sharing agreements; and
- (4) publication on commission, no rights in the work being vested in the publishers."

Under the terms of the agreement dated 9th March 1952 (Ex. P-4) between the parties, the author Maniram Vishwakarma had parted with 'all his rights' in lieu of the payment of a price. For a correct interpretation of that contract, we must primarily look to document itself. It reads:

"This agreement is made this day 9th of March 1952 between Shri Maniram Vishwakarma son of Shri Nanhebbhai Vishwakarma resident of Jabalpur (hereinafter for the sake of brevity referred to as the 'Author') of the one part and Shri Sheoratanlal Koshal son of Shri B. L. Koshal resident of Mandla (hereinafter for the sake of brevity referred to as the 'publisher') of the other part.

Whereas the author has written a book on Arithmetic for the Middle Classes in four parts, the manuscript of which is ready and fit for publication. And whereas the publisher is desirous of starting publications and the author is willing to entrust the publication thereof to the said publisher.

That the publisher shall pay Rs. 1200/- (one thousand and two hundred only) in all to the author for the said four parts of the books.

That the publisher shall print or cause the said books to be printed in four volumes to be used for middle classes. The books may be named by the publisher according to his choice.

The books may be published by the publisher himself or he may in his discretion transfer his publishing rights to some one else. For the publication of the said books for the said sum of Rs. 1200/- (one thousand and two hundred only), the author conveys all rights to Sheoratanlal.

The author has received Rs. 500/- (Five hundred only) today and has handed over the manuscript to the publisher. The balance of the sum amounting to Rs. 700/- (Seven hundred only) shall be paid to the author within a period of three months by the said publisher.

The publisher will have a right to get the work revised, translated or rewritten by the author if and when necessity arises on account of change of syllabus or any other like reason and, in the event, will be liable to reimburse the author suitably. In the event of the author refusing to rewrite or revise the work, the publisher will be at liberty to get it suitably rewritten and revised by someone else. However, when the work is rewritten or revised by someone else, the publisher will be liable to safeguard and maintain the high standard and prestige of the work done by the author.

The publisher shall not act in any way which may be detrimental to the interest of the books or their reputation and the rights of the publisher will be liable to be forfeited in case the publisher acts in a manner detrimental to the interest or reputation of the books.

That the author hereby declares and assures the publisher that the book written by him is his sole work and would not infringe the copyright of another.

M. R. Vishwakarma,
Author.
Sheoratanlal,
Publisher."

Apart from the words 'the author conveys all his rights', the other terms are clearly indicative that the agreement between the parties was of the first category, i.e., it was an agreement for an outright sale of the copyright without reservation of any kind by the author in respect of any right whatever in himself. The plaintiff had, therefore, full legal title to the copyright and as a logical consequence thereof, he also had acquired the right to enter into a publishing contract like the agreement dated 13th March 1952 (Ex. P-5) with the defendants. A fortiori, the plaintiff had a right to sue then in his own name for his royalties thereunder and for the other consequential reliefs flowing from his legal ownership in the work, i.e., the right to an account of profits, which is only an equitable remedy incidental to the right of injunction, if there was any infringement of his copyright and, upon that event, also of recovering the infringing copies, if any, which were pirated from the work in question.

17. From a perusal of the terms appearing in the agreement taken as a whole and particularly the operative portion thereof, we find that the executant had unequivocally and in categorical language "assigned" his copyright. The

recitals of the document are plain enough and the terms are susceptible of no other construction than this that the author Maniram Vishwakarma had made an outright sale of his copyright in favour of the plaintiff Sheoratanlal Koshal in consideration of payment of Rs. 1,200/- for the making of such assignment. The contention is not that the arrangement so arrived at was either forbidden by law or was against public policy and, therefore, void and unenforceable under Section 23 of the Contract Act. The submission is that the plaintiff had no right to sue, being a mere benamidar.

As already stated, we find that the author having been permitted under Exception 2 to SR 2 below Fundamental Rule 47 to undertake the work in question provided he assigns all his rights, there was no occasion for him to enter into a colourable transaction to defeat any provision of law. We may incidentally mention that although the defendants had pleaded that the agreement in question was for a consideration which was forbidden by law and opposed to public policy and, therefore, was not enforceable under Section 23 of the Contract Act and had raised this issue in the Court below, the learned counsel appearing on their behalf has abandoned that stand, and no provision either in the General Book Circulars or in the Government Servants Conduct Rules were brought to our notice to suggest that such contract would be legally invalid. On the contrary, Exception 2 to SR. 2 below Fundamental Rule 47 not only permits a Government servant to be the author of a book but also enables him to assign his rights under certain conditions.

18. Even otherwise, the onus of establishing a transaction to be benami is on the person who asserts it. This cannot be a matter of presumption and has not only to be averred in the pleadings but also must be proved by legal evidence. In absence of evidence, the apparent title prevails. See, Smt. Surasibalini Debi v. Phanindra Mohan Majumdar, AIR 1965 SC 1364. Normally, the proof of a transaction being benami rests not only on direct evidence but also on the relevant circumstances. In absence of any direct proof, the circumstantial evidence may sometime clinch the issue. The real criterion in cases of benami transactions is to consider the source of funds for the acquisition, motive, possession of property, custody of title-deeds, etc. See Sreemanchunder Dey v. Gopal Chunder Chuckerburty, (1866-67) 11 Moo Ind App 28 (PC) and Gangadara Ayyar v. Subramania Sastrigal, AIR 1949 FC 88.

In Gangadara Ayyer's case, AIR 1949 FC 88 (supra), their Lordships of the Federal Court have stated that source of money for the acquisition of property is

an important test, but unfortunately in a case like the present, that is of no avail. Even if it were, we have the testimony of P.W. 2 Sheoratanlal Koshal and P.W. 6 Maniram Vishwakarma that the transaction was real and the assignment of copyright was effected on payment of Rs. 1,200/- If in the nature of things, there is no scope for applying these tests, the burden of proving the transaction to be benami would be very much greater. In matters of this description the decision of the Court must rest not on mere suspicion but only on legal evidence, including testimony of witnesses. On the reasonable probabilities and legal inferences arising from the proved or admitted facts in the case, we are satisfied that the alleged benami nature of the transaction is not established, and, therefore, the apparent title must prevail. Having dealt with the plaintiff as the owner of copyright and having derived benefits of a contract with him, the defendants are really precluded from contending that the real title resides elsewhere. Such an estoppel necessarily arises by reason of their privy of contract.

19-20. Next, the question is whether the parties were still at the stage of negotiations and, therefore, the agreement dated 13th March 1952 (Ex. P-5) had not matured into an enforceable contract. The argument is that the document Ex. P-5, on which the suit is based, is merely a 'tentative draft' of an agreement and did not represent a 'concluded contract' between the parties. Alternatively, it is suggested that it was a 'unilateral document' executed by the plaintiff alone, and the mere addition of the word 'approved' by Basant Kumar Mishra, defendant No. 3, would not mean its acceptance by defendant No. 1 M/s Mishrabandhu Karyalaya (After considering the evidence, the Court held that the agreement dated 13th March 1952 (Ex. P-5) truly represented a concluded contract between the parties.)

21. Coming to the third contention raised by the learned counsel, we are satisfied that it is wholly devoid of substance. In dealing with arrangements between authors and publishers, particularly as regards publishing agreements, Copinger and Skone James indicate that no formalities are required, stating:

"Contracts between authors and publishers are not, as in some countries, regulated by any special law, but their validity, construction and enforcement depend upon the ordinary rules of law governing contracts relating to dealings with personal property. In practice, such arrangements vary through many gradations of formality, from an oral or implied licence to publish a single article to a full-length publishing agreement. It is the informal agreement leaving many

essential terms to implication that most often renders difficult the determination of the respective rights of the parties." (p. 375).

According to the learned authors, writing is essential when there is an assignment of copyright or an exclusive licence to publish. As already stated, such agreements form into four distinct categories. We are, however, not left to any implications to ascertain the nature of the right that came into existence, because the terms of the agreement between the parties are embodied in a writing dated 13th March 1952 (Ex. P-5). In the case of such formal agreements, the most important point to determine is whether any copyright is to be vested in the publisher or whether a licence only is intended. In the former case, the publisher will enjoy the full legal title to the copyright and will alone be entitled to enforce the right against third parties. In the case of a licence which in a publishing agreement will normally be an exclusive licence, the grant is subject to certain conditions and on their non-fulfilment, the licence is capable of being revoked. We have no manner of doubt that the real arrangement between the parties was that the copyright in the work belonged to the plaintiff Sheoratanlal and the defendants' firm M/s. Mishrabandhu Karyalaya was given an exclusive licence to publish it on certain conditions. The position would have been entirely different if the plaintiff had assigned his copyright and stipulated for payment on royalty terms. In that event, the rights of the parties would have been worked out in the light of the decision in *Barker v. Stickney*, 1919-1 KB 121. In that context, *Copinger and Skone James* state at p. 379:—

"It seems fairly clear that as the law now stands, an author, who has entered into a publishing agreement in which the copyright is assigned to the publisher on royalty terms, has no right of action for the royalties against an assign of the publisher. Authors, therefore, should keep the copyright themselves and assign no more than a right to publish conditional upon royalties being paid and only assignable if they are provided for."

That, however, is not the case, because the plaintiff had not assigned his copyright on royalty terms but merely entered into a publishing agreement with M/s. Mishrabandhu Karyalaya for retaining in himself the copyright and conferred on them the right to publish the work on payment of certain royalty. The matter depends on the construction of the terms of the agreement dated 13th March 1952 (Ex. P-5), which reads:

"मैं शिवरतनलाल कोशल, मंडला का निवासी हूँ मैंने जो अंक-गणित की पुस्तक जिसका नाम आदर्श अंक-

गणित है और जो कि मि. स्कूल की कक्षाओं के लिए चार भागों में लिखी गई है। उक्त पुस्तक के लेखक श्री. मनीराम विश्वकर्मा से सर्वाधिकार सहित खरीद ली है, उस पुस्तक के प्रकाशन का अधिकार मैं जबलपुर के मिश्र बन्धु कार्यालय को निम्नाल्लिखित शर्तों पर देता हूँ कि—

(१) मिश्र बन्धु कार्यालय से मुझे विक्री हुई प्रतियों के मूल्य पर १५ प्रतिशत (पन्द्रह प्रतिशत) रायल्टी मिले करेगी।

(२) रायल्टी का हिसाब प्रतिवर्ष दिसम्बर के माह में हुआ करेगा।

(३) मुझे अथवा मेरे द्वारा नियुक्त व्यक्ति को इस पुस्तक के हिसाब-किताब देखने का पूर्ण अधिकार रहेगा।

(४) यदि इस पुस्तक को अन्य किसी प्रांत के पाठ्यक्रम के अनुरूप बनाने में किसी प्रकार के संशोधन की आवश्यकता होगी तो मैं पुस्तक के मूल लेखक से वह कार्य निःशुल्क करा दूंगा।

(५) यदि मिश्र बन्धु कार्यालय इस पुस्तक के अनुवाद को अन्य किसी भाषा में प्रकाशित करना चाहेंगे तो उन्हें इन्हीं शर्तों पर उसके प्रकाशन का अधिकार रहेगा। यदि मिश्र बन्धु कार्यालय अनुवाद प्रकाशित न करें तो मुझे किसी अन्य प्रकाशक से प्रकाशित कराने का पूर्ण अधिकार रहेगा। उस दशा में अन्य प्रकाशन मिश्र बन्धु कार्यालय को विक्री हुई प्रतियों पर १ प्रतिशत (एक प्रतिशत) रायल्टी देगा।

(६) यदि मध्य प्रदेश के मिडिल स्कूल की कक्षाओं के इस विषय के पाठ्यक्रम में कोई परिवर्तन होगा तो मैं लेखक से इस पुस्तक का संशोधन पूरा करा दूंगा जिसे मिश्र बन्धु कार्यालय को इन्हीं शर्तों पर छापना होगा; अन्यथा मैं उसे किसी दूसरे प्रकाशक के द्वारा छापवाने में पूर्ण स्वतंत्र रहूंगा।

(७) मिश्र बन्धु कार्यालय इस पुस्तक का प्रकाशन आज से तीन महीने के भीतर कराने का प्रबन्ध करेंगे और मूल्य ५०० रुपये एडवान्स रायल्टी के बतौर देंगे जो कि मेरे रायल्टी के हफ्तेवार में २ बराबर बराबर हिस्सों में दो वर्षों में कट दिया जायेगा।

(८) मैं इस पुस्तक का कोई संस्करण न ता छापाऊँ और न छपवाऊँगा। मैं इस पुस्तक की भाषा और विषय का संक्षेप में बरके किसी दूसरे से प्रकाशित न कराऊँगा और न स्वयं करूँगा।

(९) पूर्वोक्त कार्यालय के संपादक को विषय की रक्षा करते हुए इस पुस्तक में संशोधन और परिवर्तन करने का पूर्ण अधिकार रहेगा। मैं विश्वास दिलाता हूँ कि इस पुस्तक के प्रकाशन में कोई विषय ऐसा नहीं लिया गया

है जिससे किसी दूसरी पुस्तक के प्रकाशन का स्वत्व का अपहरण होता हो। यदि इसमें ऐसा कोई दोष निकलेगा तो उसका उत्तरदायी मैं रहूँगा। पूर्वोक्त क रॉयल्टी इस पुस्तक के बाढ़े जितने संस्करण निकले इसमें मुझे कोई आपत्ति न होगी।

उपर लिखा अधिकार पत्र मैंने अपनी चेतनावस्था में इसलिए लिख दिया है कि समय पर काम आए।

तारीख १३-५-५२ द.:—

Approved वावर खई मंडल

Bd./ B. K. Mishra

साक्षी:—(१).....

(२).....

22. As a matter of construction of the words used by the parties, the agreement really intended a licence only and not an absolute or partial assignment of the copyright, that is to say, it was a publishing agreement with a printers' firm on the usual term of payment of a certain percentage of royalty to the owner of the copyright, and, therefore, the defendant firm M/s Mishrabandhu Karyalaya acquired no right in the copyright itself but only an exclusive licence to publish. In Halsbury's Laws of England, 3rd Edn., Vol. 8, Paras. 743, and 758 the effect of such agreements has been stated thus:

"A licence may be for a term of years or for a definite period, in which case, in the absence of anything to the contrary in the contract, the publisher will not be restrained from selling, after the expiration of the time specified in the agreement, copies printed during that period. *Warne v. Routledge* (1874) LR 18 Eg. 497 and *Howitt v. Hall* (1862) 6 LT 348. Where under an agreement between an author and his publisher a licence is conferred on the publisher without limitation to any definite period, and where payment to the author is by royalties or by a share in the profits, the licence, although exclusive so long as it exists, is revocable; and the author can restrain the publication of any edition subsequent to the notice of revocation. *Reade v. Bentley*, (1858) 4 K and J 656 and (1874) 18 Eq 497 (supra)," (at p. 408).

"In the case of agreements between authors and publishers, or theatrical producers, it is often difficult to distinguish between a sole and exclusive licence and an assignment of copyright. Where the agreement between the author and his publisher contains no express terms as to the copyright, if the consideration is payment to the author of royalties or a share of the profits instead of a sum of money paid down, the inference is that the copyright is not assigned, but that a sole and

exclusive licence is concerned upon the publisher. *Hole v. Bradbury*, 1879-12 Ch D 886 at p. 895, per Fry, J.; *Re. Jude's Musical Compositions 1907-1* Ch 651 (CA); *Stevens v. Benning*, 1855-6 De Gm and G 223 and *Commr. of Inland Revenue v. Longmans Green and Co. Ltd.*, (1932) Macg Cop Cas (1928-35) 345," (at p. 414). Applying these principles to the agreement in question, we are clearly of the view that the aforesaid agreement dated 13th March 1952 (Ex. P-5) created a licence in favour of the defendant firm M/s. Mishrabandhu Karyalaya, who thereupon acquired the benefits of a publishing agreement subject to their fulfilling the terms and conditions contained therein. We are fortified in this conclusion by the following observations in *Copinger and Skone James on Copyright*, 9th Edn., at p. 384:

"But wherever there are continuous obligations on the part of the publisher—for instance, the payment of royalties to the author—the tendency of the courts is to construe the agreement as conferring upon the publisher a conditional licence to publish rather than as giving him an equitable title to the copyright."

It seems to follow from these that upon non-fulfilment of any of the terms which are essential to the contract itself, the licence was capable of being terminated by reasonable notice.

23-28. Fourthly, the learned counsel for the appellant is not right in urging that there was failure on the part of the author to revise the work in question in terms of clauses 4 and 6 of the agreement set out above, and that there was, therefore, a breach of the covenants contained therein which disentitled him or his assignee from claiming any equitable relief for rendition of accounts or for the grant of an injunction. (After considering the evidence, the judgment proceeded.) In dealing with the question of breach, the learned Judge held that the defendant firm M/s. Mishrabandhu Karyalaya had committed breach of the agreement (i) in not getting the book revised through the plaintiff by the author according to the metric system, (ii) in not having the 1962 edition altered and corrected by the author and that it contained numerous mistakes and inaccuracies which were not there in the work as originally published, and (iii) in not rendering to the plaintiff regular accounts of the royalties payable to him under the agreement and in non-payment of the royalty which has fallen due thereunder for the years in question. We are fully in accord with these findings reached by the learned Judge for the reasons advanced and would, therefore, hold that there was no breach of clauses 4 and 6 of the contract by the plaintiff. On the contrary, agreeing with

the learned Judge, we would further hold that the defendants themselves had committed breach of the various covenants contained therein, particularly in regard to (i) submission and rendition of the yearly accounts of royalties in the month of December each year; (ii) their failure to pay Rs. 13,790.46, the balance of royalties which had admittedly accrued due upto the end of December 1959, and of royalties which had and have fallen due for the years subsequent thereto (clause 1), upto the date of institution of suit and thereafter; (iii) the revision of the book by a person other than the author, and the taking out its altered or revised editions, without reference to the plaintiff to whom the copyright therein belonged (Clauses 4 and 6); and (iv) by the pirating of the work in the open market by its publication and sale, after revocation of the licence by the plaintiff's notice dated 15th April 1961 (Ex. P-28). These were breaches of essential terms of the contract itself, which per se would entitle the plaintiff to treat the contract to have come to an end.

29. However, before dealing with that aspect, we would like to add that the learned Judge has also been right in arriving at his other conclusion, viz., that the publication of a rival text-book 'Purva Madhyamik Ank Ganeet' by the defendants, was not in contravention of the agreement between the parties, and, therefore, its publication and sale could not be prevented. That is so, far a two-fold reason, namely— (i) there was no restrictive covenant in the agreement prohibiting the defendants from engaging into a competitive trade, and (ii) the publication of an elementary text-book on a subject like Arithmetic which must of necessity, be drawn from a "common source" available to all, cannot be treated to be in contravention of a publishing agreement like the one with which we are dealing at present. In Halsbury's Laws of England, IIIrd Edn., Vol. 8, Para 760, the law is stated thus:

"A publisher on royalty terms is entitled to publish a competing book, and an agreement not to do anything to injure the author's right to royalties will not be implied: *Cescinsky v. Routledge (George) and Sons, Ltd.* (1916) 2 KB 325 at p. 329 per Rowlatt, J."

30. The case of *Mathewson v. Stochdale*, 1806-12 Ves 270 is instructive. In that case, the dispute was as regards a certain list which was maintained in the India House and had been published by the plaintiff. It was alleged that the defendant had copied that list and thereby infringed the plaintiff's copyright. The Court, however, held that all human events were equally open to all who wished to add to or improve the materials, already collected by others, thus making

an original work, and no man could monopolise such a subject. The judgment goes on to say that every man may take what is useful from the original work, improve, add to and give to the public the whole, comprising the original work, with the additions and improvements made by him and in such a case, there is no invasion of any right. But a copy, much less a servile copy, of a work cannot be allowed to stand. In *Hanfstaengl v. W. H. Smith and Son*, (1905) 1 Ch 519, the definition of a 'copy' was adopted from an earlier decision which runs as follows:

"A copy is that which comes so near to the original as to give every person seeing it the idea created by the original," and then follows a passage from the House of Lords' case in *Franz Hanfstaengl v. H. R. Binos and Co.*, 1895 AC 20, to the following effect:

"The question may be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lend one to say that the alleged infringement is a copy on reproduction of the original."

In *Jarrold v. Haywood*, 1870-18 WR 279, the dispute was in respect of certain scientific books that the plaintiffs pleaded that his books were the result of his individual labour and skill. The principle enunciated therein, was as follows:

"If any part of a work complained of is a transcript of another work or with colourful additions and variations and prepared without any real independent literary labour such portion of the work is piratical. But it is impossible to establish a charge of piracy when it is necessary to track mere passage and lines through hundreds of pages or when the authors of a work challenged as piratical have honestly applied their labour to various sources of information available." It would thus appear that a 'copy' is that which comes so near the original as to suggest the original to the mind of the reader. The dictum of *Kekewich, J.*, in 1908-1 Ch 519 (supra) has throughout been followed and applied in India. See, *Sitanath Basak v. Mohini Mohan Singh*, 34 Cal WN 540 = (AIR 1931 Cal 233), *Mohendra Chandra Nath Ghosh v. Emperor*, AIR 1928 Cal 359, *Kartar Singh v. Ladha Singh*, AIR 1934 Lah 777 and *Gopal Das v. Jagannath Prasad*, ILR (1938) All 370 = (AIR 1938 All 266).

31. Applying these principles to the present case, we are unable to find any material showing that the "Purva Madhyamik Ank Ganeet" published by the defendants, was a copy or a colourful imitation of the 'Sara Middle School Ank

Ganit' written by the author. Suffice to say, the laws of copyright do not protect ideas, but they deal with the particular expression of ideas. It is always possible to arrive at the same result from independent sources. The rule appears to be settled that the compiler of a work in which absolute originality is of necessity excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. See, *Spiers v. Brown*, 1858-6 WR 352, *Reade v. Lacy*, (1861) 128 RR 508 and *Hotten v. Arthur*, (1863) 136 RR 249, cited by *Barnet and Ganga Nath JJ.*, in *ILR (1938) All 370 = (AIR 1938 All 266)* (supra).

32. In *Sita Nath Basak's case*, 34 Cal WN 540 = (AIR 1931 Cal 233) the Calcutta High Court expressed its opinion that in this class of cases, the Court should be reluctant to sit as experts and to decide the question of infringement of copyright without the aid of expert evidence. That view was followed with approval by the Allahabad High Court in *ILR (1938) All 370 = (AIR 1938 All 266)* (supra). The learned counsel for the respondent has not attacked this part of the judgment under appeal, and there appears to us no evidence on record which would justify any finding of the kind that the book in question was a colourful imitation of the other, merely because there was similarity in treatment. Unless there is a minute scrutiny of alleged similarities and dis-similarities and extensive and lengthy comparison, no conclusion to that effect is possible. It is not only proper but essential that the issue of this kind should be tried with the aid of experts who should be appointed Commissioners to investigate and report on similarities. As already stated, neither has any such comparative material been placed on the record from which we could arrive at a conclusion, nor were any arguments addressed to us on this aspect. The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether the work complained of is or is not a colourable imitation of another, is essentially a question of fact and the burden of proving that fact was undoubtedly on the plaintiff who has led no evidence. The learned Judge has, therefore, rightly held this against the plaintiff.

33. Even otherwise, that decision of his as regard "Purva Madhyamik Ank Ganit", is unassailable on principle. Similarity may be a point in issue in this class of cases, but mere similarity in treatment is not enough. See, 34 Cal WN 540 = (AIR 1931 Cal 233) (supra). That is so,

because the sameness of a thing delineated does not necessarily also produce a similarity in delineation. The mere resemblance of a work by itself, is not an evidence of piracy, when the subject dealt with is common. Any fair dealing with a work has always been kept out of the mischief of the Copyright Act, particularly if the books are based on material which is common property.

Accordingly, the Calcutta High Court in *Moulvi Umar Ali v. Jnan Ranjan Mitra*, (1935) 39 Cal WN 949, while dealing with a book on Elementary Geography, stated that the author of the work complained of, was at liberty to draw upon common sources of information available to all. The test, therefore, is not the resemblance of a few passages here and there, but the general impression that is left in one's mind which is of the essence, and must be regarded as the relevant criterion in determining whether a colourable imitation has been produced. When a question of this nature arises, the Court has, therefore, to keep in mind both the external and internal features of the two books. By "external feature" is meant the get-up and the overall scope of the publication. By "internal feature" is meant the general lay-out of the subject-matter; the manner of its treatment and the amount of material contained in the book in question. See, *S. K. Dutt v. Law Book Co.*, *ILR (1954) 1 All 289 = (AIR 1954 All 570)*. That depends upon the degree of resemblance which makes one a mere slavish copy of another. The workable test of what constitutes a copy or colourable imitation which emerges from the authorities cited by us earlier appears to be this, that in order to constitute the infringement of a copyright, there should be "direct or indirect use" of the aforesaid features of the plaintiff's work in which copyright in him subsists. There is nothing to show that that test is fulfilled in this case.

34. Equally unacceptable is the next contention, namely, that the plaintiff having himself terminated the contract by his notice dated 25th April 1961 (Ex. P-28), could not fall back on its terms, for claiming any royalty for the period subsequent thereto, and that his claim, if any, was to sue for damages. That notice of revocation reads, thus:

"For the reasons stated in paras 3 and 4 above my client does not intend to keep the publishing rights with you any further and the grant of publishing right to you in respect of the Saral Middle School Ank Ganit (all parts according to old syllabus as well as new or unified syllabus) as per agreement dated 13-3-52 is hereby withdrawn, revoked and terminated. My client shall now convey the publishing rights to other persons ac-

ording to his choice and you are hereby asked not to print and publish any fresh issue or edition of the aforesaid books, after receipt of this notice. The existing copies may however be sold off or handed over to my client.

Please, therefore, take notice that you shall not hereafter publish or undertake reprinting or do any other act in that behalf in pursuance of the aforesaid agreement which stands cancelled with regard to the above referred books. You are also asked within seven days from the receipt of this notice to give a detailed account of the said books which have been printed, sold, as well as now in stock with you."

The reasons stated therein earlier were: (i) the defendants' failure to pay royalty at 15% on sales every year; (ii) the non-payment of past arrears of royalties amounting to more than Rs. 15,000/- still remaining outstanding, which they had not paid in spite of repeated demands; (iii) their publication of another book in Arithmetic "Purva Madhyamik Ank Ganeet" (in three parts) contrary to the understanding between the parties and despite protests, and (iv) being interested in promoting sales of that book, the defendants had made it impracticable for the publishing rights to remain with them any longer. To this notice, the defendants replied, by thier lawyer's letter dated 28th June 1961 (Ex. P-32), to the following effect:

"It is true that a written agreement was entered into on 13-3-52 between my clients and Shri Maniram Vishwakarma of Jabalpur (who happens to be your son-in-law) according to which my clients obtained absolute permanent irrevocable copyrights for publication and sale of "Sara! Middle School Ank Ganit" (all parts). You are aware that the original document of agreement was given to the author Shri Maniram Vishwakarma on his request and a copy thereof was retained for records by my clients.

According to this agreement the only rights which Shri Maniram wanted and he did receive was that he shall be entitled to a royalty at the rate of 15% on the sale of the aforesaid books which would be revised if and when necessary according to the changing circumstances. Shri Maniram was further given a choice of assigning his rights of Royalty in the books aforesaid to any person whom he might nominate in order to save his position as a Government servant. This he has already done by appointing you his assignee on and from 5-10-54 by a written intimation sent to my clients in this behalf.

x x x x

Please note that you cannot assign publishing rights of the books under reference to any person because their copy-

rights have absolutely and permanently vested in my client ever since 13-3-52 agreement.

x x x x

My clients reiterate that absolute rights of publication and sale of books under reference rest in my client. The books would be published as usual and amount of Royalty shall be paid to you or any other person whom Shri Maniram might nominate in future according to the new terms contained in your letter dated 16-4-60 reference to which has already been made above.

Please, therefore, note that you or anybody else including Shri Maniram have absolutely no right of publication and sale of books concerned."

35. In other words, although the defendants were in breach of the contract, they signified their unwillingness to accept its rescission, wrongfully asserted a title to the copyright in themselves which was adverse to that of the plaintiff and thereafter admittedly continued the publication and sale of "Sara! Middle School Ank Ganeet" under the terms of the agreement dated 13th March 1952, along with their own "Purva Madhyamik Ank Ganeet". Incidentally, the plaintiff after having revoked that agreement on account of the breach of its terms by the defendants-firm, M/s. Mishra Bandhu Karyalaya, rightly had the book "Sara! Middle School Ank Ganeet" published by M/s. Narbada Book Depot, Jabalpur, another firm of printers and publishers here in mitigation of damages.

That the plaintiff was entitled to enter into such an arrangement has not been questioned before us nor has his right to the rendition of accounts of royalty payable in respect of sales of "Sara! Middle School Ank Ganeet" upto 25th April, 1961, the date of revocation of the publishing agreement, been challenged.

36. Indeed, the right of the owner of a copyright to an account of the royalties or profits, as the case may be, accruing from the sales of the book when he has not parted with his copyright, is well settled. The reason for this is that a publishing agreement between an author (or his assignee) and a publisher establishes a fiduciary relationship between the parties, and the former is, therefore, entitled to an account from the publishers. For this purpose, the publisher must produce all books and documents necessary for the proper vouching of the accounts; he is not entitled to charge the author (or his assignee) at a higher rate for the expenses of printing paper, etc., than he himself actually pays; and must give the author the benefit of all trade commissions and discounts See, Copinger and Skone James on Copyright, 9th Edn., p. 389. That would necessarily be so in

a profit-sharing agreement, when the parties enter into a joint adventure like the one in (1858) 4 K and J 658, where both parties had equally taken upon themselves the whole expense and risk of bringing out a publication, by the way of a joint adventure, or a partnership. Even in such a case, the copyright therein does not vest in the publisher but belongs to the author, although the publication of it is on terms that the author and publisher would have an equal share of profits.

37. In a publishing agreement like the present one (Ex. P-5), by which the plaintiff created only a licence to print, publish and sell copies of the book in question in favour of the defendants-firm, M/s. Mishra Bandhu Karyalaya, the right to the rendition of a true account of the sales on which the royalties are payable, exists in the very nature of things. As licencees, they would have to account for the royalties earned by the plaintiff who was the owner of the copyright. However, the parties have not left this to implication, but have expressly made a provision to that effect in Clauses 1, 2 and 3 of the agreement upon a plain construction of which, we must hold that the plaintiff was clearly entitled to a rendition of accounts. Even otherwise, the principle indisputably is, that a licensor generally has (i) the right to an account of all the sales effected by the licensee during the period during which the licence had subsisted even after revocation of the licence, and also (ii) the right to an inspection of all the accounts of sales as maintained by the licensee for that period, for the purpose of quantifying royalties payable during the entire period of the licence, i.e., for the purpose of arriving at the true figure of final royalty payable to him under the agreement. See, *Anglo-American Asphalt Co. Ltd. v. Crowley Russell and Co. Ltd.*, 1945-2 All ER 324, and there is no reason why that principle should not equally be applicable to a licence created in favour of a printer's firm with a view to determine the amount of royalty payable in respect thereof.

38. We are, however, digressing from the real point in issue, namely, as to the rights of the plaintiff, if any, to receive any royalty for the period subsequent to the revocation of licence or to a rendition of accounts of such royalty in respect of that period, i.e., after the licence had been terminated by his notice. It is urged that upon failure of the defendants to render an account of the royalty earned in December each year and on their admitted failure to pay any royalties which now are in arrears, there was a breach on their part of the essential terms which were so vital that they go to the very root of the contract and the plaintiff, accordingly, had rightly treated the contract as discharged by breach, but

after a termination of that contract by the notice dated 25th April 1961 (Ex. P-28) his only remedy for the period subsequent was to sue for damages for alleged infringement of his copyright and not for a claim for an account of royalties. While we agree that after revocation of the licence, the plaintiff's remedy was for damages for the period subsequent and not for royalty, nevertheless, the claim in respect of that period in substance is one for damages. The reason for this decision of ours follows hereafter.

39. The answer to this problem is to be found in certain leading principles of the law of contract in the English common law which may be taken as well settled. Breach of contract always entitles the injured party to bring an action for damages. It may also entitle him to treat the contract as discharged, but he can only treat it as discharged on proving that the breach is either of the entire contract or of some term which is so vital that it goes to the root of the contract. The breach must be such as to show that the party in default has repudiated his obligations under the contract. Before the time for performance arrives a party to the contract may declare his intention of not performing the contract. This is called a repudiation of contract or an anticipatory breach. In such a case, the other party is not bound to wait until the actual time for performance arrives; he may immediately treat the contract as discharged and sue for damages. In the case of the repudiation of part of the contract, it is a question of construction whether the part repudiated is so vital as to entitle the other party to treat the whole contract as discharged. However, repudiation by one party does not of itself discharge the contract. The contract is only discharged when the repudiation is accepted by the other party. If the repudiation is not accepted, the contract remains in existence. The party in default may then change his mind and proceed with performance. See, *Anson's Principles of the Law of Contract*, 22nd Edn., Pp 437 et seq; *Cheshire and Fifoot's Law of Contract*, 6th Edn., Pp 505-6; *Halsbury's Laws of England*, 3rd Edn., paras 274 and 334 at Pp 160-1 and 203.

40. In *Halsbury's Laws of England*, the principles are enunciated thus:

- "(i) One of the modes in which a contract may be discharged is by breach, where the promisor has failed to perform his promise and the other party elects to treat them at an end.
- (ii) Where one of parties repudiates the contract by showing that he does not intend to perform it, the other party is entitled to sue him for breach of the contract and is absolved from further performance

of his part of the contract and if he elects to do this the party in default is not entitled to an opportunity of changing his mind. In such a case, the contract is completely determined, and the party in default cannot insist upon the performance by the other party even of a stipulation which is collateral to the main purpose of the contract.

(iii) In order to amount to repudiation, there must be conduct showing clearly an intention not to fulfil the contract."

41. A fortiori, the breach of the fundamental obligation created by the contract is a cause of discharge. It may, indeed, be said, in general that any breach which prevents substantial performance is a cause of discharge. Whether performance is substantially prevented or only partially affected is, of course, a question that depends upon the circumstances of each case. But the general principle is, in the words of Lord Blackburn in *Hersey Steel and Iron Co. v. Naylor Benzon and Co.*, 1884-9 AC 434; thus:

"Where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'if you go on and perform your side of the contract I will not perform mine', that in effect amounts to saying, 'I will not perform the contract'. In that case the other party may say 'you have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract.'"

To bring this principle into operation, the intention of a party not to proceed further with the contract need not be expressly stated. It may be inferred from his acts or omissions. But "repudiation of a contract is a serious matter not to be found or inferred". *Smyth (Rose T.) and Co. Ltd. v. T. D. Bailey, Son and Co.*, 1940-3 All ER 60 at p. 71, per Lord Wright, and the question whether the inference is justified is one of fact dependent upon the nature of the default and the circumstances in which it was made.

42. It must be observed, however, that a contract cannot be terminated unilaterally. Therefore, if one party commits a breach sufficiently serious to constitute a discharge, this does not automatically abrogate the mutual obligations, but merely gives the other party an option either to ignore the breach and to insist upon performance when due, or to accept the repudiation and treat himself as free from further liability. If he adopts the latter course, he can sue for damages forthwith, whether the time for performance is due or not, but if he refuses

to regard the contract as discharged, he presents the guilty party with an opportunity to re-consider his attitude. It thus follows that a contract is not automatically discharged by breach but it only gives the injured party an option to treat the contract as at an end. Dealing with the case where a party has refused to proceed further with performance, Lord Simon in *Heyman v. Darwins, Ltd.*, 1942 AC 356 at p. 361, described the position of the other party as follows:

"He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) 'accept the repudiation', by so acting as to make plain that, in view of the wrongful action of the party who was repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages."

43. These English common law principles are merely re-stated in Section 39 and the other allied sections of the Indian Contract Act, 1872. The right to rescission of a contract under Section 39, arises when the other party fails to perform the contract in its entirety. It reads:

"39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance." In terms of this section, the renunciation must be absolute. In *A. C. Moitra's Contract Act*, 2nd Edn., p. 282, the law is stated thus:

"The term 'in its entirety' has been the subject of much judicial discussion, and it is sometimes very difficult to say when the promisor may be said to have refused to perform, or disabled himself from performing, his promise 'in its entirety'. A contract may contain several terms some of which may be subsidiary or ancillary to the main terms which the parties had as their object at the time entering into the agreement. It cannot be said that a breach of every term of a contract, e.g., as to time of delivery and as to time of payment, or even a breach in a material particular, gives the promisee the right of rescission when the breach does not relate to the substance of the promise taken as a whole. To constitute repudiation it must be shown that the party to the contract made it quite plain his intention not to perform the contract. In cases of this

sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract, and in order to give rise to a right of action immediately on the renunciation, the renunciation must relate at least to so vital a part of the contract as goes to the root of it. It is not, therefore, every breach but breach of an essential term of a contract alone by one party that entitles the other to repudiate the contract; the breach of non-essential terms entitles the other party to damages only."

44. While interpreting Section 39 of the Contract Act, the Judicial Committee of the Privy Council has in *Murldhar Chatterjee v. International Film and Co.*, AIR 1943 PC 34 stated:

"The language employed by the Act presents certain problems of construction. When one party to a contract has refused to perform his obligation thereunder so as to give rise to a right in the other party to put an end to the contract, is the later a person at whose option the contract is voidable, and if he does put an end to the contract, does he rescind a voidable contract?"

XX XX XX
In a case within Section 39 the party who rightly 'puts an end to' or 'rescinds' the contract is entitled to damages for the defaulting party's breach. In this sense the contract has not ceased to be 'enforceable by law'. On the other hand, neither party is any longer bound to perform his promise—indeed an offer to do so, if made by either party, could properly be rejected by the other.

XX XX XX
The election of the party rescinding, as Cotton L. J. once put it in *Johnstone v. Milling*, 1886-16 QBD 460 at p. 470: 'relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end.'

45. Applying these principles to the present controversy, we have no manner of doubt that the non-remission of yearly accounts of royalties and the non-payment of the royalties which had accrued on sales, were breaches of the fundamental obligation as regards payment of royalty created by the contract in question, which entitled the plaintiff to treat the contract as discharged by breach. As already stated, repudiation or disclaimer occurs where one of the contracting parties evinces an intention not to go on with the contract. Such intention on the part of the defendants was sufficiently evinced by their conduct in not paying the amounts

of royalties which have fallen in arrears, not rendering any accounts in respect thereof, for all the years in question, and also in asserting to themselves a title hostile to the plaintiff by falsely claiming in their notice dated 28th June 1961 (Ex. P-32) that they had acquired ownership in the copyright under a direct assignment from the author and that in the alternative, the copyright had been transferred to them under the agreement dated 13th March 1952 (Ex. P-5).

In other words, the defendants had acted in a manner so as to lead a reasonable person to the irresistible conclusion that they did not intend to fulfil their part of the contract. Now, the renunciation of a contract may take place either before its performance is due, or, during the performance of the contract itself. In the present case, the defendants had made it impossible by their own conduct for the contract to go on; and, there was no other alternative left to the plaintiff than to treat the contract as at an end, by the acceptance of their repudiation as discharging it, which absolved or discharged him from any further performance thereof. It is needless for us to stress that the rendition of accounts of the royalty earned @ 15% of the sales during the year, annually in the month of December of each year, and the payment of such royalties were the fundamental obligations of the contract, i.e., the "hard core" or the primary obligations, upon the breach of which, the contract itself would necessarily come to an end.

46. We regret to say that some of the authorities cited at the Bar have hardly any relevance to the question in controversy. A few of them may, however, be worth noticing. In *Century Spg. and Mfg. Co. Ltd. v. M/s. Motilal Dhariwal*, 1966 MPLJ 659 = (AIR 1966 Madh Pra 313), this Court stated that a novation of contract under S. 62 of the Contract Act requires an agreement for rescission, in the context of a substitution of the original contract by a new contract where the promisee before its breach had gratuitously released the promisor from the obligation to perform his original promise. Now, a contract may be discharged, at any time, before breach by a new agreement made by the parties. Such new agreement may simply rescind the original contract or alter its terms and substitute a new contract in its place. In order to discharge the original contract, it is not necessary that the new agreement should have been performed, as is generally required for accord and satisfaction. For a discharge of the original contract, the new agreement must, however, possess all the attributes which are requisite to constitute a valid contract. A substituted agreement may operate as a waiver of the obligations imposed by the original contract or as a

defence to a claim arising therefrom. The decision is, therefore, inapplicable to the present case.

In *Tan Ah Boon v. State of Johore*, AIR 1936 PC 236, the Judicial Committee of the Privy Council had, while dealing with a claim for damages for the breach of an alleged contract, stated that a plaintiff could not succeed unless he avers and proves that he had performed or was at all times ready to perform his part of the contract. We can hardly see how this citation helps the learned counsel unless he wants to rely on it in furtherance of his submission that the plaintiff's only remedy after a termination of the contract lay in damages and he himself being in breach, that part of his claim must fail. As we have already held, the plaintiff was not in breach. On the contrary, the defendants themselves had committed quite a few breaches of the contract in question. The decision of the Privy Council in *Tan Ah Boon's case*, AIR 1936 PC 236 (Supra), therefore, is equally of no avail.

Similarly, although *General Billposting Co. v. Atkinson*, 1909 AC 118 and *O'Neil v. Armstrong*, (1895) 2 QB 418 relate to the rights of a party who accepts the discharge of a contract by the acceptance of its breach, the decisions there actually turned on the law of master and servant; and in reality they turned on their own facts. In *General Billposting Co.'s case* (1909) AC 118 (supra), it was held that a promise in restraint of trade, made by a servant, is dependent upon the obligation of the master to employ and pay him, in accordance with the contract of service, and therefore, if he was wrongfully dismissed, he was instantaneously discharged from the obligation of the restraint. In *O'Neil's case*, 1895-2 QB 418 (supra), a seaman had been employed, at an agreed wage, by the Captain of a torpedo-boat which was built in England for the Japanese Government and was on its voyage from England to Japan flying the Japanese flag; the Captain of that vessel was, incidentally, an officer in the Japanese Navy. While the vessel was on its voyage, the Japanese Government declared war against China which, besides making the voyage dangerous, also made it illegal under the Foreign Enlistment Act, 1870, for the plaintiff to serve on board the ship which, flying the Japanese flag became a ship of war. The plaintiff, being warned on these matters, left the vessel at Aden, and thereafter, brought an action to recover the whole of the agreed wages for the entire voyage from England to Japan. Having regard to these circumstances the Court of Appeal held that the seaman was entitled to leave the vessel at Aden, and to sue for the full amount of his agreed wages for the voyage. We are unable to appreciate how

these decisions apply to the present controversy.

47. The law is as has been stated by us in paras 38 et seq., of this judgment. In that view of the law, the question that arises is when there is a termination of a publishing contract occasioned by a breach of the fundamental obligations created by acceptance of the breach by the plaintiff in his notice of termination, whether he could fall back upon its terms for claiming any benefit like royalty on sale for the subsequent period, or, whether his right is only to sue for damages. We feel it is not necessary for us in this case to go into the wider question, namely, whether the injured party after acceptance of the breach of a contract can rely on its terms of "keep it alive" for his own benefit, i.e., for enforcing his rights thereunder against the party in breach. Suffice to say, that after revocation of the licence to print, publish and sell copies of the book "*Saral Middle School Ank Ganeet*" created in their favour, the injurious publication and sale of that book by the defendants thereafter, in spite of the plaintiff's notice of the termination dated 25th April 1961 (Lx. P-28), clearly constituted an infringement of his copyright therein, and the plaintiff's remedy was to sue for aggravated or exemplary damages.

48. In substance and essence, the plaintiff's claim for that period is for recovery of damages @ 15% of the sale proceeds. Although the plaintiff has in paragraph 14(c) claimed rendition of accounts of the sales from the year 1960 onwards for purposes of computation of royalty @ 15% of the total sales and interest @ 6% per annum from 1st January 1961, having regard to the revocation of licence w.e.f. 25th April 1961 that claim must be regarded as a claim for damages @ 15% of the sale proceeds which the plaintiff treats as the loss of his business profits he has actually suffered. An action for damages is only one method whereby a plaintiff may seek redress; he will frequently apply for an injunction and, if granted, this can affect the amount of recoverable damages, since prospective loss may have been thereby largely eliminated. More important in relation to damages, is the plaintiff's equitable remedy by way of an account of profits. This remedy is alternative to the action for damages, and is to be preferred by a plaintiff where the defendant has made more profit out of the infringement than the plaintiff has lost. See, *Mayne and McGregor on Damages*, 12th Edn. p. 794. The award of damages for infringement of a copyright, therefore, follows on the same lines as damages in an action for infringement of trade-mark or for passing off. The principal head of damages is the loss of business profits caused by the defendant's infraction of his copyright. We, accord-

ingly, are of the view that the quantum of damages ordinarily claimable, in respect of a period after the revocation of a licence would be the loss of business profits. The plaintiff in such a case need not fall back on the royalty clause, i.e., try to keep alive the contract for enforcing his right to royalty thereunder. Nevertheless, nothing prevents a plaintiff from relying on the rate of royalty provided therein and he may adopt the "lost royalty profits" (in this case, 15% of the sale proceeds), as the basis for calculation of his loss. Even otherwise, the measure of damages under the Law of Copyright on the termination of such an agreement, is the "loss of profits" which the plaintiff might otherwise have made. See *Copinger and Skone James on Copyright*, 9th Edn. p. 204. In the present case, the plaintiff has chosen to value this loss w.e.f. 25th April 1961 @ 15% of the total sales, and we find no reason to interfere with that part of the claim.

49. Before parting with this aspect of the case, we think it desirable to state that though the remedies given by Section 6 of the Imperial Copyright Act of 1911, are not alternative to those given by Section 7, yet when the owner of a copyright obtains damages under Section 6, it often happens that he can recover nothing further in respect of damages under Section 7. Where the amount of damages awarded under Section 6 covers the price of permission to publish the work in question, the author is not entitled to damages also under Section 7. See, *Copinger and Skone James on Copyright*, p. 207-8. Also, *Sutherland Publishing Co. v. Caxton Publishing Co.*, 1939 AC 178. Thus, damages for infringement under Section 6 and damages for conversion under Section 7 are cumulative but not alternative, and care must be taken to see that the damages awarded under the respective sections do not overlap. The latter point is explained by Green, L. J. in *Sutherland Publishing Co. v. Caxton Publishing Co.*, 1936 Ch 323 at p. 342 as follows:

"As an example of what I mean by overlapping let me take the following case. The owner of a copyright in a book proves that, whereas if it had not been for the infringement he could have sold 1,000 copies, he has only been able to sell 500, the infringer having printed and sold 500 copies. It is obvious that as the possible market for the book is limited to 1,000 copies, if the damages for infringement under Section 6 are fixed on the basis that the copyright owner would have sold 1,000 copies but for the infringement, and at the same time the value of the 500 copies sold by the infringer is fixed for the purposes of Section 7 at the amount for which they were sold, the result will be that the copyright owner will have recovered damages on the footing that there

was an available market for 1,500 copies only. If he had sold 1,000 copies there would have been no market for the 500 copies made by the infringer, which would accordingly have had no value. Conversely, if the 500 copies sold by the infringer were worth what they were sold for this could only be so on the basis that the copyright owner was only going to sell 500. In such a case it appears to me that to award to the copyright owner damages for infringement based on his inability to sell 500 copies and at the same time to award him damages based on the sale price of the 500 copies sold by the infringer would not be permissible."

The judgment of the Court of Appeal on this point was affirmed in the House of Lords. These decisions have throughout been followed in India. See *W. B. Yeats v. Eric Dickinson*, AIR 1938 Lah 173; *Dharam Dutt Dhawan v. Ram Lal*, AIR 1957 Punj 161 and *Associated Publishers v. K. Bachyan*, AIR 1961 Mad 114.

50. Lastly, the contention that the claim for recovery of Rs. 13,790 46 paise towards the arrears of royalty due upto the end of 1959, was barred by limitation was eventually not pressed by the learned counsel for the appellant because there is no merit in it. That part of the claim arises as a result of the rendition of accounts by the defendants, as per their statements of account dated 16th April 1964, (Exs. P-6, P-7 and P-8), whereby they acknowledged their liability to pay Rs. 15,760 46 paise towards the royalty for that period and the value of the stock-in-trade in their hands as on 26th January 1960. Towards this, the defendants have only paid Rupees 2,000/- on 18th April 1960, which left a sum of Rs. 13,760 46 paise in arrears. The present suit for the recovery of that amount was brought on 1st January 1963, within 3 years from the date of rendition of account, i.e., well within the period prescribed under the residuary Art. 120 of the Limitation Act, 1908 which alone applies to that part of the claim.

51. The result is that the appeal fails and is dismissed with costs. The judgment and decree of the 5th Additional District Judge, Jabalpur, are upheld. Counsel's fee, as per the Schedule or certificate, whichever is less.

Appeal dismissed.

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(V 57 C 47)

BISHAMBHAR DAYAL, C. J.

AND SHIV DAYAL, J.

Smt. Krishnabai Babulal Mishra, Appellant v. Smt. Laxmibai, Respondent.

Second Appeal No 740 of 1965, D/- 30-3-1970 decided by Division Bench on Order of Reference made by Bhawe J., D/- 26-11-1969.

GN/GN/D67/70/YPB/T

Houses and Rents — M. P. Accommodation Control Act (41 of 1961), Sections 13(6), 12 — Suit for eviction — Striking out of the defence — Effect — S. A. No. 940 of 1965, D/- 3-3-1969 (M. P.) Overruled.

The effect of the striking out of the defence under Section 13(6) is that the suit thereafter proceeds ex parte to the extent that it relates to Section 12. The written statement, so far as it relates to plaint averments concerning Sec. 12 is overlooked, the defendant-tenant is precluded from cross-examining the plaintiff-landlord or his witnesses and he is also precluded from producing any evidence on any question relating to the Act. The plaintiff's burden to establish at least one of the grounds under Section 12 becomes light. However, the effect is not to confer any additional right on the plaintiff or to make the provisions of Section 12 inapplicable to the suit. The plaintiff has still to establish that he is entitled to a decree for eviction (a) under general law and (b) also under the Act. In spite of his defence having been struck out, the defendant can still contest the suit as regards (a), although it will proceed ex parte as regards (b). Second Appeal No. 940 of 1965, D/- 3-3-1969 (M. P.), Overruled. (Para 12)

If the defence is struck out in the appellate Court, the appellate Court will still have to see whether on the plaintiff's evidence produced in trial Court, a ground under Section 12 has been made out. The defendant will be heard on that point to the limited extent of showing that the plaintiff's evidence is not enough to prove any ground under Section 12 but his written statement and evidence on that aspect of the case will not be considered. (Para 12)

Cases Referred: Chronological Paras
(1969) S. A. No. 940 of 1965, D/- 3-

3-1969 (M. P.), Hajara Begum v. Guljar Khan 3
(1964) 1964 MPLJ 190 = 1964 Jab LJ 87, Premdas v. Laxminarayan 7
R. K. Pandey, for Appellant; P. R. Padhye, for Respondent.

SHIV DAYAL, J.:— This reference has been made by Bhawe, J. in the following circumstances. The appellant brought a suit against the respondent for ejectment under Section 12 of the M. P. Accommodation Control Act, 1961, (hereinafter called the Act), on the ground that the suit accommodation had become unsafe for human residence, unless extensive repairs were effected; that the suit accommodation was required for the use of some relations of the plaintiff; that the defendant had sublet the suit premises; and that the defendant had caused substantial damage to the premises let out. The suit was resisted by the defendant.

The trial Court dismissed it holding that not one of those grounds was made out.

2. The plaintiff appealed. At her instance, the first appellate Court struck out the respondent's defence under Section 13(6) of the Act. However, the first appellate Court dismissed the plaintiff's appeal because she had not established any one of the grounds under Section 12 of the Act. The plaintiff then preferred this second appeal.

3. When this second appeal was placed for hearing before a learned single Judge, learned counsel for the defendant urged that the lower appellate Court was in error in striking out the defence. This contention was rejected by the learned single Judge. Then the question which arose for his consideration was whether the burden of proving one of the grounds under Section 12 of the Act still remained on the plaintiff notwithstanding the defence having been struck out. A decision of another learned Judge, in *Mst. Hajara Begum v. Guljar Khan*, S. A. No. 940 of 1965, D/- 3-3-1969 (M. P.), was cited before the learned single Judge, where the learned Judge in the cited case, had observed as follows:—

"Under the ordinary law, a tenancy is a matter of contract between a landlord and his tenant and is governed by the provisions of the Transfer of Property Act, with the result that a landlord is entitled to evict his tenant after determining his tenancy in accordance with the provisions of the Transfer of Property Act. Section 12 of the Madhya Pradesh Accommodation Control Act, however, puts statutory restrictions on the rights of the landlord in the matter of eviction of tenants by providing that 'notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds' which are then enumerated in clauses (a) to (p) of the Act. But Section 13 at the same time casts certain duties and obligations on the tenant if he wants to get the benefit of these statutory restrictions against eviction. The intention of the Legislature thus appears to be that tenants who do not comply with the provisions of Section 13, cannot get any statutory protection against eviction granted by the Act and cannot therefore claim that the plaintiff landlord cannot evict them unless he has complied with the provisions of Section 12 of the Act. The statutory immunity, from eviction which has been enacted in Section 12 of the Act for the benefit of the tenant is not available to him and the suit becomes in fact a simple suit governed by the provisions of the Transfer of Property Act whereunder the

landlord can evict his tenant after determining his tenancy in accordance with the provisions of that Act.

As the only defences of the defendant tenant against his eviction were those which were provided by the Act and which were now not available to him, the suit of the plaintiff landlord must be decreed with costs."

Since the referring Judge, did not agree with the other learned Judge in the above observations, he has referred the following questions for being decided by a Division Bench:—

"(1) Whether the effect of striking out the defence under Section 13(6) of the M. P. Accommodation Control Act, 1961, is to take out the case from the ambit of that Act, and to render that suit as one governed by the Transfer of Property Act alone?

or

(2) Whether the effect is only to preclude the tenant from adducing positive evidence to show that none of the grounds are made out but the burden of making out a prima facie case of the existence of the grounds still remaining on the plaintiff?"

4. Under the general law, the legal relations between the landlord and tenant are governed by the contract of tenancy between them. The law relating to the landlord's right to eject the tenant and the tenant's liability of being ejected is to be found in the Transfer of Property Act.

5. The Accommodation Control Act is a special enactment conferring certain special rights and imposing certain special obligations upon the landlords and tenants. One of the objects of this special enactment is to regulate and control the eviction of tenants. Section 12 is the pivot. Under the Transfer of Property Act, once the tenancy is determined according to Section 111, the lessee is bound to put the lessor into possession of the property. The landlord acquires right to possession under Section 108(q) of the Transfer of Property Act, but Section 12 of the Accommodation Control Act then steps in. It imposes a restriction on the right of the landlord to eject his tenant, except on one or more of the grounds enumerated in it. Sub-section (1) of Section 12 reads thus:—

"12. Restriction on eviction of tenants.—

(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:—,....."

6. It is thus quite clear that the landlord, in order to entitle him to a decree for eviction, must prove: (1) that the contractual tenancy of the demised premises has been validly determined having regard to the provisions of the Transfer of Property Act and the contract between the parties; and (2) at least one of the grounds enumerated in Section 12 exists. If either of these two is not proved, a decree for eviction cannot be passed. Both these factors are *sine qua non* for a decree for eviction.

7. Section 13 of the Act imposes an obligation on the tenant to deposit in Court or pay to the landlord all arrears of rent and also to go on so depositing or paying rent throughout the pendency of the suit within the time prescribed in the two parts of that section. Sub-section (6) of Section 13 then lays down the consequences of non-compliance with the requirements of section. It runs thus:—

"13(6) If tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

Two things are abundantly clear from the language of sub-section (6). The first is that the defence against eviction, which is struck out is the defence against eviction of the tenant under Section 12 of the Act. Such striking out of the defence does not debar the tenant from taking any defence to which he is entitled under the Transfer of Property Act. Notwithstanding such striking out of the defence he can still show, for instance, that there is no relationship of landlord and tenant between him and the plaintiff, or that the lease was not determined as required by Section 111 of the Transfer of Property Act, so that during the subsistence of the lease he cannot be ejected. This was also the view taken in *Premdas v. Laxmi Narayan*, 1964 MPLJ 190.

8. The second consequence is that when the tenant's defence is struck out under Section 13(6), he loses his right to be heard on the question whether there exists a ground under Section 12 of the Act. This means that his written statement, so far as it relates to plaint averments concerning Section 12, will be ignored and overlooked by the Court; he cannot cross-examine witnesses produced by the plaintiff, and he cannot produce his own evidence in rebuttal. In effect, therefore, the suit or proceeding is to be treated *ex parte* so far as the question of Section 12 is concerned.

9. However, it is elementary that the plaintiff, in order to be entitled to a decree, must plead and prove the "cause of action", that is, the bundle of facts which will entitle him to a decree. We have already pointed out from the language of

Section 12 of the Act that the existence of one of the grounds under that Section is essential before a decree for eviction can be passed. This is the force of the words "no suit shall be filed except on one or more of the following grounds only." It is incontestable that the plaintiff will have to make out a ground under Section 12 even where the defendant does not enter appearance at all or does not file any written statement.

10. It is wrong to think that the grounds enumerated in Section 12 are grounds of defence; indeed, they are grounds to constitute a cause of action for the plaintiff to sue for ejection. There is nothing in the language of Sec. 13(6) of the Act to exclude the application of Section 12 to a suit as a consequence of the striking out of the defence. If that had been the intention of the framers of the law, then the section would have been so worded, and after the words "may order defence against eviction to be struck out and shall proceed with the hearing of the suit", there would have been found the following words:—

"and shall proceed with the hearing of the suit without entering into an enquiry whether any ground under Section 12 exists."

The section, as it stands today, merely enjoins the Court "to proceed with the hearing of the suit". The only meaning of this expression is that the Court shall proceed with the hearing of the suit according to law. To put it differently, a decree shall be passed, if the plaintiff proves the cause of action on which the suit is based; otherwise, it will be dismissed.

11. On the above analysis, it must be said that as a consequence of the striking out of the defence under Section 13(6) of the Act, the plaintiff is placed in the same position as if the suit proceeds *ex parte* in the absence of the defendant. The striking out of the defence does not confer any additional right on the plaintiff, nor is he relieved of his burden, which he has to discharge in order to be entitled to an *ex parte* decree against the tenant. In every event he has to satisfy the Court that he is entitled to eviction under the general law as well as under the special law, that is, Section 12 of the Act. It is a different matter that when the defence is struck out and the second part of his case is to be treated as *ex parte*, his burden becomes light.

12. In the result, we answer the reference thus:—

- (1) The effect of the striking out of the defence under Section 13(6) of the M. P. Accommodation Control Act, 1961, is that the suit thereafter proceeds *ex parte* to the extent that it relates to Section 12 of the Act. The written statement, so

far as it relates to plaintiff averments concerning Section 12 is overlooked, the defendant is precluded from cross-examining the plaintiff or his witnesses and he is also precluded from producing any evidence on any question relating to the Accommodation Control Act. The plaintiff's burden to establish at least one of the grounds under Section 12 of the Act becomes light.

- (2) However, the effect of the striking out of the defence under Sec. 13(6) is not to confer any additional right on the plaintiff or to make the provisions of Section 12 inapplicable to the suit. The plaintiff has still to establish that he is entitled to a decree for eviction (a) under the general law; and (b) also under the Accommodation Control Act. And, in spite of his defence having been struck out under Section 13(6), the defendant can still contest the suit as regards (a), although it will proceed *ex parte* as regards (b).
- (3) If the defence is struck out under Section 13(6) in the appellate Court, the appellate Court will still have to see whether on the plaintiff's evidence produced in the trial Court, a ground under Section 12 has been made out. The defendant will be heard on that point to the limited extent of showing that the plaintiff's evidence is not enough to prove any ground under Section 12, but his written statement and the evidence on that aspect of the case will not be considered.

Reference answered accordingly.

AIR 1970 MADHYA PRADESH 283
(V 57 C 48)

(At Indore)

H. R. KRISHNAN AND
G. L. OZA, JJ.

Nathusingh, Appellant v. Sukhram and others, Respondents.

Second Appeal No. 226 of 1964. D/-21-3-1969.

Easements Act (1882), S. 15 — Easement against Government— 60 years rule applicable to easement against Government is not applicable to easements over *bhumiswami* lands.

One particular incident of the tenure is significant. Under the Madhya Bharat Tenancy Act the *pakka* tenant while entitled to a certain degree of permanency could not sell his holding without the permission of Government conveyed by the Suba. That has now disappeared and a

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bhumiswami can sell his holding to whomsoever he likes subject to certain limitations of ceiling on the side of the purchaser without taking government sanction. In other words, the ownership of government in respect of bhumiswami tenancy is very remote and tenuous.

(Para 7)
Therefore, under the present law which gives very extensive rights to the bhumiswami and reduces to a remote theoretical possibility the "belonging to government" it would not be correct to apply the last clause of Section 15 to easements over bhumiswami lands. AIR 1936 Mad 682 & AIR 1968 Madh Pra 247. Rel on; AIR 1929 All 382 & AIR 1934 Mad 575 Dist; AIR 1963 Madh Pra 202. Ref (Para 9)

Cases Referred:	Chronological	Paras
#1968) AIR 1968 Madh Pra 247 (V 55) = 1968 Jab LJ 706, Ramlali v Bhagunti		8
#1963) AIR 1963 Madh Pra 202 (V 50) = 1962 Jab LJ 1039, Rawaji v Keshav		3, 5
#1936) AIR 1936 Mad 682 (V 23) = ILR 59 Mad 979, Nagarentha Mudaliar v Sami Pillai		6
#1934) AIR 1934 Mad 575 (V 21) = 67 Mad LJ 262, Chinnaswami Goundan v Balasundara Mudaliar		5
#1929) AIR 1929 All 382 (V 16) = 116 Ind Cas 806, Municipal Board Pilibhit v. Khalil ul Rahman		5

KRISHNAN, J.:— In this reference the question to be answered by us is this: Whether in the event of the owner of a bhumiswami agricultural holding claiming a right of easement on a contiguous holding which is also held in bhumiswami rights, the easement materializes on peaceful, uninterrupted and continuous usage for 20 years as provided in the main body of Section 15 of the Indian Easements Act, or whether on the ground that the land "belongs" to government, it should be for a period of 60 years under the old Limitation Act and 30 years under the present one, as provided in the last clause of the same section?

2. There are two other questions which arise in the same second appeal, first, one of fact, whether actually the claimant to the easement has proved such usage for a period of over 30 years; the second, one of law, whether, in view of the amendment of the Indian Limitation Act, even on the theory that this land "belongs" to the government, the period would be only 30 and not 60 years. This would depend upon the applicability or otherwise of the "savings" in S. 31 (b). We do not feel called upon to say anything about these two questions which are entirely within the competence of the Single Bench to which the case shall be returned with an answer to the first question already set out.

3. The facts necessary for our purposes are simple and are practically common grounds except for the duration mentioned in connection with the question of fact. The parties to the suit hold contiguous holdings namely, plot No 101 in the village Nogawa, Tahsil Depalpur of area 0.40 acres owned by the plaintiff. Adjacent to it are two fields Nos. 104 & 105, the first belonging to defendants 1 to 3 and the second to defendant No. 4. By "belonging to" or "owned by" with reference to these three plots is meant that all these persons have a bhumiswami right on the respective plots owned by them. The plaintiff's case is that he has got a right of easement for passage over the plots 104 and 105 to his own plot 101. He has claimed to have exercised it for a long time and wants this right to be declared. In addition he wants the defendants to be restrained by a permanent injunction from interfering with his (plaintiff's) exercise of the right of easement over the respective plot numbers. The lower appellate Court has found as a fact that the plaintiff had been exercising his right of passage over the fields of the defendants peacefully and without interruption for a continuous period between 30 and 35 years. The trial Court itself has dismissed the suit giving reasons which are slightly different from those given by the lower appellate Court; but it is sufficient for our purpose to concentrate our attention on the appellate decision. Holding that the last clause of Section 15 of the Indian Easements Act was applicable to this case and that the Indian Limitation Act as it stood at the time of the filing of the suit was applicable, the lower Court held that in the absence of 60 years' continuous and uninterrupted use the easement could not be declared. In this it was guided by the ruling of another Single Bench of this High Court reported in Rawaji v. Keshav, 1962 Jab LJ 1039 = (AIR 1963 Madh Pra. 202).

4. The solution of this problem centres round the phrase "belongs to government". Courts have said that this "belonging" should be contemporaneous with the suit. Of that of course there is no difficulty. The real difficulty is of the degree of the "belonging", because it is a very common happening that property which belongs ultimately to the Government, also belongs in a more or less limited measure to other persons. If we lay emphasis upon a very remote ultimate belonging to government practically every piece of land would be in the ownership of government at least in our country where according to the ancient theory all land belongs to Government. On the other hand, if we restrict the meaning of the word "belonging" every derivative or limited owner would become the owner for the purposes of allowing an

easement to grow by grant or by prescription. The line has therefore to be drawn somewhere. An idea of the degree of belonging to the Government or to a limited owner holding under government can be developed for the purposes of the application of Section 15 as the case may be, the general rule of 20 years, or the special rule of the period of limitation against Government as indicated in the last clause.

5. There is a certain quantity of case law and as the circumstances of each case are distinctive they do not have any cast-iron principle rigorously applicable; but all the same, a general conception of where to draw the line between "belonging to government" and "belonging to somebody else" can be gathered. The two cases on which the learned Single Bench relied in 1962 Jab LJ 1039 = (AIR 1963 Madh Pra 202) (supra) are — Municipal Board, Pilibhit v. Khalil-ul-Rahman, AIR 1929 All 382 and Chinnaswami Goundan v. Balasundara Mudaliar, AIR 1934 Mad 575. In the Allahabad case the land clearly belonged to government but being situated in a municipal area in the U. P. it was under the control of the Municipality under the U. P. Municipality Act in the manner common all over our country. Even the Municipal Board could not create the easement because—

"a Bye-law, passed by the Board and sanctioned by the Government, signifying the intention to let out the spaces at the sides of roads to hawkers, does not create Board's ownership to those sides but merely extends its power of user, the ownership being already created by Section 116, Municipalities Act of 1916, or a similar provision in the previous Act." It was a clear case of the land belonging to government in a very real sense, with the Municipal Board exercising control for certain limited purposes. In the Madras case the land belonged to the government but was in the actual occupancy of the trustees or the sewaks of a temple. The rights, if any, of the temple were very precarious and the most the Court could hold was that the temple was not a trespasser. On that view of course the land belonged to the government in a very real sense and not merely in a sense of a very remote ultimate ownership. Naturally, therefore, the 60 year rule contained in the last clause of Section 15 of the Easements Act was applied.

6. At the other extreme we have the position in Nagarethra Mudaliar v. Sami Pillai, AIR 1936 Mad 682. In that case both the properties, that is, the dominant as well as the servient belonged to raiyatwari tenants. Certainly they held under government and in theory the land ultimately belonged to government. Unlike the zamindari land there is absolutely no doubt in the ultimate governmental ownership of the raiyatwari lands. All the same

the raiyatwari tenants were also owners in a very real sense, and the theory of the land belonging to government while true in principle was of very remote practical application. Accordingly, the High Court held—

"Even though raiyatwari land is held by several tenants under the Government, one tenant can acquire title by prescription or lost grant against another, for the estate of raiyatwari proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. The estate of a raiyatwari proprietor is also heritable and alienable. He has a sufficient estate to support a grant of an easement. He would be a "capable grantor" as understood in English law for the application of the doctrine of lost grant."

It may be noted even here that the position of the bhumiswami under the Madhya Pradesh Land Revenue Code is in no way different from the raiyatwari tenants in Madras and similar raiyatwari settlement areas. In both areas the land does ultimately belong to government and what the occupier pays can, in principle, be described as rent and not revenue. Still without going into any academic discussion on the abstruse concepts of government ownership and of the raiyats' ownership, it can be asserted in regard to bhumiswami what the Madras High Court has said about the raiyatwari tenant.

7. The pakka tenant under the Madhya Bharat Land Revenue and Tenancy Act had very real rights; but they do not come up to the level of the raiyatwari tenants or of the bhumiswamis after 1959. One particular incident of the tenure is significant. Under the Madhya Bharat Tenancy Act the pakka tenant while entitled to a certain degree of permanency could not sell his holding without the permission of government conveyed by the Suba. That has now disappeared and a bhumiswami can sell his holding to whomsoever he likes subject to certain limitations of ceiling on the side of the purchaser without taking government sanction. In other words, while the application of the 60 years rule to a servient tenement which is a pakka tenancy under the Madhya Bharat law can be justified on the view that the ownership of government is still very real, the same cannot be said of the bhumiswami tenancy where the Government's ownership is very remote and tenuous.

8. In this connection the remarks made by the Division Bench of this Court in Ramlali v. Bhaganti, 1968 Jab LJ 706 = (AIR 1968 Madh Pra 247) are of some interest:

"A Bhumiswami or Bhumidhari pays land revenue and not rent. Chapter XII of the Code also contains provisions for the transfer of Bhumiswami or Bhumid-

dhari rights, partition of Bhumiswami and Bhumidhari holdings when there are more than one tenure-holders, etc. It is worthy of note that tenancy rights are dealt with separately by the Code in Chapter XIV thereof. That Chapter also contains Sections 168 and 172 which deal with the devolution of rights of an ordinary tenant and an occupancy tenant. Those rights also pass on the death of a tenant in accordance with personal law. All these provisions read together show that Bhumiswamis and Bhumidharis who hold land directly from the State and pay land revenue to the State like owners of land are not tenants; they have permanent rights in the land which are not taken away by the Government except in certain cases."

The language would indicate that the Court has rejected totally the doctrine of Government ownership even as an ultimate possibility and has veered round to the theory of occupier's ownership. The doctrine of the occupier's ownership of a very extensive kind with the ultimate governmental ownership in the remote background would have led precisely to the same results; yet the language used by the Court shows how much it had been impressed with the extent and the reality of the ownership of the bhumiswami. To maintain in such a situation that the land still "belongs" to the government in the sense in which the words "belongs to" have been used in the last clause of Section 15 of the Easements Act, is to ignore the real implication of bhumiswami tenancy.

9. We would, therefore, hold that under the present law which gives very extensive rights to the bhumiswami and reduces to a remote theoretical possibility the "belonging to government" it would not be correct to apply the last clause of Section 15 to easements over bhumiswami lands. The general rule should be applied. We would answer the reference accordingly.

10. In view of this it is unnecessary for us to examine whether there is any conflict between Sections 8 and 11 on the one hand and the last clause of Section 15 of the Easements Act on the other. We can easily reconcile all these sections by holding that while Section 11 gives certain powers to a limited owner of land other than government owned land, these powers are denied to the limited owner when the ultimate owner is government. But it is unnecessary for our purposes to develop any further on this.

11. As already indicated we are leaving the other questions in this case to be answered by the referring Single Bench.

Question answered accordingly.

AIR 1970 MADHYA PRADESH 286

(V 57 C 49)

T. P. NAIK AND
S. P. BHARGAVA, JJ.

The Commissioner of Income-tax, M. P. Nagpur and Bhandara, Nagpur, Applicant v. Bhopal Sugar Industries Ltd., Sore, Opposite Party.

Misc. Civil Case No. 171 of 1967, D/- 27-3-1970, against Order of Income-tax Appellate Tribunal Bombay Bench 'A' D/- 12-1-1967.

Income-tax Act (1922), S. 10 (2) (xv) — Any expenditure not being in nature of capital expenditure — Assessee Company manufacturer of sugar as well as owner of farms growing sugar-cane — Assessee paying commission to Managing Agents, fees and travelling expenses to Directors — Expenses not apportionable between agricultural and business activities of assessee — Held expenses were admissible as deductions in their entirety in computing income of assessee — (1968) 68 ITR 512 (Bom), Rel. on. (Para 10)

Cases Referred: Chronological Paras
(1968) 68 ITR 512 = 1968-2 ITJ

213 (Bom), Commr. of L-T., Bombay City-1 v. Maharashtra Sugar Mills Ltd. 5, 8

(1965) AIR 1965 SC 1473 (V 52) =

56 ITR 77, Commr. of I. T. v. Indian Bank Ltd. 8

M. Adhikari and P. S. Khirwadkar, for Applicant; S. P. Mehta, for Opposite Party.

NAIK, J.:— This is a reference under sub-section (1) of Section 66 of the Indian Income-tax Act, 1922 (hereinafter referred to as 'the Act') at the instance of the Commissioner of Income-tax. The questions referred to us for decision are:

- (1) "Whether, on the facts and in the circumstances of the case, the overhead expenses under the heads of Salaries and Travelling expenses of general staff, General charges, Legal expenses, postage, registration fee, etc., Directors' fees and travelling expenses and Managing Agents' office allowance incurred by the assessee could be apportioned between agricultural and business activities of the company and were not admissible as deductions in their entirety in computing the income of the company?"
- (2) "Whether, on the facts and in the circumstances of the case, the overhead expenses under the heads Salaries of general staff, Provident fund, Directorial expenses, Managing Agents' office allowance and Managing Agents' commission on net profit incurred by the assessee company could be apportioned between agricultural and business

activities of the company and were not admissible as deductions in their entirety in computing the income of the company?"

The first question relates to the assessment year 1956-57 and the second to the assessment year 1957-58.

2. The facts relevant for our purpose, as appearing in the statement of the case, are as follows:

The assessee is a public limited company carrying on business in the manufacture and sale of sugar. The activities of the company are composite. It manufactures sugar. It also owns large farms where sugar-cane is grown, which is used by it in its manufacture of sugar.

3. During the course of assessment proceedings for the assessment year 1956-57 (the account year being the year ending on 30-9-1955), the assessee claimed deductions in respect of the following items:

- "(1) Salaries and travelling expenses of general staff.
- (2) General charges.
- (3) Provident fund for agricultural staff.
- (4) Legal expenses, postage, registration fee, etc.
- (5) Directors' fees and travelling expenses.
- (6) Managing Agents' office allowances."

Similarly, in respect of the assessment year 1957-58 (the account year being the year ending on 30-9-1956), it claimed deductions in respect of the following items:—

- "(1) Salaries of general staff.
- (2) Provident fund contributions.
- (3) Company's contribution to Provident fund pertaining to staff and workers of Estate Department.
- (4) Expenditure on repairs and maintenance of agricultural buildings.
- (5) Registration, insurance and taxes on tractors and trailers.
- (6) Directorial expenses.
- (7) Managing Agent's office allowances.
- (8) Managing Agents' commission on net profits."

4. The controversy between the Department and the assessee related to the aforesaid items. The assessee claimed full deductions in respect of the aforesaid items. But, according to the Income-tax Officer, as only part of the expenses incurred in respect of the aforesaid items was attributable to agricultural activities of the assessee and as income from agricultural activities was exempt from income-tax, that part of the expenses could alone be excluded. The Income-tax Officer accordingly disallowed a portion of the expenditure on an estimate basis.

5. On appeal by the assessee, the Appellate Assistant Commissioner of Income-tax, relying on a decision of the Income-tax Appellate Tribunal in *M/s. Maharashtra Sugar Mills Ltd. Bombay v. In-*

come-tax Officer, Companies Circle 1(2), Bombay (which decision has since been approved by the Bombay High Court in *Commr. of Income-tax, Bombay City 1 v. Maharashtra Sugar Mills Ltd., (1968) 68 ITR 512 (Bom)*, allowed the appeal holding, inter alia, that the remuneration paid to the Managing Agents, Directors' fees, Auditors' fees, etc. could not be apportioned as relating partly to the business of manufacturing sugar carried on by the assessee and partly to its agricultural activities and directed that the whole of it be allowed as deduction in computing the income of the assessee.

6. On further appeal to the Income-tax Appellate Tribunal, the orders of the Appellate Assistant Commissioner were confirmed.

7. The Commissioner of Income-tax therefore, prayed that the case be stated to the High Court for its decision on the two questions aforesaid which arose out of the orders of the Tribunal in respect of the two assessments for the years 1956-57 and 1957-58 respectively.

8. The learned counsel for the Commissioner contends that the judgment in the Bombay case in (1968) 68 ITR 512 (Bom), has not been correctly decided and required reconsideration. He reiterated before us all the arguments which were urged on behalf of the Department before the Bombay High Court and which, in our opinion, have been rightly answered in that judgment. The learned Judges of the Division Bench of the Bombay High Court have held that where there is only one business of the assessee, namely, the manufacture of sugar (and not of cultivation of sugar-cane) the expenditure which the assessee incurs for that business has to be allowed to the assessee under Section 10(2) (xv) of the Act, being "any expenditure.....not being in the nature of capital expenditure or personal expenses of the assessee, laid out or expended wholly and exclusively the purpose of such business, profession or vocation". They have then examined whether Rule 23 of the Indian Income-tax Rules, 1922 (which have been framed under Section 59 of the Act), which, so far as relevant for our purpose, is in the following terms:

"In the case of income which is partially agricultural income as defined in Section 2 and partially income chargeable to income-tax under the head 'Business', in determining that part which is chargeable to income-tax the market value of any agricultural produce which has been raised by the assessee or received by him as rent in kind and which has been utilised as raw material in such business or the sale receipts of which are included in the accounts of the business shall be deducted, and no further deduction shall be made in

respect of any expenditure incurred by the assessee as a cultivator or receiver of rent in kind".

It could be said to be a statutory provision which would take the case out of the provisions of Section 10(2) (xv) of the Act, and have held that there were three reasons why it would not. In the first place, the words 'further deduction' occurring in the latter part of the rule refer to deductions of an expenditure relating to the agricultural activity of the assessee, and as Managing Agents are not normally appointed by a cultivator, expenditure on Managing Agents can hardly be said to be expenditure incurred by an assessee as a cultivator. Secondly, the words 'further deduction' have been used with reference to the definition of 'agricultural income' in Section 2(1) of the Act; and as that definition emphasises the process ordinarily employed by a cultivator in raising crops and contemplates all the processes up to the stage of sale of those crops, the expression 'further deduction' is referable to the expenditure incurred by the assessee as a cultivator. Thirdly, where the rules intended that any part of the income earned from agriculture should be treated as a business income, the rule expressly says so, as a comparison with the phraseology of Rule 24, which is in the following terms:

"Income derived from the sale of tea grown and manufactured by the seller in the taxable territories shall be computed as if it were income derived from business, and 40 per cent. of such income shall be deemed to be income, profits and gains liable to tax."

amply shows. Answering the further contention that the assessee should not be allowed to claim the amount paid to the Managing Agents as a commission as an allowable expenditure, because it would give to the assessee a double exemption, it relied on the decision of the Supreme Court in Commr. of Income-tax v. Indian Bank Ltd., 56 ITR 77 = (AIR 1965 SC 1473) where it has been held that where the assessee carries on any indivisible business and a part of its profits is not liable to tax, the entire expenditure incurred for the purpose of the business should be allowed, although a part of the expenses may have been incurred for earning non-taxable profits.

9. We may further add that though the case in the Bombay High Court related to

amounts paid to the Managing Agents as commission, that is to say, to one species of overhead expenses of the assessee company, and our cases relate to amounts paid by the assessee not only to the Managing Agents as commission but also to Directors as fees and travelling expenses, and various other kinds of overhead expenses, such as provident fund for agricultural staff, general charges and salaries and travelling expenses to general staff, etc., the principle governing the two types of cases would be the same. In both types of cases, expenses in question, even though they were expenses partly incurred by the assessee as a cultivator, were not apportionable between the agricultural and business activities of the assessee company, provided the business of the assessee was one and indivisible.

10. In the result, we answer the reference in respect of the assessment years 1956-57 and 1957-58 respectively as follows:

- (1) That, on the facts and in the circumstances of the case, the overhead expenses under the heads of Salaries and Travelling expenses of general staff, General charges, Legal expenses, postage, registration fee, etc., Director's fees and travelling expenses and Managing Agents' office allowance incurred by the assessee could not be apportioned between agricultural and business activities of the assessee company and were admissible as deductions in their entirety in computing the income of the assessee company.
- (2) That, on the facts and in the circumstances of the case, the overhead expenses under the heads Salaries of general staff, Provident fund, Directorial expenses, Managing Agents' office allowances and Managing Agents' commission on net profit incurred by the assessee company could not be apportioned between agricultural and business activities of the assessee company and were admissible as deductions in their entirety in computing the income of the assessee company.

Costs of this reference shall be paid by the Commissioner. Counsel's fee Rupees 100/-.

Answer accordingly.

tion till the passing of the Councils Act in 1861 and thereafter there was divergence in the Acts passed for the cities of Madras, Calcutta and Bombay.

In the earlier decades of this century, the control of the local government over the Madras Corporation was far more stringent than in the other presidency towns. If we leave out of consideration the municipal administration of the presidency towns of Calcutta, Madras and Bombay, there was practically no attempt at Municipal legislation as regards the mofussil areas before the year 1842. It was only in 1870 that real progress was made when Lord Mayo's Government in their famous resolution introducing the system of provincial finance referred to the necessity of taking further steps to bring local interest and supervision to bear on the management of funds devoted to education, sanitation, medical charge and local public works.

The advance in local self-government was largely stimulated by the memorable resolution of 1882 on the subject issued by the Government of Lord Ripon, which laid down some common principles for the guidance of the local governments in the matter. It is not necessary to refer in detail the progress of municipalities in the districts. Thus, on account of historical reasons, there were different legislative enactments, one dealing with City Municipal Corporations, and the other with the District Municipalities. But the common feature is that the State Government retained some ultimate control over both types of institutions.

4. Kailasam, J. has held that the municipalities are not departments of the Government and that, taking into account the scheme of the Act, it appears that the municipality is given a right to appoint its own officers, subject to the provisions of Sections 12-C, 72 and 76-A of the Act. It is true that certain amount of autonomy is given to local bodies like municipalities, Corporations etc. But it is clear from the provisions of the Act that the State Government could exercise effective control over the local administration by the municipalities.

Under Section 12-C, the right of appointment of the Commissioner, the most important executive officer of the Municipality, is vested in the State Government. Under Section 72, the appointments of important officers, such as Health Officer, Engineer, Electrical Engineer and Assistant Electrical Engineer, made by the council are subject to the approval of the State Government. In fact, the State Government could itself appoint such officers under certain circumstances. Under Section 76-A of the Act, powers are given to the State Government to appoint Health officers and municipal engineers, notwith-

standing anything contained in the other provisions of the Act. Under Section 36 of the Act, the State Government has power to suspend or cancel resolutions etc. made under the Act.

Under Section 73 of the Act, appointments to all posts other than those specified in Sections 12-C and 72 of the Act in cases where the pay exceeds Rs. 50 per month shall be made by the appointment committee and all other posts carrying pay less than Rs. 50 by the executive authority, subject to any rules including the rules for the representation of different communities which the State Government may make in that behalf. Thus the scheme of the Act shows that in the case of important appointments, the Government either reserved for itself the right to appoint the incumbents, or to have effective control by providing such appointments being made subject to the approval of the Government. In regard to the other employees of the Municipalities the effective control by the Government is secured by its framing rules by virtue of the specific provision contained in Section 73 of the Act and the power of superintendence exercised by appointing Inspector of Municipal Councils under Section 38(1) of the Act.

5. The main question for consideration in these writ petition appeals is whether the Act gives powers to the State Government to make the impugned Rule 7-B (5) of the Rules, relating to establishment, in other words, rules providing for revising the order of appointment made by the Appointment Committee. Section 73 of the Act itself provides that appointments to all posts by the Appointment Committee as contemplated in that section shall be subject to any rules which the State Government may make in this behalf. We see no justification for putting a narrow construction that the framing of rules contemplated by Section 73 could only relate to the manner in which the Appointment Committee could exercise its powers and not as authorising the Government to frame rules giving to itself, or to the Inspector appointed by it, powers to revise the appointment made by the Appointment Committee.

Part V of the Act deals with subsidiary legislation. Section 303(1) of the Act provides that the State Government may make rules to carry out all or any of the purposes of the Act not inconsistent therewith. Section 303(2) (r) of the Act provides that in particular and without prejudice to the generality of the foregoing power the State Government may make rules:

"as to the powers of auditors, inspecting and superintending officers and officers authorised to hold inquiries, to summon and examine witnesses and to compel the production of documents and all

other matters connected with audit, inspection and superintendence." It cannot be disputed that the State Government has ample supervisory powers under the provisions of the Act and thus is clear from Sections 34 and 41 of the Act.

It is in order to effectively carry out the powers of supervision, Sec. 38(1) of the Act, provides that the State Government may appoint such officers as may be required for the purpose of inspecting or superintending the operations of all or any of the municipal councils established under the Act. If the State Government has powers to appoint the Inspector of Municipal Councils to inspect and supervise the working of the Municipality, including the Appointment Committee, we fail to see how the relevant provisions referred to above do not give sufficient jurisdiction to the State Government to frame the impugned rule.

The power of superintendence given to every High Court under Article 227 of the Constitution of India, corresponding to Section 107 of the Government of India Act, 1915 and Section 224 of the Government of India Act, 1935, over subordinate courts, has been interpreted to include judicial, as well as administrative superintendence in all matters. It is clear from the definition of superintendence in the Law Lexicon of British India by Ramanathan that the word seems properly to imply the exercise of some authority or control over the person or things subjected to oversight. Thus the Inspector of Municipal Councils who has powers of superintendence is one who has the oversight and charge of something with power of direction. It could not be disputed that if the Inspector of Municipal Councils revised the order of the appointing authority by virtue of the impugned rule, he is superintending the work of the appointing authority. It could not be said that the impugned rule goes beyond the scope of Section 73 of the Act or that it is inconsistent with the reasonable interpretation of the relevant provisions of the Act.

6. Kailasam J. has referred to Sections 85 to 96 of the City Municipal Corporation Act as containing elaborate provisions as to right of appeal, unlike Section 73 of the District Municipalities Act, and he has relied on this circumstance to find that in the absence of similar provisions in the District Municipalities Act, Section 73 cannot be construed as empowering the State Government to make rules providing for revision of the order of the appointment committee by the Inspector of Municipal Councils. As regards the City Municipal Corporation Act, the provisions relating to establishment are no doubt different from those contained in the District Municipalities Act.

But it can be accounted for on historical grounds and the existence of separate legislative enactments for the District Municipalities and the City Municipal Corporations for over several decades. But under both the Acts, the State Government has control in the matter of appointment of superior officers, like the Commissioner and certain important officers like Engineer, Health Officer etc. But in spite of the difference in the mode of treatment of establishments in the District Municipalities Act and the City Municipal Corporation Act, it is not possible to infer that the District Municipalities Act did not contemplate the Government making rules for revising the orders of the appointment committee.

7. In Nagappa Chettiar v. Annapooral Achi, 1941-1 Mad LJ 164 = (AIR 1941 Mad 235) (FB), a Full Bench of this Court has held that R. 8 of the Rules framed under the Madras Agriculturists' Relief Act providing for appeals from the orders of the trial Courts is ultra vires the rule-making power under Section 28 of the Madras Agriculturists' Relief Act. It is pointed out in the decision that an appeal does not lie as of right, but must be conferred by express enactment.

The circumstances under which the case arose are as follows: An application was made under Section 19 of the Madras Agriculturists' Relief Act to scale down the debt and it was dismissed by the Sub-Court. There was no provision in the Act for an appeal against that order. But subsequently the impugned Rule 8 was passed by the Provincial Government providing for an appeal against such an order. It is pointed out in the decision that the object of the Act is to grant relief to agriculturists by providing machinery for the scaling down of their debts and that if a case falls within the Act, the court must scale down the debt in accordance with the directions embodied in the Act.

It has been held in that decision that sub-section (2) of the Section 28 enabling the Provincial Government to make rules in regard to any matter which is required to be prescribed by the Act and for removing any difficulty in giving effect to the provisions of the Act, will not empower the Provincial Government to provide the right of appeal by framing rules. The reason is that in making a rule providing for appeals the Provincial Government is not making a rule for carrying into effect the purposes of the Act. It is adding in effect something to the Act. The object of the Act is to grant relief to agriculturists by providing machinery for the scaling down of their debts and this is achieved by the court of the first instance deciding whether a case falls within or without the Act. It has been held in the decision that by providing for an

appeal, the Provincial Government is not removing any difficulty in giving effect to the provisions of the Act.

This decision has been referred to and discussed in the decision, *State of Madras v. Louis Dreyfus and Co. Ltd.*, (1955) 6 STC 318 = (AIR 1956 Mad 659) (FB). It is pointed out in this decision that the familiar principle of the decision in 1941-1 Mad LJ 164 = (AIR 1941 Mad 235) (FB) can hardly apply to a case where the language of the rule-making power is couched in different terms. The following passage in (1955) 6 STC 318 = (AIR 1956 Mad 659) (FB) which is also extracted in the judgment of Kailasam J. brings out the distinction clearly:—

"In particular we might refer to Section 19(2) (i) which enables rules to be made prescribing the duties and powers of officers appointed for the purpose of enforcing the provisions of the Act particularly in the context of the Act leaving it to the rules to constitute the hierarchy of officials to exercise powers under the Act and secondly, sub-clause (1) where power is conferred upon the Provincial Government to frame rules in respect of 'any other matter for which there is no provision or no sufficient provision in this Act and for which provision is, in the opinion of the Provincial Government, necessary for giving effect to the purposes of this Act.' These words are of the widest amplitude and, in the absence of any prohibitions or restrictions inferable from the Act itself, are apt to confer upon the Government power to constitute revisional authorities and invest them with powers in that behalf. This contention also fails and has to be rejected. We therefore hold that it was open to the Provincial Government to have framed Rule 14(2) conferring upon the Commercial Tax Officers the revisional powers that were vested in them by that provision."

In *Venkayya v. Pullayya*, AIR 1942 Mad 466 also the above Full Bench case has been distinguished and the test laid down by the House of Lords in *Blackwood v. London Chartered Bank of Australia*, (1874) 5 PC 92, at p. 108 has been followed as evident from the following passage:

"As has been pointed out by the House of Lords in (1874) 5 PC 92, at p. 108 the tests to apply in considering whether rules are within the powers of the rule-making authority under a statute are: (1) Whether the rules are reasonable and convenient for carrying the Act into full effect; (2) Whether the rules relate to matters arising under the provisions of the Act; (3) Whether they relate to matters not in the Act otherwise provided for and (4) Whether they are consistent with the provisions of the Act. The validity of a rule is to be determined not so much by

ascertaining whether it confers rights or merely regulates procedure, but by determining whether the rule is in conformity with the powers conferred under the statute and whether it is consistent with the statute, reasonable and not contrary to general principles."

8. We have already pointed out that Section 73 of the Act clearly provides for the State Government making rules as regards the filling up of appointments, other than those specified in Sections 12-C and 72 of the Act. Sections 303(1) and 303(2) (r) clearly empower the State Government to make rules to carry out all or any of the purposes of the Act and in particular to define the powers of inspecting and superintending officers in respect of inspection and superintendence. The above provisions give ample powers to the State Government to frame rules to confer on Inspector of Municipal Councils jurisdiction to revise the order of the appointing authority. For the foregoing reasons, we find that Rule 7-B (5) of the Establishment Rules framed under Section 73 of the Act is not ultra vires of the powers of the State Government.

9. We, however, agree with the view of Kailasam, J. that the Inspector of Municipalities has really prejudged the case even before giving the show cause notice to the second respondent P. Murugaiyan. We have already pointed out that the appellant K. S. Ramaswami preferred an appeal to the Inspector of Municipalities. Though the appeal is not really competent, the Inspector of Municipalities has jurisdiction to call for the records on the information gained by him through the appeal petition, to peruse the same and to revise the order of appointment, after giving an opportunity to P. Murugaiyan to show cause against the proposed action. But what the Inspector of Municipalities did was to pass an order on 16-11-1967 on the appeal petition of K. Ramaswami, setting aside the order of appointment made by the Appointment Committee in favour of P. Murugaiyan without giving an opportunity to the said Murugaiyan to defend the order of appointment in his favour.

In fact, the Inspector of Municipalities has mentioned in the order that though it is not obligatory under the rules to issue a notice, yet he as Inspector has directed the appointment committee and Murugaiyan to show cause within 15 days from the date of receipt of his order dated 16-11-1967, why the appointment order in favour of P. Murugaiyan should not be cancelled. After Murugaiyan filed his objections in the form of a petition. The Inspector finally passed the order on 29-1-1968, rejecting his petition and directing his earlier order dated 16-11-

1967 to be carried out. In the first paragraph of his order dated 29-1-1968 he has specifically stated that he had allowed the appeal petition of K. S. Ramaswami and set aside the order of the appointment committee. Even in the counter affidavit filed in the writ petition, the Inspector of Municipalities has categorically stated that by his order dated 16-11-1967 he allowed the appeal petition of K. S. Ramaswami and set aside the order of the appointment committee and then issued notice to Murugaian to show cause why the order passed by him should not be given effect to. Thus, there can be no doubt in this case that the Inspector of Municipalities has prejudged the case of Murugaian and acted in total disregard of the principles of natural justice.

It is true the position would have been different if the Inspector of Municipalities had merely come to a prima facie conclusion and given an opportunity to Murugaian to show cause against it. In *Felix Fernandez v. Integral Coach Factory*, (1966) 79 Mad LW 422 a Bench of this Court has held that the Memorandum following the charge-sheet calling upon the delinquent to show cause why he should not be punished in case the charge is made out would not in anyway indicate that the cause has been prejudged. But it is clear from the facts already stated that the Inspector of Municipalities in this case had clearly prejudged the case against Murugaian.

10. The order of Kailasam, J. setting aside the order of Inspector of Municipalities is, therefore, correct. But in view of our finding that the Inspector of Municipalities has powers to revise the order of the Appointment Committee, it is open to the present Inspector of Municipalities to consider the relative claims of K. S. Ramaswami and P. Murugaian and to revise the order of the appointment committee if he sees sufficient grounds to do so.

11. The State of Madras and K. S. Ramaswami have preferred W. A. Nos. 376 and 218 of 1968 respectively against the order on W. P. 538 of 1968. But as objection was taken that no writ appeal had been filed against W. P. 539 of 1968 in which a writ of quo warranto was prayed for by the second respondent Murugaian, the decision of Kailasam, J. had become final. C. M. P. No 18730 of 1968 has been filed to condone the delay and permit a writ appeal to be filed against the order on W. P. 539 of 1968. There can be no doubt that by oversight appellant K. S. Ramaswami failed to file a writ appeal against the order on W. P. 539 of 1968. The delay in filing the writ appeal is condoned.

12. In the result, the order of Kailasam, J. setting aside the order of the Inspector of Municipalities is confirmed, but, as already pointed out, it is open to

the present Inspector of Municipalities to exercise his jurisdiction under Rule 7-B (5) of the Rules relating to employment under the Municipal Council to revise the order of the Appointment Committee, if he sees sufficient grounds to do so. The writ appeals are ordered accordingly but in the circumstances, there will be no order as to costs.

Appeal dismissed.

AIR 1970 MADRAS 484 (V 57 C 141)

NATESAN, J.

G. Ramakrishnaiah and another, Defendants-Appellants v. Dasaratharama Reddiar, Plaintiff-Respondent.

Second Appeal No 1153 of 1965, D/- 26-6-1969, from decree of Dist J., Chingleput, in Appeal Suit No. 107 of 1962.

Transfer of Property Act (1882), S. 14 — Settlement — Evasion of rules against perpetuities.

Pursuant to a family arrangement, one P settled properties in favour of two sons of D and the sons that might be born subsequently. D was the son of P's wife's sister. After the end of the minority of the last son that might be born to D the sons were to take the properties in equal share.

Held, that the prohibition of S. 14 was not evaded by the settlement. (Para 5)

Cases Referred: Chronological Paras (1833) 1 Cl & F 372 = 6 ER 956.

Cadell v. Palmer

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T. R. Gopalakrishnan and K. S. Varadachari, for Appellants; V. Somasundaram and P. Kothandaraman, for Respondent.

JUDGMENT:— A short but interesting question in the application of the rule against perpetuities embodied in Section 14 of the Transfer of Property Act arises for consideration in this Second Appeal. The appeal is directed against a preliminary decree for partition and separate possession of an one-fourth share in the suit properties. One Pattabirama Reddy, pursuant to a family arrangement, under the registered settlement deed Ex. A-1 dated 5-1-1931, settled the suit properties in favour of the sons of one Duraiswamy Reddy, two sons then in existence and sons that may be born subsequently. Duraiswamy Reddy was the son of Pattabirama Reddy's wife's sister and on the date of the settlement Duraiswamy Reddy had two sons, Ravana, aged two years and Sundararama, aged four months. The settlement referred to the two minor sons then in existence and provided that the father Duraiswamy Reddy shall be the guardian of the minor sons in existence and that may be born and that he

shall look after them, maintain proper accounts of the income and safeguard the properties without effecting alienation.

After the end of the minority of the last son that may be born to Duraiswamy Reddy, the sons were to take the properties in equal shares. The minor son Sundararama died in 1931 itself. Subsequently about the year 1933 another son Sriramulu was born. The last son of Duraiswamy Reddy, Dasaratharama Reddiar, the plaintiff in the suit out of which the Second Appeal arises, was born in the year 1941. Notwithstanding the prohibition against alienation, Duraiswamy Reddy executed a sale deed Ex. B-2 dated 14-7-1941 on behalf of the minors of items 2 to 5 in the suit properties, in favour of one Jayalakshmi Ammal for a sum of Rs. 200. He executed on the same day another sale deed also, Ex. B-3 in her favour. Under Ex. B-1 dated 21-8-1945 Jayalakshmi Ammal sold the suit items 2 to 5 to the second defendant in the case, the present second appellant. The first defendant in the case is a purchaser of the first item under Ex. B-5 dated 5-5-1946 from Sundararaju to whom Duraiswamy Reddy had conveyed the properties under Ex. B-6 dated 30-9-1943.

Duraiswamy Reddy died in the year 1949 and his wife Seshammal died in 1951. Duraiswamy Reddy and his wife were survived by their three sons Ravana, Sriramulu and the plaintiff. The son Ravana died in the year 1950, when aged about 22. Sriramulu died in the year 1951 after just becoming a major. An earlier suit filed by the present plaintiff claiming only possession was permitted to be withdrawn by this Court in Second Appeal No. 1018 of 1955 with liberty to file a fresh suit on the same cause of action under certain terms. The suit, out of which this second appeal arises, has been filed after due compliance with the conditions laid down by this Court in S. A. No. 1018 of 1955 the plaintiff here seeking to have the sale deeds Exs. B-2, B-3 and B-6 set aside. He claimed title to and possession of the entire suit properties. The plaintiff has been given a decree only for an one-fourth share in the suit properties. Ravana had died at the age of 22 without seeking to set aside the alienation within three years of becoming a major.

So far as Sriramulu is concerned, he died within three years of attaining majority. The Courts below denied his share to the plaintiff on the ground that the right to avoid the transfer was a personal privilege of the minor. As regards the share of Sundararama which had been inherited by his mother, here again, it was held that the plaintiff could claim no part therein. The plaintiff has not preferred any second appeal or come up with any Memos of Cross-objections questioning the limitation on the share he could

have in the suit properties. The Second Appeal has been filed by the alienees defendants 1 and 2 in the suit contending that the plaintiff's claim must be dismissed in toto on the ground that recognition of any interest in his favour would be a violation of the Rule against perpetuities.

2. Mr. T. P. Gopalakrishnan, learned Counsel appearing for the appellants submits that the provisions of the settlement deed are manifestly opposed to Section 14 of the Transfer of Property Act which prohibits any transfer of property that can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong. The argument of Mr. T. P. Gopalakrishnan learned Counsel for the appellants based on Section 14 of the Act runs thus: Under the terms of the settlement the properties have been settled on the minors Ravana and Sundararama and other sons that may be born to Duraiswamy Reddy. Sons of Duraiswamy Reddy in existence at the time of the settlement and sons that may be born to him thereafter, take the property absolutely in equal shares on the attainment of majority of the last born son.

The effect of the disposition in the settlement deed is to vest properties even on sons that may be born to Duraiswamy Reddy after the death of the sons in existence at the time of the settlement and the minority of other sons who might be in existence at the time of their death. For instance ignoring the existence of the plaintiff for the purposes of envisaging a possibility, one cannot rule out Duraiswamy Reddy surviving Sriramulu and having a minor son after the death of Sriramulu. It is submitted that if such an event is possible, the settlement offends S. 14 of the Transfer of Property Act, and in the circumstances the operation of the settlement deed, should under Section 15 of the Act be limited to Ravana and Sundararama, persons in existence at the time of the settlement. Learned Counsel urged that the validity of the settlement must be considered in relation to the time when the document creating it takes effect and if at the relevant time there is the slightest possibility that the perpetuity period may be exceeded, the settlement is void.

It is apparent that the learned counsel in presenting the case this way, takes the lives of Ravana and Sundararama in existence at the time of the settlement and the minority of any son that may be born during their lives as the measurement of the perpetuity period.

3. In my view the arguments proceed on an erroneous assumption. It is overlooked that the persons living at the date of the settlement, whose outstanding lives may be taken into consideration in applying the perpetuity rule, need not necessarily be persons having or taking an interest under the settlement. The perpetuity period under Section 14 of the Act consists of the lifetime of one or more persons living at the time the transfer takes effect, and the further period of the minority of a person in existence at the close of the person living at the time of the transfer. For a valid settlement all that is necessary is that it must be clear even at the outset of the settlement, that the beneficiaries will necessarily be ascertained, if at all within the perpetuity period and any contingency or vesting specified by the settlement will also necessarily be satisfied within the period. It is a requisite for not offending the perpetuity rule that the identity of the beneficiary and the quantum of the beneficiary's interest are all ascertainable and ascertained within the period limited.

Section 14 of the Act however does not place any restriction as to who can be the living person whose existence can postpone the vesting. It allows the settlor to use any life for the purpose. But as has been pointed out in English text books dealing with the rule against perpetuities no life can be of the slightest use for postponing the vesting, unless they somehow restrict the period of time within which the interest under the transfer is to be capable of vesting according to the terms laid down by the settlor. Any life can help if it has something to do with the conditions appointed by the settlor for vesting of the gift.

4. In English Rule against Perpetuity, the perpetuity period consists of lives in being at the creation of the interest plus the age of majority twenty one years in gross plus the actual periods of gestation. The lives in being need not be beneficiaries or relations of the settlor; they may be selected at random. As Morris and Leach put it in their *Rule Against Perpetuities*, 2nd Edition at Page 62, the lives in being must be either specified in the instrument or "necessarily involved in limitations contained therein". Megarry and Wade in their *Modern Law of Real Property* (2nd Edn. P. 229) would state:

"that only lives in being which can be of assistance for the purposes of perpetuity rule are those which in some way or other govern the time when the gift is to vest."

In the *Manual of Law on Real Property* by Megarry, 2nd Edn. Page 150, the learned author gives the example of gifts by a testator to such of his descendants as are living 21 years after the death of

the last survivor of the members of a given school at the testator's death. In *Cheshire's Modern Real Property*, 10th Edn. the position is thus stated at page 241:

"The lives in being must be designated either expressly, as in *Cadell v Palmer*, (1833) 1 Cl & F 372 or by implication. Lives are designated by implication only if, according to the terms of the instrument of gift, they serve to measure the time within which the vesting contingency must occur. They must form a possible part of the apparatus for determining the moment at which the interest is to vest." The learned author points out that the Settlor need not choose persons who have interests in the settled property or a connection with the family and he has full liberty of action with regard to the number of persons he may select. Even so is the rule embodied in Section 14. I see nothing in Section 14 of the Transfer of Property Act to place a restriction on the persons whose lives are to be taken to prolong the period of vesting. May be the language of the Section at the close is somewhat involved, but the section uses language in this regard without any limitation "after the lifetime of one or more person living at the date of such transfer." It may be any person or any number of persons, but the person or persons must be living at the date of such transfer. True, one must infer from the document itself the person or persons whose life has to be considered. Here it is Duraiswamy Reddy's sons that have to take. The gift is to a class and it cannot be said that, the quantum or the share in the property to be taken by each member of the class is not ascertainable within the perpetuity period.

The last of the persons to take is the last minor son of Duraiswamy Reddy. The exact share of each beneficiary would depend upon the number of male children that may be born. The settlor intends that the shares diminish in amount according to the number of the sons that may be born to Duraiswamy Reddy. But the share of each member of the class is definitely and finally ascertainable within the perpetuity period. The class closes within the perpetuity period. In the instant case the vesting is postponed utmost to the birth of the last son of Duraiswamy Reddy. Duraiswamy Reddy's lifetime is part of the apparatus for determining the moment at which the interest is to vest. A reading of the settlement deed shows that it does not look upon the lives of Ravana and Sundarama "as lives in being" for the purpose of calculating the perpetuity period. They along with the other sons that may be born have to share the property and the settlor obviously expects all the sons to be alive when the distribution and vesting in possession takes place.

Possession is postponed till the minority of the last son of Duraiswamy Reddy. Cheshire (page 242) taking a case where the testator bequeaths a fund to such of his grand-children as attain the age of twenty-one years, points out that his children who survive him are effective lives in being, since the ascertainment of the beneficiaries requires a reference to their parents. "The gift, therefore, is good, for the grand-children must all become of age within twenty-one years after the death of their parents, and the parents must, all have been born (or begotten) in the testator's life time."

5. It follows that the settlement in question does not offend the rule against perpetuities. The prohibition of Section 14 of the Transfer of Property Act is not evaded by the settlement in question. Vesting of interest has necessarily to be within the minority of a person in existence at the death of Duraiswamy Reddy.

6. In the result, the Second Appeal fails and is dismissed with costs. No leave. Appeal dismissed.

AIR 1970 MADRAS 487 (V 57 C 142)

ISMAIL, J.

The Lakshmi Vilas Bank Ltd., Karur, Petitioner v. L. S. Pattabhi Chettiar and another, Respondents.

Writ Petn. No. 3544 of 1968, D/- 4-2-1970.

Shops and Establishments — Madras Shops and Establishments Act (36 of 1947), Section 41 (1) — Procedure under — Employer, when must follow — Employee reaching superannuation age — Procedure under Section 41(1) need not be followed,

Where an employer relieves an employee from his duties on the ground that he has reached the age of superannuation and the period of his service has come to an end, the employer is not required to follow the procedure prescribed by Section 41(1). The employer is required to follow the procedure prescribed in Section 41(1) only where the services are dispensed with for a reasonable cause or on a charge of misconduct and such dispensing with contemplates a termination of the services anterior and prior to the date on which the services would come to an end automatically, either as a result of the terms in the contract of service or as a result of a rule applicable to the service in question and not a termination.

(Para 3)

T. S. Rangarajan, for Petitioner; T. Satya Dev, Asst. Govt. Pleader, J. Seetharaman and K. S. Janakiraman, for Respondents.

GN/GN/D203/70/SNV/T

ORDER:— The first respondent herein was appointed as the Jewel appraiser in the Jalakandapuram Branch of the Petitioner Bank in 1960. On September 30, 1966 the petitioner herein sent a communication to the first respondent herein which stated that the first respondent herein was completing sixty years of age on 15th Purattasi, Parabhava, equivalent to October 1, 1966, and as per the Articles of the Association, he shall retire from the service of the Bank and will be relieved completely at the close of business on Saturday, the 1st October, 1966. On receipt of this communication, the first respondent herein purported to file an appeal to the second respondent herein under Section 41(2) of the Madras Shops and Establishments Act, 1947 (hereinafter referred to as the Act). In the appeal filed by the first respondent, he contended that on October 1, 1966, his services were terminated alleging that he had completed sixty years of age and the horoscope and the medical certificate furnished by the first respondent proved that the age of the first respondent was only fifty four, and hence the termination of the first respondent's service was wrongful and against the provisions of the Act. The petitioner herein filed a counter statement before the second respondent herein contending that the second respondent had no jurisdiction to deal with the matter, since discharge on retirement was not contemplated in Section 41 (1) of the Act. The further case of the petitioner was that the first respondent was asked on June 15, 1966 to produce an educational certificate to prove his age and he took time till September 20, 1966, that the first respondent was not asked to produce a medical certificate or any horoscope, that they have been produced of his own accord, that the horoscope produced by the first respondent could not be the original horoscope and was a recent one fabricated and written for the purpose and its authenticity and antiquity were both denied. The further case of the petitioner was that the horoscope and the medical certificate were not admissible forms of proof of age and the petitioner would not be bound to accept the same. The second respondent herein considered the case of the parties and passed an order on November 30, 1967 in M. S. E. Case No. 42 of 1967. The second respondent overruled the contention of the petitioner that Section 41 of the Act has no application to the retirement, and on merits, came to the conclusion that the first respondent's services had not been terminated in the manner contemplated by Section 41 of the Act. The second respondent recorded:

"As already observed, the respondent (petitioner herein) was not able to explain for having accepted horoscope and medi-

cal certificates as proof of age in respect of certain other employees and not having accepted them as satisfactory proof of age in the case of the appellant (first respondent herein). Further, no notice as required under Section 41(1) of the Madras Shops and Establishments Act has been given to the appellant before giving effect to Exhibit A-1, (the memorandum dated September 30, 1966 referred to already). I therefore hold that the termination of the appellant's services by retirement as per the order of the respondent dated 30-9-1966 (Exhibit A-1) would not be for a reasonable cause as the appellant had been retired from service without resolving the dispute regarding his age on that date. Inasmuch as there was no reasonable cause for the termination of the appellant's services by retirement and since the statutory notice was also absent, the termination of the appellant's services by retirement as per Exhibit A-1 dated 30-9-1966 is illegal. I therefore, set aside the order of termination by retirement dated 30-9-1966."

It is to quash this order of the second respondent, the present Writ Petition under Article 226 of the Constitution of India has been filed.

2. The learned counsel for the petitioner put forward two contentions in support of the Writ Petition. The first is that the appeal preferred by the first respondent to the second respondent was not maintainable since the retirement of an employee by an employer on the employee reaching the age of superannuation does not come within the scope of Section 41 of the Act. The second is that in coming to the conclusion that the first respondent's services had not been terminated lawfully, the second respondent had failed to consider very important circumstances and facts that were placed before him and that were available to him. I shall now consider these contentions in that order.

3. As far as the first contention is concerned it is necessary to refer to the language of Section 41(1) of the Act. Section 41(1) states:—

"No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided, however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose."

Thus, it will be seen that this section falls under two limbs, though the second limb is framed in the form of a proviso to the first limb. The first limb is that the ser-

vices of the employee who had been continuously employed for a period of not less than six months cannot be dispensed with except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice. For the purpose of complying with the requirements of the first limb, both the conditions must be simultaneously satisfied, namely, that the dispensing with the services must be for a reasonable cause, and the employee should be given at least one month's notice or wages in lieu of such notice. As far as the second limb is concerned, it contemplates the dispensing with the services of an employee on a charge of misconduct. In such an event, the requirement of the giving of one month's notice or wages in lieu thereof, is not insisted upon. On the other hand, the statute insists that the services of such a person cannot be dispensed with on a charge of misconduct, unless an enquiry has been held and satisfactory evidence supporting the charge of misconduct had been recorded at the enquiry.

Now looking at the language of the section and the provisions contained in the two limbs, can it be said that the retirement of an employee on reaching the age of superannuation, according to the rules applicable to the employment, would come within the scope of the section? I am of the opinion that such retirement cannot come within the scope of the section. From the very nature of the language employed in Section 41(1), only a premature termination of the services of an employee can be brought within the scope of the section. When I say premature termination, I mean a termination of the services prior to the period fixed in a contract of service, if there is one, or a termination of service prior to the period fixed for retirement on reaching the age of superannuation prescribed either in a contract of service, if there is one, or in the rules or regulations governing such service. Consequently, if there is a contract of service, and the contract of service itself prescribes the period of service, the termination of the services of the employee pursuant to the expiry of such period of employment, cannot fall within the scope of Section 41(1). Equally, if there are terms in the contract of service or provisions in the rules applicable to the service providing for the retirement of the employee on reaching the age of superannuation, such a case also cannot fall within the scope of Section 41(1).

The dispensing with the services for a reasonable cause or the dispensing with the services on a charge of misconduct, both of them, contemplate a termination of the services anterior and prior to the date on which the services would come to an end automatically, either as a result

of the terms in the contract of service or as a result of a rule applicable to the service in question. Consequently, where an employer relieves an employee from his duties for the reason that he had reached the age of superannuation and the period of service had come to an end, such a case cannot fall within the scope of Section 41(1) of the Act. On the other hand, the second respondent appears to have proceeded on the basis that reaching the age of superannuation will be a reasonable cause as contemplated in the first limb of Section 41(1). I am of the view that this is an erroneous one. The reasonable cause that is contemplated in Section 41(1) is with reference to a premature termination of service. Can it be contended that the retirement of a particular employee constitutes termination of his services, for a reasonable cause, and therefore, even in such an event, the employee is entitled to at least one month's notice or wages in lieu thereof?

In the case of retirement on reaching the age of superannuation, the employer and the employee know when the employee will cease to be in service, and therefore, the question of giving one month's notice or wages in lieu of such notice cannot possibly arise. The giving of one month's notice or wages in lieu thereof is generally intended to help the employee concerned during the interval before he obtains another employment. But in the case of retirement on reaching the age of superannuation, the basis for such a requirement is not present and therefore, there is no scope for any such contention, and the relieving of an employee from his duties on the basis that he retired from service on reaching the age of superannuation cannot by any stretch of imagination be said to be dispensing with the services of an employee for a reasonable cause. Hence, I am of the opinion that the conclusion of the second respondent in this behalf is erroneous, and as a matter of fact, the appeal preferred by the first respondent to the second respondent was really incompetent.

I may also mention one other feature. It may happen in a particular case; the retirement was used by the employer as a cloak for dispensing with the services of an employee where the motive for dispensing with the services is something different. In that event, a different position may possibly result, because no person will be allowed to evade the obligation imposed on him by law by having recourse to a cloak or guise under which he can take refuge in order to escape from such an obligation. The present case is not one such and while dealing with the second of the contentions, I shall refer to the facts of this case which support this conclusion of mine. Conse-

quently, I am of the opinion that the appeal preferred by the first respondent to the second respondent under Section 41(2) of the Act is incompetent and the second respondent had no jurisdiction whatever to pass the order in question.

Normally speaking, this conclusion of mine would be sufficient to dispose of the writ petition. However, the learned counsel on both the sides argued on the merits also and invited me to give my conclusions on the second of the contentions put forward by the learned counsel for the petitioner. For the purpose of understanding and appreciating the contentions in this behalf, it is necessary to refer to one or two admitted facts. The first respondent herein sought employment under the petitioner by a letter dated February 10, 1960 which has been marked as Exhibit A-1 before the second respondent. In that letter, the first respondent has stated that he learnt that in the Trichy branch of the petitioner-bank there was a vacancy for the post of appraiser and he had been a shroff in a shroff's shop for a period of ten or twelve years and he had experience in that post, and hence he wanted the appointment and undertook to conduct himself according to the rules and regulations of the bank. In that letter, he had stated that his age would be 52 or 53 and he had studied upto VII Standard. On the same day, there was a written application given by the first respondent for the post in question. That application is also dated February 10, 1960, and has been marked as Exhibit R-2. Against the column "Date of birth and proof of age", it was stated "Parabava, Purattasi. 16th: Age 52 horoscope." It is on the basis of Exhibits R-1 and R-2, the petitioner came to the conclusion that the first respondent was born on October 1, 1906, and therefore he reached the age of sixty years on September 30, 1966.

However, even in March, 1966 itself, the petitioner sent out a circular marked as Exhibit R-7, to all its employees calling upon them to produce their Secondary School Leaving Certificate or Transfer Certificate issued by the Headmaster of the School as a proof of the date of birth of the employee concerned. This circular itself expressly stated that such particulars were required to make the file up-to-date in respect of the staff of the petitioner bank. Such a communication was sent to the first respondent also, and the first respondent after a number of reminders on August 22, 1966 wrote a letter asking one month's time to produce the necessary records to prove the age, as he had to go to the village to gather the records. Subsequently, the first respondent sent to the petitioner herein, a certificate dated September 16, 1966, granted by a Civil Surgeon, Erskine Hospital,

Madurai, which has been marked as Exhibit R-3 before the second respondent, and a horoscope which has been marked as Exhibit R-4. On the basis of these two documents, the case of the first respondent was that he was born only in 1912 and therefore he had not attained the age of superannuation on October 1, 1966 as contended by the petitioner herein.

The second respondent took the view that since the petitioner accepted horoscopes and medical certificates as proof of age in respect of certain other employees, it should have accepted the horoscope as well as the medical certificate in proof of the age of the first respondent also, and in not having done so, the petitioner illegally terminated the services of the first respondent. It is in this context the learned counsel for the petitioner contends that the second respondent has completely ignored Exhibits R-1 and R-2 wherein the first respondent had given his age as 52 or 53 in 1960, and also the evidence of the first respondent before the second respondent wherein he has stated that he was aged 25 or 26 at the time of his marriage, and he was married on the 10th Avani, Sukla Year.

I am of the opinion that the contention of the petitioner in this behalf is well-founded. As I pointed out already, Exhibit R-1 was written by the first respondent himself where he had given his age as 52 or 53 on February 10, 1960. The first respondent in his evidence before the second respondent had admitted that Exhibit R-1 was written by him in his own handwriting, and he had given his age as 52 or 53. With regard to Exhibit R-2, the first respondent stated that his signature was obtained in a blank form and the particulars in the application were filled upon by the Secretary of the bank. On the face of it, this contention of the first respondent cannot be correct, though I am not deciding that question. *Ex. R-2 contains a number of particulars in addition to the Tamil year, month and the date of birth of the first respondent, such as his father's name, religion, caste and sect, qualifications including educational he possessed, whether he was married and if so, how many children he had, the properties he possessed, whether he inherited the same or acquired the same, the value of the properties and the encumbrance on such properties. The case of the first respondent was that all those particulars were filled up by the Secretary to the bank without any reference whatever to the first respondent and the first respondent was not aware of any of these entries.*

On the face of it, such a case is palpably false. The Secretary of the bank could not have drawn out of his fertile imagination all the particulars with regard to father's name of the first respon-

dent, how many children he had, what was the property the first respondent possessed, whether it was inherited by him or acquired by him and whether there was any encumbrance subsisting on the property. In any event, that is a matter which the second respondent should have considered before coming to the conclusion that the petitioner's services were illegally terminated. I have already referred to the fact that in the evidence before the second respondent, the first respondent stated that he was married when he was 25 or 26 years and that his marriage took place on 10th Avani in the year Sukla. This statement will be more consistent with the first respondent having been born in Purattasi Parabhava than in Purattasi Parithapi, as has been shown in the horoscope produced by the first respondent before the second respondent.

As I pointed out already, the case of the petitioner was that the first respondent was superannuated on October 1, 1966 only on the basis of his own declaration made in Exhibits R-1 and R-2 and this fact was not all considered by the second respondent. The further case of the petitioner was that Exhibit R-3, the doctor's certificate would not be real proof of age of the first respondent and Exhibit R-4 was really a fabricated one. Here again, I am of the view that the second respondent had not considered these questions and merely proceeded on the basis that since the petitioner had accepted horoscope and medical certificates as proof of age of some of the employees of the petitioner, the petitioner was bound to accept the same as proof of age of the first respondent as well.

In this case, it is admitted that in the case of night watchmen of the petitioner, the petitioner accepted horoscope and medical certificates as proof of age of those night watchmen on the basis that they were illiterate and therefore there was no occasion for them to produce their Secondary School Leaving Certificate or Transfer Certificate as proof of the correct date of birth, and the said consideration will not apply to a person like the first respondent who was appointed as a jewel appraiser in the petitioner bank. Over and above this, the petitioner's contention is that Exhibit R-3 which is the doctor's certificate would not really constitute evidence of proof of age of the first respondent since the doctor had not stated that he arrived at the age of the first respondent as 54 years as a result of any examination conducted by him. Here again, I am of the opinion that the contention of the petitioner is well founded. The said certificate is as follows:—

"This is to certify that Sri L. S. Pattabhi Chettiar has declared before me that he

is aged 64 years. On the basis of his appearance and health, I am prepared to accept his declaration and state that he appears to be 54 years."

To say the least, this certificate couched in such cautious language could never be the proof of age of the first respondent. There are a number of significant features with regard to this certificate. The first thing is that the doctor who gave the certificate, though of the rank of a Civil Surgeon was merely a Reader in Paediatric Surgery, in the Madurai Medical College and Paediatric Surgeon, Erskine Hospital, Madurai. Secondly, the doctor in his certificate does not say that he examined the first respondent and as a result of such examination, come to the conclusion that the age of the first respondent was 54 years. On the other hand, the doctor clearly and categorically states that the first respondent declared before him that he was 54 years of age and that on the basis of his appearance and health, he was prepared to accept his declaration and state that he appeared to be 54 years of age. It is hardly necessary to state that such a certificate cannot really be proof of age of the first respondent.

Over and above this, I have already pointed out more than once that the second respondent had never paid any attention whatever to the fact that in Exhibit R-1 written in the hand of the first respondent, he stated that as on February 10, 1960, he was aged 52 or 53 years and that Exhibit R-2 also gave the date of birth of the first respondent as 16th Purattasi, Parabhava which would be consistent with the admitted statement of the first respondent in Ex. R-1 and that the evidence of the first respondent before the second respondent was that he was married when he was 25 or 26 years of age and the marriage took place on the 10th of Avani, Sukla. For these reasons, I am of the opinion that the conclusion of the second respondent even on merits cannot stand because he has not considered the real point put forward by the petitioner and proceeded on an erroneous assumption that the petitioner having accepted horoscopes and medical certificates as proof of age in respect of some other employees, should have accepted Exhibits R-3 and R-4 also as proof of age of the first respondent, and in not having done so, it had wrongfully terminated the services of the first respondent.

4. The learned counsel for the first respondent contended before me that in any event there was a dispute about the age of the first respondent and the petitioner could not retire the first respondent on the ground of his reaching the age of superannuation until that dispute is solved. I repeatedly asked the learned counsel for the first respondent to show

me any specific statutory machinery provided for the resolution of such a dispute so that it can be contended that the petitioner could not have proceeded to retire the first respondent on the basis of his reaching the age of superannuation without having recourse to that statutory machinery provided for the resolution of the dispute as to the correct age of the first respondent. The learned counsel was not able to draw my attention to any such statutory provision and merely contended by stating that there could have been an industrial dispute with regard thereto. If so, certainly the first respondent should have raised such a dispute and should not have approached the second respondent under Section 41(2) of the Act. For these reasons, I am of the opinion that the impugned order of the second respondent cannot stand and accordingly the writ petition is allowed and the said order is quashed. There will be no order as to costs.

Petition allowed.

AIR 1970 MADRAS 491 (V 57 C 143)

K. N. MUDALIAR, J.

In re Manicka Achari and another, Appellants.

Criminal Appeal No. 404 of 1968, D/- 11-2-1970, from Order of 3rd Presy. Magistrate, Saidapet, Madras, D/- 27-6-1968.

(A) Suppression of Immoral Traffic in Women and Girls Act (1956), Ss. 4(1), 8 — Living on earnings of prostitution — Conviction for — Prosecution must prove that accused was knowingly living wholly or in part on earnings of prostitution.

(Paras 8, 11)

(B) Suppression of Immoral Traffic in Women and Girls Act (1956), Section 8 — Seducing for purpose of prostitution — In absence of corroboration regarding solicitation it is not safe to convict merely on testimony of person alleged to have been seduced.

(Para 13)

C. K. Venkatanarasimham for B. Shan-thakumar and A. S. Natarajan, for Appellants; The Addl. Public Prosecutor, for the State

JUDGMENT:— In this appeal accused 1 and 2 who are the appellants herein are at least entitled to the benefit of doubt on two grounds principally which will be set down by me presently. Briefly the facts are:

2. P.W. 1 employed as an Assistant Manager in Spens and Co., General Paters Road, was going along Buzullah Road, T. Nagar at about 5-40 p.m. He found accused 1 and 2 standing on the road in front of Thiru N. T. Rama Rao's bunga-

GN/GN/D214/70/YPB/T

low. Accused 1 called him and pointing to accused 2 asked him if he liked her. Accused 2 was very attractively and glamorously dressed and made up. Accused 1 told P.W. 1 that if he paid him Rs. 25 he could have sexual intercourse with accused 2. P.W. 1 was taken aback, so he says. Accused 2 took his hand and spoke endearingly to him and asked him to pay her Rs. 25 and have sexual intercourse with her. She also pointed out to a house nearby and told him that it was hers and pointed to the currency notes visible in his Terylene shirt pocket. He claims he was upset. He promised to come back in an hour and went away. According to his evidence, some passers-by smiled. On his way, he saw a police van near the Vani mahal. P.W. 1 told P.W. 2 what had happened. P.W. 2 took Ex. P-1 from him and then P.W. 1 took him to place. When accused 1 and 2 saw the police, they went inside. The police went in and accused 1 and 2 and P.W. 1 were taken to the police station.

3. P.W. 1 further says that the Assistant Commissioner P.W. 3 examined him at 6-30 p.m. He claims his office closed at 1-30 p.m. because of the Aruvatinmoovar festival. P.W. 1 makes it appear that this romantic adventure was result of his accidentally walking in the Bazululah Road on his return from Kodambakkam where he appears to have gone to see a friend. The entire incident occupied three minutes. P.W. 1 further says that there were two petty shops nearby. He also says that he had an idea of reporting to the police even before he saw the van. He saw the van in ten minutes of the incident. The van was in the petrol bunk near Vani Mahal. P.W. 1 wrote out Ex. P-1. The suggestion that P.W. 1 was perjuring himself for the reason that he wanted to avoid being brought to book by the inspector as a pimp was refuted by him. He admits that the inspector did not question the petty shop owners. Therefore no petty shop owner was examined.

4. P.W. 2 says that at about 5-55 p.m. P.W. 1 came to him and complained about his being solicited by accused 1 and 2. He corroborates the evidence of P.W. 1 in respect of Ex. P-1 and also in regard to the apprehension of accused 1 and 2 who were brought to the Mambalam Police Station. He claims that he was on his rounds under instructions from the Assistant Commissioner of Police (Vigilance) checking street solicitation. To him, it was suggested that P.W. 1 is a stock witness for the police or is a known pimp. He admits that he did not examine any nearby neighbours. He says that no one else complained about accused 1 and 2 before this incident.

5. P.W. 3 is the Assistant Commissioner, Vigilance. On 12-3-1968 he had

authorised P.W. 2 to book cases under the Suppression of Immoral Traffic Act under Ex. P 2. At about 7 p.m., he received information that P.W. 2 had arrested accused 1 and 2 in T. Nagar. He says he proceeded to Mambalam Police Station, took up investigation and filed charge-sheet against the accused after examining P.Ws. 1 and 2. In cross-examination P.W. 3 admits that he was in Mambalam Police Station from 5 p.m. In the light of this evidence, it is not possible to understand how P.W. 3 proceeded to Mambalam Police Station after receiving the information at 7 p.m. According to his own evidence, he was in Mambalam Police Station from 5 p.m. and when accused 1 and 2 and P.W. 1 were brought to the police station by P.W. 2, he ought to have known about their presence in the Mambalam Police Station probably even before 7 p.m. He admits he examined P.Ws. 1 and 2 and no one else. The investigation lasted till 10-30 p.m. on that date. It is suggested to P.W. 3 that he had accused 1 and 2 remanded for 15 days in order to harass them although his investigation was over by 10-30 p.m. on that date. At any rate, the material in cross-examination does not disclose what further investigation after 10-30 p.m. that night has revealed either in respect of the antecedents of the accused or their associates or their prior convictions etc.

6. P.W. 3 claims that he filed the charge-sheet against the accused. But, strangely, I find the Inspector of Police making the following endorsement on the charge-sheet in the following language wherein one reads the admission on the part of the accused that they have solicited the complainant on payment of hire charges of Rs. 25 for the night. This endorsement makes strange reading. The Inspector of Police ought to have known that after he recorded the complaint Ex. P-1, the so-called admission made to him is totally inadmissible in evidence. This betrays a certain amount of anxiety on the part of the Inspector of Police to fasten the so-called admission on the accused which is embodied as an endorsement in continuation of Ex. P-1 in the charge-sheet against accused 1 and 2.

7. The plea of the accused is a total denial. Accused 1 and 2 examined D.W. 1 for proving that the family, consisting of accused 1 and 2 and another son, make a total earning of Rs. 400 per-mensem. D.W. 1 claims that he has been sending paddy and other articles besides. D.W. 1 filed in this court an affidavit swearing that accused Jayanthi is living with him as his wife under his care and protection at No. 13 Ramalingam St., Coimbatore. There is another averment in the affidavit that D.W. 1 married the second accused on 13-9-1968 at Coimbatore. In order to test the averments in the affidavit filed

by K. V. Kandaswami. D.W. 1, I summoned him and examined him before this court. He admits that he married the second accused on 13-9-1968 and that he and accused 2 are living as husband and wife.

8. The question that falls for determination is whether the prosecution has brought home the guilt against accused 1 for an offence under Section 4(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956. In this context, it is necessary to analyse Section 4(1) of the Act and also Section 2(e) and (f) and also Section 8 of the said Act. Section 8 starts with the heading 'seducing or soliciting for purposes of prostitution'. In Section 8(a) and (b) the significant words 'for the purpose of prostitution' would predicate the state of affairs, or a state of things anterior in point of time to the state of things embodied in Section 4. Section 2 reads as follows:

"Prostitute means female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind."

Therefore the earnings of the prostitution are the resultant outcome of the state of things embodied in Section 8. Even accepting the entire prosecution evidence, the proof of the earnings of the prostitution of accused 2 is still lacking. There is the further ingredient which is not proved by the prosecution evidence, namely, that accused 1 knowingly lives wholly or in part on the earnings of the prostitution. The only evidence that emerges from the entire record is that D.W. 1 speaks to the fact all the three including accused 1's son are together earning Rs. 400. D.W. 1 further claims that he is sending Rs. 200 every month besides paddy and other articles. Excepting this tiny particle of evidence, the prosecution has not chosen to adduce any evidence for the purpose of proof of accused 1 living wholly or in part on the earnings of the prostitution.

9. There is also another grave defect in the charge framed by the learned III Presidency Magistrate. The charge against accused 1 reads as follows—

"That you accused 1 on 12-3-1968 at about 5-40 p. m. at Bazullah Road, Thyagarayanagar, Madras, acted as pimp for Jayanthi (accused 2) by soliciting one Subramaniam for the purpose of having sexual intercourse with the said Jayanthi and that you were living either in whole or in part on the earning of such prostitution and that you thereby committed an offence punishable under Section 4(1) of the Suppression of Immoral Traffic in Women and Girls Act, and within my cognisance".

Immediately it becomes clear that the above mentioned charge does not mention

the significant ingredient 'for hire' and the latter part of the charge mentions the earnings of such prostitution. In the absence of the words 'for hire' the charge is vitiated by a grave defect which goes to the very root of the matter for the essence of the offence is offering the body of accused 2 for promiscuous sexual intercourse for hire.

10. The learned Public Prosecutor has argued before me that in the light of the unsatisfactory evidence which fails to prove the other ingredients in Section 4(1) of the Act, it is unnecessary for me to go into the question whether this grave defect in the charge against accused 1 is an illegality or an irregularity and whether it is curable or whether it occasions failure of justice. I leave this at that.

11. I hold that the offence under Section 4(1) of the said Act against accused 1 is not proved and accused 1 is acquitted.

12. So far as the case of accused 2 is concerned, the question which I have got to determine is whether it is safe to act on the testimony of P. W. 1 in the absence of some corroboration in regard to the solicitation made by accused 2 for the purpose of prostitution.

13. The prosecution claims that P. W. 1 meeting with this adventure in Bazullah Road is rather fortuitous and that his meeting the van at Vani Mahal is another piece of accident. The date of authorisation, Ex. P.2, is 12-3-1968 and even the admission of P. W. 3 that he was in Mambalam police station till 5 p. m. is another coincidence and P. W. 3 continuing to remain at the Mambalam police station from 5 p. m. is another link in the chain of coincidences. I hesitate to find that these series of events would be the result of a combination or of fortuitous circumstance. I am left with an impression that the entire thing is the result of a pre-arranged plan. At any rate, the evidence does not necessarily negative the possible theory of a pre-planned deliberation on the part of P. Ws. 1, 2 and 3. Therefore, I am still left with the question whether I should act on the testimony of P. W. 1 in regard to the charge against accused 2. It was certainly open to the prosecution to have examined the petty shop owners in support of the testimony of P. W. 1 for the alleged incident is stated to have taken place even before the sun had set. Even P. W. 2 states that he did not examine any nearby neighbours. He does not give any convincing reasons why he did not choose to examine them. Even the investigation of P. W. 3 does not disclose the examination either of the shop owners or any nearby owners. In the absence of some other testimony lending assurance to the testimony of P. W. 1, I feel hesitant to act on the testimony of P. W. 1 alone.

14. I give the benefit of doubt to accused 2 and acquit her. The Criminal appeal is thus allowed.

Appeal allowed.

(1963) AIR 1963 SC 928 (V 50) =
(1963) 14 STC 355, Firm A. T. B. Mehtab Majid & Co. v. State of Madras

0, 1

(1960) AIR 1960 SC 1254 (V 47) =
(1960) 11 STC 570, State of Madras v. Noor Mohammed & Co

6, 1

(1954) AIR 1954 SC 314 (V 41) =
(1954) 5 STC 108, Syed Mohamed & Co. v. State of Andhra

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The Asst Govt Pleader, for Appellant R. B. Abdul Karim and P. B. Jammam Khan, for Respondent.

VEERASWAMI, C. J.:— The assessee, who is the common respondent, was an unlicensed dealer in hides and skins assessed to sales tax on March, 23, 1956 and his appeal therefrom had failed. Thereafter, he paid part of the tax, and, while he remained in arrears of the balance, he took out two petitions under Art. 226 of the Constitution, one in April, 1964 to forbid the Revenue from collecting the balance of the tax, and, the other in August, 1966 to quash the order dismissing his appeal. These two petitions were allowed by this Court following *Hajee Abdul Wahab & Sons v. Govt. of Madras*, (1966) 17 STC 284 (Mad). In that case Srinivasan and Venkatadri, JJ., were of the view that since by the rules framed under the Madras General Sales Tax Act, 1939, relevant to the assessment year 1953-54, tanned hides and skins as one category had been taxed differently in the hands of the local tanner and in the hands of the person who imported them, either dressed or undressed, tanned and sold, the provisions were discriminatory as offending Art. 304 of the Constitution. The Revenue has come up in appeals.

2. When the appeals came up before another Division Bench, to which one of us was a party, it was felt that (1966) 17 STC 284 (Mad) required reconsideration, and, as a result, the appeals have been placed before us.

3. In order to appreciate the point at issue, it is first necessary to notice the relative statutory provisions and the rules made thereunder relevant to charge of transactions in hides and skins during the assessment year 1953-54. Section 3 of the Madras General Sales Tax Act, 1939, was the charging section. The scheme envisaged by sub-section (1) of that section was multi-point tax. Every dealer should pay for each year a tax on his total turnover for the year and the tax should be calculated at the flat rate of three paise for every rupee in the turnover. The proviso to the sub-section was added in 1949 with which we are not concerned at this moment. The scheme of multi-point tax was of course subject to the other provisions of the Act. Sub-section (2), before its amendment by Act 20 of 1954, charged

AIR 1970 MADRAS 494 (V 57 C 144)

FULL BENCH

K. VEERASWAMI, C. J., NATESAN AND SOMASUNDARAM, JJ.

The State of Madras, represented by the Appellate Assistant Commissioner of Commercial Taxes, Madras-III, Appellant v M/s M. A. Noor Mohamed & Co. Tanners and Dealers in Hides and Skins, Chrompet Madras-44, Respondent.

Writ Appeal Nos. 204 and 99 of 1967, D/-19-11-1969

(A) Sales Tax — Madras General Sales Tax Act (9 of 1939), Sections 3 (1), 5 — Madras General Sales Tax Turnover Rules, R. 16 — Unlicensed dealer in hides and skins — During 1953-54 such dealer was liable to multipoint taxation — No case of discrimination.

As the Act and the Turnover Rules stood during the assessment period 1953-54, the consequence of not taking out a licence by a dealer in hides and skins was that he would not be entitled to the benefit of the single point scheme of taxation and would be exposed to multipoint charges. (Para 6)

When an unlicensed dealer during 1953-54 sold hides and skins which he imported, tanned and sold, his sale would attract tax under Section 3(1) itself without reference to Section 5 and the corresponding Turnover Rule 16. In such a scheme of taxation there was no room for discrimination as contemplated in Art. 304(a), Constitution of India. (1966) 17 STC 284 (Mad). Overruled. Case law discussed. (Paras 9 and 10)

(B) Constitution of India, Art. 304(a) — Tax on goods imported — Permissibility.

Article 304(a) contemplates countervailing duties being permissible in respect of imported goods and similar goods in taxing State provided they do not result in discrimination. Tax on imported goods by Art. 304(a) is permitted if similar goods manufactured or produced in the taxing State are subjected to similar tax. Case law discussed. (Para 8)

Cases Referred: Chronological Paras
(1956) 17 STC 284 (Mad), *Hajee Abdul Wahab & Sons v Govt. of Madras* 1, 2
(1964) AIR 1964 SC 1729 (V 51) =
(1964) 15 STC 719, *Haji Abdul Shakoor & Co. v. State of Madras* 7, 8

in addition, in respect of certain goods specified therein, a single-point tax, also specified in the sub-section. So far as hides and skins were concerned, Section 5 made a departure from the general scheme of multi-point tax on general goods and provided that such sales of hides and skins, whether tanned or untanned, should be liable to tax, under Section 3(1) only at such single point in the series of sales by successive dealers as might be prescribed. Sub-section (1) of S. 3 directed that turnover should be determined in accordance with such rules as might be prescribed. Section 6-A, which was inserted in a substituted form by the Madras General Sales Tax (Amendment) Act, 1947, provided for cases of liability to tax of persons not observing conditions of licence. We shall refer to this section in more detail presently. The prescription contemplated by Section 5 took the form of Rule 16 of the Turnover Rules. This rule had, as it stood originally and during the relevant period, five clauses. The first said that in the case of hides and skins the tax would be payable under Section 3(1) in accordance with the rest of the clauses in the rule. Sub-rule (2) dealt with charge on sales of untanned hides or skins by licensed dealers in such goods. Under this clause tax on such sales should not be levied except at the stage at which the hides or skins were sold to a tanner in the State or sold for export outside the State. But, in the case of the former, the tax should be levied from the tanner on the amount for which the hides or skins were bought by him, and, in the case of the latter, any such untanned hides or skins which were not sold to a tanner inside the State but were exported outside the State, the tax should be levied from the dealer who was the last dealer not exempt from taxation under Section 3(3) who bought them in the State on the amount for which they were bought by him. Clause (3) was concerned with taxation on sales by licensed dealers of hides or skins which had been tanned within the State. Such sales would be exempt from taxation provided the hides or skins had been tanned in a tannery which had paid the tax leviable under the Act. If that was not so, that is to say, if tax had not been paid at the earlier stage, the sales of such hides or skins were made liable to tax at the stage of the first sale of such goods on the amount for which the sales hides and skins were made.

4. It may be seen from what we have said of Section 5 and R. 16(1) to (4), a scheme of single-point taxation had been introduced, but, confined to dealings between licensed dealers in which tax was levied in the case of untanned hides or skins at the stage of their first purchase and on the purchase value, and in the case of sales of tanned hides or skins at the

stage of their sale and on the sale value, provided the goods involved in such sales had not suffered tax at their raw stage earlier.

5. Sub-rule (5) of R. 16 was to the effect that sales of hides or skins by dealers other than licensed dealers in hides or skins should, subject to the provisions of Section 3, be liable to tax on each occasion of sale. That meant that the consequence of not taking out a licence by a dealer in hides and skins was that he would not be entitled to the benefit of the single-point scheme of taxation. This sub-rule was but stating the true legal position of failure to take out a licence, and, the position would have been the same even without sub-r. (5). This is especially so because of the specific provisions of Section 6-A. According to this section, if any restrictions, or conditions prescribed under Section 5 were contravened or not observed by a dealer, or if a licence was not taken out or renewed, the sales of the dealer would be subject to charge as if Section 5 did not apply to the sales by such dealers.

6. In passing we may mention that in *Syed Mohamed & Co. v. State of Andhra*, (1954) 5 STC 108 = (AIR 1954 SC 314) it had been conceded for the Revenue that sub-rule (5) of R. 16 of the Turnover Rules was inconsistent with the scheme of single point taxation and was therefore, ultra vires. But the validity of this concession, which was the basis for invalidating the sub-rule in that case, was contested by the Revenue eventually in *State of Madras v. Noor Mohammed & Co.*, (1960) 11 STC 570 = (AIR 1960 SC 1254) before the Supreme Court and successfully. The Supreme Court held that there was no inconsistency between Rule 16(5) and Section 5(vi) of the Act and that S. 5(vi) was but a concessional provision for making the sales of hides and skins liable to taxation at a single point, but that was subject to the restrictions and conditions prescribed in the rules, and, one of these was taking out a licence. It was therefore, pointed out by the Supreme Court that all that Rule 16(5) did was to emphasise the consequences of non-observance of the condition which Sections 5 (vi) and 6-A had in clear terms prescribed. It should be taken as, therefore, well settled that as the Act and the Rules stood during the assessment year 1953-54, the consequence of not taking out a licence by a dealer in hides and skins was that he would not be entitled to the benefit of the single point scheme of taxation and would be exposed to multi-point charges. Rule 16(2) to (4) were amended subsequently, but, in substance, the scheme of single-point taxation remained the same. With reference to the amended Turnover Rule 16 its validity, in the context of Art. 301 of the Constitution read with Art. 304(a) was

contested with the result that in Firm A. T. B. Mehtab Majid & Co., v. State of Madras, (1963) 14 STC 355 = (AIR 1963 SC 928), the Supreme Court ruled that the provisions of Rule 16(2) discriminated between hides and skins imported from outside the State and those manufactured or produced inside the State and therefore, contravened the provisions of Art 304(a) of the Constitution of India and were invalid. The reasoning for the decision is to be found in the following observation:

"The grievance arises on account of the amount of tax levied being different on account of the existence of substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the same under Section 3(1) (b) of the Act. If the dealer has purchased the raw hides or skin in the State, he does not pay on the sale price of the tanned hides or skins; he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales tax on the sale price of the tanned hides or skins. He too will have to pay more for even though the hides and skins are tanned within the State, merely on account of his having imported the hides and skins from outside, and having not therefore, paid any tax under sub-rule (1)."

The discrimination thus found flowed from the nature of the single point scheme of taxation relating to hides and skins and on the differential quantum of turnover to which the same rate was applied, the difference arising by the accident of tanned hides and skins being imported and suffering tax on the sale turnover and sales of locally tanned goods not suffering such tax because the corresponding untanned hides or skins constituting a lesser turnover having suffered tax.

7. In *Hajee Abdul Shakoor & Co. v. State of Madras*, (1964) 15 STC 719 = (AIR 1964 SC 1729) the discrimination resulted from the differential in rate applied, though there was the same quantum of turnover, in the case of sales of imported and local tanned goods. This is what the Supreme Court stated:

"The rate of tax on the sale of tanned hides and skins is 2% on the purchase price of those hides and skins in the untanned condition while the rate of tax on the sale of raw hides and skins in the State during 1955 to 1957 is 3 pies per rupee. The difference in tax works out to 7/1600th of a rupee, i.e. a little less than 1/4 naya paise per rupee."

That was the discrimination which offended Art. 304(a) of the Constitution.

8. Mainly on the strength of (1963) 14 STC 355 = (AIR 1963 SC 928) and (1964) 15 STC 719 = (AIR 1964 SC 1729) the as-

sessee, who is the respondent, contends that the benefit of the two decisions should be extended to his case too though he was an unlicensed dealer. The argument is that in the context of Art. 301 the restrictions on trade, commerce and intercourse among States envisaged by Article 304(a) are related to the goods without reference to anything else and that therefore, irrespective of whether a dealer in hides and skins is licensed or not, if on a survey of the generality of the flow of trade and commerce locally and in the context of inter-State transactions there is a difference in the incidence of taxation, that would suffice to invalidate the relative charging provisions as violating Art. 304(a). We are unable to accept this contention in that broad form. It is no doubt true that Art. 304(a) speaks of goods imported vis-a-vis similar goods in the taxing State. But the Article does not stop there. It contemplates countervailing duties being permissible in respect of imported and similar local goods provided they do not result in discrimination. Tax on imported goods by Art. 304(a) is permitted if similar goods manufactured or produced in the taxing State are subjected to similar tax. The implication necessarily is that not only the article is concerned with imported and similar local goods but also the incidence of taxation which would have to be ascertained with reference to the relative statutory provisions. (1963) 14 STC 355 = (AIR 1963 SC 928) and (1964) 15 STC 719 = (AIR 1964 SC 1729) were decided in the context of Turnover Rule 16 and of the Single point scheme of taxation applicable to transactions in hides and skins, dressed or undressed, imported or local. It is only in that scheme of taxation would there be any occasion for a classification between tax on purchase value and exemption at the sale point relatable to the same goods, first in the raw stage and in the second stage of sale of dressed hides and skins. It is this aspect engendered by the structure of turnover Rule 16 that gave rise to a differential in the turnover of purchase of untanned hides and skins and sale of dressed hides and skins made out of them, vis-a-vis, the turnover of imported hides and skins that were sold and, on an equalisation, after (1963) 14 STC 355 = (AIR 1963 SC 928) of the turnovers and removal of the differential in the quantum of turnover brought to charge, there remained, by reason of the language of the rule, a differential in rates which brought about a discrimination, as held in (1964) 15 STC 719 = (AIR 1964 SC 1729) between imported tanned hides and skins and locally made hides and skins, on their sale, the discrimination in either case, entirely dependant, on, as we said, a scheme of single point taxation relating to hides and skins, as noticed by us *supra*.

9. So far as the assessee in these appeals is concerned, on account of the fact that he was an unlicensed dealer during the assessment year in question, he would not in accordance with (1960) 11 STC 570 = (AIR 1960 SC 1254) be entitled to the benefit of the single point taxation and that would mean that his sales of hides and skins, which he imported, tanned and sold, would attract tax under Section 3(1) itself without reference to Section 5 and the corresponding Turnover Rule 16. That being the case, we are of opinion that he cannot press into service the differential treatment in taxation arising out of R. 16 and contend that, by that yard-stick, his assessments on the basis of multi-point scheme of taxation, should be quashed. In such a scheme of taxation, there will be no room whatever for discrimination, as contemplated by Art. 304(a), because of charge being levied at the point of every transaction, not merely at any prescribed stage or point. To illustrate, supposing A sold raw hides and skins to B for Rs 100/- and C. tanned them and sold them at the value of Rs. 150/-. Suppose also that C, another dealer, who is like A or B unlicensed, imported similar quantity of untanned hides or skins, tanned them locally and sold for Rs. 150/-. In every one of these cases, under the multi-point scheme of taxation, the turnover in each case would be liable to charge. There will then be no discrimination between B and C, for, in either case, the turnover would only be Rs. 150/- and the same rate would be applied. There can be no complaint also that A suffers lesser tax on a lesser turnover while B, on a higher turnover, did at the same rate. Each of A, B, and C had been equally treated and no differential is evident neither in the quantum or in the rate applied thereto. That is the result of applying the statutory provisions relating to unlicensed dealers. We do not think that the assessee, as an unlicensed dealer, can invoke the position, under Section 5 read with Rule 16 and then plead discrimination because, in actual point of tax, the charge in respect of his turnover was under the multi-point scheme of taxation.

10. On that view, of the matter, we are, with due respect, unable to concur on that question with the view in (1966) 17 STC 284 (Mad). The appeals are therefore allowed but with no costs.

Appeals allowed.

AIR 1970 MADRAS 497 (V 57 C 145)

FULL BENCH

K. VEERASWAMI, C. J., NATESAN AND SOMASUNDARAM, JJ.

R. M. Chidambaram Pillai and another, Applicants v. Commissioner of Income-tax, Madras, Respondent.

Tax Cases Nos. 114 and 115 of 1964, D/- 5-12-1969.

(A) Income-tax Act (1922), Sections 10(4) (b) and 16(1) (b) — Read with Income-tax Rules (1922), Rule 24 — Assessee, partner of registered firm owning tea estates — Firm deriving agricultural as well as business income — Salary received by partner for services rendered to firm continue to bear same character as part of total income of firm — Forty per cent of such salary can only be taken in computation of total income of partner under Section 16(1) (b) by virtue of Rule 24 — (1964) 51 ITR 467 (Mad), Overruled.

The salary received by a partner of a firm for services rendered by him to it continue to bear for purpose of charge at his hands the same character as part of the total income of the firm which has been shared between its partners. Section 16(1) (b), consistent with Section 10(4) (b), which does not regard salary paid to a partner for his services to the firm as deductible expenditure, recognises logically that such salary is in principle but a part of his share of the profits of the firm. The total income of the firm as computed with reference to Section 10(4) (b) includes the salary paid to the partners and so too it is not separated from the share income of the partners as determined under Section 16(1) (b) and treated as springing from a different source than the share income of the partner. (Paras 2, 4)

Hence, where the assessee is a partner of a firm owning tea estates and carrying on the business of manufacture and sale of tea, in computing the total income of the assessee under Section 16(1) (b) for purposes of income-tax only forty per cent of the salary received by him from the firm would be included. What is apportioned by application of Rule 24 is the total composite income of the firm inclusive of the salary paid to the partner and it follows, therefore, that such salary is necessarily apportioned and it is only 40 per cent of the salary that can properly be taken for the purpose of computation of the total income under Section 16(1) (b). (1964) 51 ITR 467 (Mad), Overruled. Case Law Reviewed. (Para 14)

(B) Partnership Act (1932), Section 4— Partnership firm — Nature of— Relationship between firm and its partners — Sa-

HN/HN/D743/70/KSB/M

lary received by partner partakes of same character as his share of profits.

Notwithstanding the fact that a firm like an association of persons is for the purpose of assessment treated as a separate entity, it is not a legal person having a corporate character distinct from that of its members. A firm is but a compendious expression of the relationship between the partners, who, by an agreement between them, embark on a commercial venture and contribute capital or labour and share profit and loss according to mutual understanding.

(Para 5)

Salary drawn by a partner from the firm for his services rendered to it has not been treated as something different from his right to get an additional amount in the form of salary as his share of the firm's profits. As the partners continue to retain their individuality in working under the relationship, no partner can naturally be his own servant, and in this view, though the partners may stipulate that one or more for his or their share may draw salary from the firm, its payment, in reality and in the eye of law, is a mode of division of part of the firm's profits.

(Para 9)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 862 (V 56) = 74 ITR 57, Commr. of I-T. v. Ramniklal Kothari 11
- (1967) 64 ITR 166 = 1966-1 ITJ 741 (Mad), Simrathmull v. Commr. of I-T. 15
- (1966) AIR 1966 SC 1300 (V 53) = 1966-2 SCJ 490, Narayanappa v. Bhaskar Krishnappa 9
- (1965) AIR 1965 SC 1836 (V 52) = 57 ITR 29, Commr. of I-T. v. Kunwar Trivikram Narain Singh 15
- (1964) 51 ITR 467 = 1963-2 Mad LJ 38, Mathew Abraham v. Commr. of I-T. 1. 14
- (1961) AIR 1961 SC 362 (V 48) = 41 ITR 169, Kameshwar Singh v. Commr. of I-T. 15
- (1958) AIR 1958 Bom 467 (V 45) = 33 ITR 538, Magnus v. Commr. of I-T. 12
- (1956) AIR 1956 SC 354 (V 43) = 29 ITR 535, Dulichand Laxminarayan v. Commr. of I-T., Nagpur 7
- (1953) 1953-5 AIR 458 = 3 CTBR (NS) 11, Federal Commr. of Taxation v. Beville 10
- (1951) 84 CLR 118 = 5AITR 197, Rose v. Federal Commr. of Taxation 10
- (1949) AIR 1949 PC 1 (V 36) = 16 ITR 325, Commr. of I-T. v. Kamakhya Naravana Singh 15
- (1948) AIR 1948 PC 100 (V 35) = 75 Ind App 147, Bhagwanji v. Alembic Chemical Works Co., Ltd. 6

- (1943) AIR 1943 PC 20 (V 30) = 11 ITR 295, Habibulla v. Commr. of I-T. 15
- (1942) AIR 1942 All 194 (V 29) = 10 ITR 267, Syed Mohd. Isa v. Commr. of I-T. 15
- (1941) AIR 1941 Mad 672 (V 28) = 9 ITR 284, Venkatadri Somappa v. Venkataswamy Chetti 11
- (1922) (1922) 1 ITC 176 (Mad) (FB), Commr. of I-T. v. B. S. Mines and Co. 11
- (1905) 1905-1 KB 324 = 74 LJKB 229, Ellis v. Joseph Ellis and Co. 10
- (1880) 14 Ch D 122 = 42 LT 164, Ex parte Corbett, In re, Shand 7

S. Swaminathan and Ramagopala, for Applicants; V. Balasubramaniam and J. Jayaraman, for Respondent.

VEERASWAMI, C. J.—These are two consolidated references relating to the assessment years 1959-60 to 1961-62 in one case and to the last two years in the other. When they came up before a Division Bench to which one of us was a party, it was felt that Mathew Abraham v. Commr. of Income-tax, (1964) 51 ITR 467 (Mad) required reconsideration and they have been placed before us. The common question for decision in the references under Section 66(1) of the Indian Income-tax Act 1922, is:

"Whether the sums of Rs. 10045 in each of the two years received by Thangavelu of Rs. 7200, Rs. 10578 and Rs. 10578 received by Chidambaram in the three years from the two firms have been rightly brought to tax as (income-Ed.) from other sources under the provisions of the Income-tax Act, 1922?"

The assessee was partners in two firms—Kavukal Estates and Tuttapallam estates, which owned tea estates in the Nilgiris. In addition to their right to share the profits of the firms, the partners were, under the terms of the deed of partnership, entitled each to draw specified salaries for their services to the firms. Till the assessment years ending March 31, 1959, the total income of each firm was computed with reference to Section 10(4) (b) which was apportioned between agricultural and business income in accordance with Rule 24 of the Income-tax Rules. As the firms were registered under the provisions of the Act, the non-agricultural portion of the income was apportioned between the partners and brought to tax in their hands. For the assessment year 1959-60 the Income-tax Officer being of opinion that the income received by the assessee as salary from the firms would not constitute agricultural income but represented income from other sources, recomputed the income on that basis. As a result, the entire salaries paid to the partners were included in the total chargeable income of each of

them. The Appellate Assistant Commissioner of Income-tax did not accept that basis, but proceeded to allow the appeals on the view that since a partner's share of the firm's profits would include any salary earned by him, only 40 per cent of such salary could be taxed in his hands. He did not agree that the immediate source of the income representing the salary was not agricultural land, but services rendered by the assessee to the firm. By the time the Tribunal disposed of the appeals (1964) 51 ITR 467 (Mad) had come, which it followed and allowed the appeals observing that the partners had nothing to do with agricultural operations, but drew the salaries for services rendered by them to the firms, and that, therefore, Rule 24 had no application to them.

2. The Division Bench in its order of reference to a Fuller Bench stated thus:

"The combined effect of Sections 10(4) (b) and 16(1) (b) and of Rule 24, as it seems to us, is an implied direction that only 40 per cent of the salary paid but increased or decreased by the share of profit or loss of the business of the firm doing the particular agricultural operation, can be charged to income-tax at the hands of the partner, notwithstanding the fact that the immediate source of the salary is the service to the firm, rather than its business. On this view, (1964) 51 ITR 467 (Mad) may require reconsideration."

We are of the view that the salary received by a partner of a firm for services rendered by him to it continues to bear, for purpose of charge at his hands the same character as part of the total income of the firm which has been shared between its partners and that the consequence of applying Rule 24 to the total income of the firm computed in accordance with Section 10(4) (b) is necessarily that only 40 per cent of the salary as referable to agricultural income can be taken as salary in computing the total income of a partner of a firm in terms of Section 16(1) (b). This view seems to us to be supported not only by the relative provisions of the Income-tax Act, but is in accord with the basic principles of the partnership law.

3. A firm, partner and partnership, says Section 2(6B), have the same meanings respectively as in the Indian Partnership Act and the expression 'partner' included a minor admitted to the benefits of the partnership. For purpose of charge of income-tax a firm like other association of persons has been treated as an entity.

4. Save for that purpose, there is nothing in S. 3 which qualifies or in any way modifies the legal position of a firm or the principles applicable to it under the Indian Partnership Act. The procedure for assessing a firm, however, varied

under Section 23(5) according to whether it was registered or not. The head of the income of the firm depended on the character of its source. If the firm, as in these references, derived business income, such income should have to be computed after making the allowance permissible under Section 10(2) but subject to Section 10(4). In view of clause (b) of sub-section (4) of the Section any salary, commission or remuneration paid by a firm to any of its partners would not be entitled to deduction in the computation of the firm's income. The procedure for computing the total income of a partner of a firm is to be found in Section 16(1) (b), according to which, whether the firm has made a profit or a loss, his share shall be taken to be any salary, interest, commission or other remuneration payable to him by the firm in respect of the previous year increased or decreased respectively by his share in the balance of the profit or loss of the firm after the deduction of any interest, salary, commission or other remuneration payable to any partner in respect of the previous year. It is implicit in this provision that what constitutes the total income of a partner of a firm is his share of the profit or loss of the firm and such share, be it noted, shall be taken to be the salary received by him as well as his share of income in the balance of the profit of the firm after deduction of the salary paid to the partner. Where, however, a firm incurs a loss, the partner's share of liability in it goes to decrease his share of income by way of salary. It seems to us, therefore, that Section 16(1) (b), consistent with Section 10(4) (b), which does not regard salary paid to a partner for his services to the firm as deductible expenditure, recognises logically that such salary is in principle but a part of his share of the profits of the firm. It is because of this conception of the character of the salary received by a partner that when the firm incurs a loss, a partner's share in such loss goes to reduce his salary received from the firm and he is allowed to set off or carry forward and set off the outstanding loss in accordance with the provisions of Section 24. If a firm sustains a loss in a year the liability towards payment of salary to its partner forms part of such loss which means that the partner entitled to receive salary is also proportionately charged with the liability, in respect of it. That seems to be the rationale behind the particular manner of computation of the total income of an assessee who is a partner of a firm and the liberty given to him to set off or carry forward his share in the loss of the firm. That, we think, is also the justification for Section 10(4) (b). On this view of Section 10(4) (b) read with Section 16(1) (b),

salary paid to a partner being treated as a component of his share of income in the firm, there is no reason to think that such salary has a source other than that of or different from his share in the income including the salary. The total income of the firm as computed with reference to Section 10(4) (b) includes the salary paid to the partners and so too it is not separated from the share income of the partners as determined under Section 16(1) (b) and treated as springing from a different source than the share income of the partner.

5. The statutory effect just mentioned is also in consonance with the principles of the law of partnership. Notwithstanding the fact that a firm like an association of persons is for the purpose of assessment treated as a separate entity, it is not a legal person having a corporate character distinct from that of its members. A firm is but a compendious expression of the relationship between the partners, who, by an agreement between them, embark on a commercial venture and contribute capital or labour and share profit and loss according to mutual understanding. In mercantile practice the trade seems to look upon the firm as a kind of a body distinct from its members and capable in its right of owning property and entering into dealings and creating rights and liabilities binding on the partners. But in law that clearly is not the position. The Indian Partnership Act by Section 4, defines 'partnership' as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all and that such persons collectively are called a firm and individually as partners. It is true that looked at from certain circumstances permitted by the provisions of the Partnership Act, a firm may have the appearance or the trappings of a continuous body possessing somewhat a corporate character. For instance, by agreement to the contrary, the death of a partner may not affect the continuity of the firm. Nevertheless, the firm is brought about by a contract and is dissolved by the will of the partners and in the making of a firm, there is nothing like incorporation. We think that this is truly the position of a firm under the provisions of the Indian Partnership Act, which is fashioned after its English counterpart. Lindley on Partnership refers to merchants and lawyers having different notions respecting the nature of a firm, the former impersonifying a firm and the latter denying it. The legal view of a firm, as stated by Lindley at p. 28 is:

"The firm is not recognised by English lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, courts have to some extent adopt-

ed the mercantile view, and actions may now, speaking generally, be brought by or against partners in the name of their firm; but speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property; and what are called the debts and liabilities of the firm are their debts and liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer."

That precisely is the legal position of a firm under the Indian Partnership Act as well. The Scottish view of the firm being a legal entity has not been adopted by it in its entirety, for the exceptional features suggesting the unitary character of a firm are confined mostly to procedural matters, as for instance, the provisions of Order XXX, C. P. Code or Order XLVIII-A of the English Rules of Practice.

6. Bhagwanji v. Alembic Chemical Works Co. Ltd., AIR 1948 PC 100 to which our attention has been invited by the Revenue, no doubt, stated:—

"It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland, than what (with) that of England."

But by this observation we do not think that Sir John Beaumont, who spoke for the Judicial Committee, meant to say that a firm under the Indian law is a legal entity distinct from its partners. In fact, the further observations in the judgment make this clear, namely:—

"The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession."

As a matter of fact, the rule in that case was that when all the members who entered into a partnership originally ceased to be members of the firm by death or assignment, there was no longer any privity such as to sustain the continued existence of the firm and that consequently upon the change in the membership of the firm the agreement came to an end.

7. In Dulichand Laxminarayan v. Commr. of Income-tax, Nagpur, 29 ITR 535 = (AIR 1956 SC 354) the Supreme Court held that a firm was not a person and as such was not entitled to enter into a partnership with another firm or a

Hindu undivided family or individual. It was pointed out there (at p. 540 of ITR) = (at p. 357 of AIR):—

"In some systems of law this separate personality of a firm apart from its members has received full and formal recognition as, for instance, in Scotland. That is, however, not the English common law conception of a firm. English lawyers do not recognise a firm as an entity distinct from the members composing it. Our partnership law is based on English law and we have also adopted the notions of English lawyers as regards a partnership firm."

The Supreme Court then referred to the usages relating to a firm, the provisions of Order XXX, C. P. Code and the position in taking partnership accounts and administering partnership assets and the liabilities of the firm being regarded as the liabilities of the partners in certain circumstances. The Supreme Court further observed (page 541):—

"It is clear from the foregoing discussion that the law, English as well as Indian, has, for some specific purposes, some of which are referred to above relaxed its rigid notions and extended a limited personality to a firm. Nevertheless, the general concept of a partnership, firmly established in both systems of law, still is that a firm is not an entity or 'person' in law but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership. According to the principles of English jurisprudence, which we have adopted, for the purposes of determining legal rights 'there is no such thing as a firm known to the law' as was said by James, L. J. in *Ex parte Corbett In re Shand*, (1880) 14 Ch D 122, at p. 126. In these circumstances, to import the definition of the word 'person' occurring in Section 3(42) of the General Clauses Act, 1897, into Section 4 of the Indian Partnership Act, will, according to lawyers, English or Indian be totally repugnant to the subject of partnership law as they know and understand it to be."

8. It was on this view that the Supreme Court held that that firm as such was not entitled to enter into partnership with another firm or individuals.

9. That a partnership collectively known as a firm has no legal existence has again been pointed out by the Supreme Court in *Naravanappa v. Bhaskar Krishnappa*, AIR 1966 SC 1300 = 1966-2 SCJ 490. The actual decision in the case related to registration being unnecessary for a document recording the fact of dissolution of partnership and relinquishment

of interest of a partner in a partnership asset by way of adjustment. This is on the view that the property brought into the firm by the partners became the property of the firm and what the partners, on dissolution, would be entitled to was but a share in the money representing the value of the property. In saying that the Supreme Court observed at p. 493 of 1966-2 SCJ = (at p. 1303 of AIR):—

"No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to any one. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in Cl. (a) and sub-cl. (i) (ii) and (iii) of Cl. (b) of Section 48."

It is because of the fact that a firm is not a legal person in India it should be taken as well settled that as a necessary implication in that position, the salary drawn by a partner from the firm for his services rendered to it has not been treated as something different from his right to get an additional amount in the form of salary as his share of the firm's profits. Partnership being but merely expressive of the loose relationship between persons resulting from their agreement to venture on an enterprise and as the partners continue to retain their individuality in working under the relationship, no partner can naturally be his own servant, and in this view, though the partners may stipulate that one or more for his or their share may draw salary from the firm, its payment, in reality and in the eye of law, is a mode of division of part of the firm's profits.

10. This character of the partner's salary has been well brought out by the Australian Income-tax Law and Practice by F. C. Bock and F. F. Mannix, 1968, Edn. Vol. 3, at p. 3092. It is there stated—

"The decision of the High Court in *Rose v. Federal Commissioner of Taxation*, 1951-84 CLR 118 established that there is nothing in the relevant income-tax legislation to warrant treating a partnership as a distinct legal entity. A partner cannot, therefore, also be an employee of the partnership, for a man cannot be his own employer. *Ellis v. Joseph Ellis and Co.*, (1905-1 KB 324). An agreement that one partner shall receive a 'salary' does no more than regulate the mode in which accounts are to be taken for the purpose of ascertaining the division of profits between the partners and does not affect the nature

of any part of the partnership income. Ellis case, (1905-1 KB 324) (supra) per Mathews, L. J. at page 329 and see F. C. of T. v. Beville 1953-5 AITR 458 = 3 CTBR (NS) case 11. It follows that where the partnership income consists of income from property the salary is also income from property".

Not only payment of salary to a partner by the firm does no more than regulate the mode in which accounts have to be taken for the purpose of division of profits between the partners and does not affect the nature of any part of the partnership income, but the income of the partnership retains its character in the assessments of the partners. The Australian authors in this connection rightly observe that "if the partnership income is derived from more than one source, such as from a business and from Government loan interest, the income is apportioned accordingly in the individual assessment of each partner". The contention for the Revenue in the references before us that the immediate source for the partner's salary is the service and not the share in the profits of the firm cannot, therefore, be accepted.

11. This view receives support from other decided cases. In Commr. of Income-tax v. B. S. Mines Co., (1922) 1 ITC 176 (Mad) (FB) a Full Bench of this Court held with reference to the provisions of Income-tax Act, 1918, that the salaries paid to the partners of a firm were not admissible as deductions in the computation of the profits of the firm for income-tax purposes and so the partners' drawings were taxable. The entire judgment was only this:

"On the facts stated we have no hesitation in answering that the drawings of the partners, by whatever name they are described, are part of the profits and therefore, taxable."

The ratio of this case is clearly that salary drawn by partners being part of the profits, it was assessable in the hands of the partner as part of his profits, that is to say, the salary drawn by a partner from the firm was not to be regarded as emanating from a source different from that from which he derived a share of the profits. Evidently this decision had been kept in view while enacting Section 10(4) (b) and Section 16(1) (b) in the Income-tax Act 1922. Venkatadri Somappa v. Venkataswamy Chetti, 9 ITR 284 = (AIR 1941 Mad 672) pointed out that when the income of a partnership was assessed to tax under the Income-tax Act, what was really assessed was nothing less than the Income of the individual partners. In the same way, the Supreme Court in Commr. of Income-tax v. Ramniklal Kothari, 74 ITR 57 = (AIR 1969 SC 862) said that the business carried on by a firm was business carried on by the partners, that the pro-

fits of the firm were profits earned by all the partners in carrying on the business and that the share of the partner was business income in his hands for the purpose of Section 10 (1) of the Indian Income-tax Act, 1922. It was held that if any expenditure was incurred by the partner in earning such share that was admissible for deduction in determining the total income under Section 10 (1).

12. The principle that a partner in a partnership could not be an employee of that partnership was recognised by the Bombay High Court in *Magnus v Commr. of Income-tax*, 33 ITR 538 = (AIR 1951 Bom 467) and it was held that the salary and commission payable to the wife, who was one of the two partners the other being her husband, was received by her in her capacity as a partner and it, therefore, fell within the scope of Section 16 (3) (a) (i) of the Income-tax Act and should be included in the total income of her husband. The underlying principle is that the salary received by a partner from the firm is but a part of his share of the profits and has no different source by any means.

13. Agricultural income being not chargeable to income-tax where the total income derived by an assessee is composite in character as it consists of partly agricultural and partly non-agricultural income, Section 59 (2) (a) empowers the Central Board of Revenue, subject to the control of the Central Government, to make rules to prescribe the manner in which, and the procedure by which, the income, profits and gains should be arrived at in the case of incomes derived in part from agriculture and in part from business. Rule 24 of the Income-tax Rules, 1922, is to the effect that—

"Income derived from the sale of tea grown and manufactured by the seller in the taxable territories shall be computed as if it were income derived from business, and 40 per cent of such income shall be deemed to be income, profits and gains liable to tax."

14. We are not here concerned with the proviso to the rule. This rule is applied the moment the total composite income is arrived at under Sec. 10(4) (b). Once by application of Rule 24 agricultural income from tea plantations is arrived at, only the rest of the income shall be treated as from business which is chargeable to tax. Beyond this, Rule 24 has no effect. Salary paid to a partner being treated as part of the profit of the firm by disallowance of the amount, there is no warrant for the view that after applying Rule 24 to the total composite income the entire salary paid to the partner will enter into the computation under Section 16(1) (b). What is apportioned by application of Rule 24 is the total composite income of,

the firm inclusive of the salary paid to the partner and it follows, therefore, that such salary is necessarily apportioned and it is only 40 per cent of the salary that can properly be taken for the purpose of computation of the total income under Section 16(1) (b). (1964) 51 ITR 467 (Mad) however, held a contrary view, but, with due respect we are of opinion that it cannot be upheld as correct. In that case, the assessee was the managing partner of a firm which carried on the manufacture and sale of tea. The managing partner owned a fifth share in the partnership and was entitled, under the terms of the partnership, to a monthly allowance of Rupees 250 as salary for the services rendered by him to the firm. Jagadisan and Srinivasan, JJ. held that Rule 24 was not applicable to the monthly allowance received by the assessee, even though it was paid out of the profits and the whole of such income was assessable to income-tax, though they were prepared to say at the same time that, under Rule 24 of the Income-tax rules, only 40 per cent of the share income received by the managing partner was assessable to tax. The basis for the view held by the learned Judges was (page 471):—

"Though for purposes of computation of income his share income of the firm is clubbed along with the allowance and commission, it is obvious that the character of the receipt of the latter amounts, though related to the business, cannot be said to partake of the same character of their receipt by the firm. The assessee who is a managing partner was entitled to receive the amount not by virtue of the relationship between him and the other members of the firm as partners but by virtue of the special agreement between the partners by which his services to the partnership were agreed to be remunerated."

We are wholly unable to accept this reasoning for the reasons we have already given. As we said, the salary received by a partner from the firm cannot be regarded in anywise having a source different from that of his share of the profit of the firm he receives. Having regard to the legal position of a firm vis-a-vis its partners and Section 10(4) (b) and Section 16 (1) (b) of the Income-tax Act 1922, receipt of salary by a partner, if we may reiterate, is but a mode of adjustment in his share of the firm's income. The salary of a partner and his share of the income do not emanate from two different sources, but from one and the same, which is the source of income of the firm. We hold, therefore, that Mathew Abraham v. Commissioner of Income-tax, (1964) 51 ITR 467 (Mad) was not correctly decided.

15. For the Revenue a number of decided cases, particularly, Syed Mohd. Isa v. Commr. of Income-tax, 10 ITR 267 = (AIR 1942 All 194); Habibulla v.

Commr. of Income-tax, 11 ITR 295 = (AIR 1943 PC 20); Commr. of Income-tax v. Kamakhya Narayana Singh, 16 ITR 325 = (AIR 1949 PC 1); Kameshwar Singh v. Commr. of Income-tax, 41 ITR 169 = (AIR 1961 SC 362); Commr. of Income-tax v. Kunwar Trivikram Narain Singh, 57 ITR 29 = (AIR 1965 SC 1386) and K. Simrahmul v. Commr. of Income-tax, (1967) 64 ITR 166 (Mad) have been cited to us to show that the salary received by a partner from his firm had no nexus with the estate and that its immediate source was but his service. We do not think that any useful purpose will be served by examining those cases, as the contention of the Revenue in these references based on those decisions overlooks that a partner cannot be the employee of the firm of which he is a member, that the salary paid to him is but an element of his share of its profits and that Rule 24 of the Income-tax Rules has no relevance to the source but is applied to the entire income of the firm which by disallowance includes also the salary paid to the partner.

16. We accordingly answer the common question in these references in favour of the assessee in each case with costs, counsel's fee in each case Rs. 250/-.

Answered accordingly.

AIR 1970 MADRAS 503 (V 57 C 146)

M. ANANTANARAYANAN, C. J.

In re R. V. Gopalan, Petitioner.

Civil Revn. Petn. No. 497 of 1967,
D/- 25-4-1969.

(A) Civil P. C. (1908), Section 115 — Revisional jurisdiction — Suit for bare declaration — No lis — Only one party (plaintiff) — Decree as prayed for obtained — Appeal not maintainable, there being no unsuccessful party — Exercise of revisional jurisdiction was justified.

(Para 4)

(B) Civil P. C. (1908), Section 2 (2) — Decree — Nullity — Since plaintiff did not institute lis, in proper sense and there was no defendant on record, decree is a nullity and has to be set aside.

(Para 5)

O. V. Baluswami, for Petitioner; The Govt. Pleader, for State.

ORDER:— This revision proceeding arises under very singular circumstances, perhaps without any parallel in the cases that have come up in revisional jurisdiction before this court. O. S. No. 400 of 1966 on the file of the learned District Munsif, Tiruchirapalli, was instituted by a plaintiff, on whose behalf Sri Baluswami has here submitted arguments before me, for a declaration that he (the plaintiff) belonged to the Tuluva Vellala community. In the affidavit, the plaintiff states

LM/EN/F806/69/VRB/C

that the said declaration was needed to be produced before the Public Service Commission with regard to the consideration of his claim for appointment. There was no defendant shown upon the record, and, what the learned District Munsif did, after having taken up the suit for trial, was to call for objections by a kind of proclamation viz. beat of tom-tom, in the town. No one appeared in response to this proclamation and, the suit was decreed, after examining the plaintiff on 13th April 1966. The declaration granted in the suit is a bare one to the effect that the plaintiff belonged to and was a member of a backward community viz. Tuluva Vellala community, entitled to the rights and privileges recognised in favour of that community, as a backward class.

2. It appears from the record that this matter has been taken up suo motu by this court, after receiving a report from the learned District Judge, under Section 115, Civil P. C.

3. Sri Baluswami raised an interesting argument, at the threshold, that such a revision proceeding may be without jurisdiction. He fully conceded the power of this Court to act suo motu in revisional jurisdiction. The reason alleged by him was that Section 115, Civil P. C. itself makes the point explicit that the case should be one decided by some court subordinate to this court, "and in which no appeal lies thereto". It is alleged that this was an ordinary decree in a civil suit. A regular appeal is provided for by the processual law, which fact, would bar revisional jurisdiction.

4. I have carefully considered this preliminary objection and I find it to be unsubstantial. Certainly the point would have force and weight, if there had been a decree in the suit based on a lis, viz. a controversy between two parties. When there is no lis, and there is only one party (here the plaintiff) who succeeded in obtaining the decree that he prayed for, it is indisputable that there could be no appeal, since the successful party cannot appeal, and, there is no other party who has suffered a decree. Hence, I find that the exercise of revisional jurisdiction is justified and within the law, on the peculiar and exceptional facts of this case.

5. The next point is, how such an extraordinary procedure came to be followed and how such a decree was passed. It is seen from the report of the learned District Judge, that some senior counsel did appear for the plaintiff, that the difficulty with regard to the absence of a defendant was felt, and that some authority was cited which persuaded the District Munsif to adopt this extraordinary course. As the learned Government Pleader has submitted, appearing as amicus curiae, there are no authorities upon a point of this kind. But, there is indeed, a reference

in Halsbury's Laws of England, 3rd Edn. Section 1610, page 747, with regard to merely declaratory judgments, which can be given "whether there be a cause of action or not" and though there is no consequential relief. But this passage has no application to the present situation. The real point here is not that the decree is only for a bare declaration without a consequential relief, such a decree would be perfectly valid, if no ancillary relief was needed for the adjudication of the claim.

But, every decree presupposes a lis, or a matter in controversy between two parties. There can be no lis when there is only a plaintiff without a defendant. Further, in the present case, it is perfectly obvious that there could have been a defendant, viz. the Director of Public Instruction, who according to the plaintiff, was responsible for a wrong entry or erroneous omission, which deprived the plaintiff of the protection afforded by his membership of a backward community. Since the plaintiff did not institute a lis, in the proper sense and there was no defendant on record, the decree is a nullity. It has accordingly to be set aside as such.

6. But, in the interest of justice, I equally direct that the plaint itself be remitted back to the trial court, and that the plaintiff be now called upon to amend the plaint, by impleading a defendant or defendants, whether the Director of Public Instruction or some other authority of the State. If, after the opportunity is given, for this purpose, the plaintiff does not choose to do so, the suit has to be dismissed or struck off as not maintainable in law. I must here make it clear that I am carefully refraining from any observation whatever, about the present status of the plaintiff as an Officer of the State service, since Sri Baluswami represents that the plaintiff was ultimately appointed by the Madras Public Service Commission. Also, I have no reason to think that there was any lack of bona fides on the part of any one concerned in this suit and the consequential decree; the error seems to be purely due to a failure to grasp the fundamental postulates of the situation. The revision is allowed accordingly. No order as to costs.

Revision allowed.

AIR 1970 MADRAS 504 (V 57 C 147)
ALAGIRISWAMI, J.

K. Srinivasa Ivengar, Appellant v. Noor Muhammad Rowther, Respondent.

Second Appeal No 605 of 1965, D/- 24-2-1969, from decree of Sub. J., Pudukottai, in A. S. No. 49 of 1964.

KM/CN/F788/69/BDB/D

Civil P. C. (1908), S. 73(2) — Rateable distribution — One decree-holder attaching property not realising dues for want of bidders at execution sale — Other decree-holder attaching property belonging to same judgment-debtor, succeeding in realization of dues — Former decree-holder having knowledge of execution by the latter — Former decree-holder is entitled to share rateably the realization by the latter. (1868) 9 WR 514 (Cal). Distinguished. (Paras 3, 4)

Cases Referred: Chronological Paras
(1868) 9 WR 514 = Beng LR Sup
Vol 1022, Gogaram v. Kartik
Chunder Singh 5

N. K. Ramaswami, for Appellant; T. R. Ramachandran and T. R. Rajagopal, for Respondent.

JUDGMENT:— The plaintiff is the appellant. He obtained a decree in O. S. 220 of 1957 against one Rajagopal Iyengar and in execution attached 32 items of properties belonging to him on 25-3-1958. Since the properties were not sold, the execution petition was dismissed on 22-12-1958 and the attachment was ordered to continue for three months. The defendant, an assignee decree-holder in S. C. 131 of 1957, brought 39 items of properties belonging to Rajagopala Iyengar to sale in E. P. 21 of 1958, attached them on 3-2-1958 and purchased on 28-1-1959, 20 out of those 39 items. He set off the purchase price against the decree amount and full satisfaction of his decree was entered and the attachment in respect of the remaining 19 items was raised and the sale was confirmed on 10-3-1959. The plaintiff then filed E. P. 217 of 1959 on 19-3-1959 and applied for attachment of the properties purchased by the defendant along with some other items. The defendant filed a claim petition and that was allowed. Thereafter the plaintiff brought the rest of the properties to sale and as there were no bidders, the execution petition was closed. Thereafter the plaintiff filed E. A. 814 of 1959 in defendant's execution petition praying for a rateable distribution from out of the assets realised by the defendant by the sale of 20 items already referred to. That petition was dismissed and the plaintiff was directed to seek his redress, if so advised in a suit under Section 73(2), C.P.C. He then filed a suit, out of which this second appeal arises.

2. The defendant's contention was that the plaintiff filed the suit in collusion with his judgment-debtor, who was his cousin, that he had knowledge of the execution petition filed by the defendant and is, therefore, not entitled to any remedy, and that in any case as his claim petition was allowed, the plaintiff had no right of suit under Section 73(2), C. P. Code. The trial court decreed the plain-

tiff's suit, but the lower appellate court has reversed the judgment of the trial court and dismissed the plaintiff's suit. The lower appellate court has held that the plaintiff has no right of suit under Section 73(2) C. P. Code and that such a suit would lie only when the assets which are liable to be rateably distributed are taken away by a person not entitled to receive those assets and that the defendant, a rival decree-holder, cannot fall under that category because as a decree-holder he was entitled to receive the assets as of right. On this point, the lower appellate court is clearly wrong and the learned advocate for the respondent does not seek to support the judgment of the lower appellate court on that ground.

3. The lower appellate court also took the view that the suit is the result of a collusion between the plaintiff and his judgment-debtor and, therefore, he is not entitled to any relief. There is no evidence of any collusion between the plaintiff and his judgment-debtor. It is true that he had received some moneys from the judgment-debtor out of court. But he had also brought the judgment-debtor's properties to sale once in E. P. 174 of 1958 and that execution petition was dismissed after the properties were brought to sale on two occasions only because there were no bidders. Even subsequently, he filed another execution petition, attached all the properties of the judgment-debtor and after the present defendant's claim petition was allowed, pursued his remedy against the other properties of the judgment-debtor and brought them to sale on 13-9-1959. That execution petition was closed only because there were no bidders on that day. It is not necessary in order to enable a decree-holder to claim a rateable distribution of the assets realised in execution by another decree-holder against the common judgment-debtor that he should pursue to the bitter end his remedies against the judgment-debtor's other assets before he can claim a rateable distribution from the rival decree-holder. Even if a decree-holder has realised a part of his decree amount before the rival decree-holder has filed his execution petition and realised some assets he is entitled to claim rateable distribution from the rival decree-holder in respect of the balance of the decree amount due to him.

Therefore, the fact that the plaintiff had already received some amounts from his judgment-debtor out of court does not disentitle him to claim rateable distribution of the assets realised by the defendant. Even after getting a rateable distribution of the assets realised by the rival decree-holder, it is open to the plaintiff to pursue his remedies against the other properties of the judgment-

debtor in respect of the balance that may be due to him. It is not therefore, correct to say that just because the plaintiff's E P. 217 of 1959 was closed on 13-9-1959 for want of bidders, he is not entitled to any rateable distribution from out of the assets realised by the defendant; nor would the fact that he had knowledge of the filing of the execution petition by the defendant, disentitle the plaintiff to his remedy. That point is wholly irrelevant to the decision of the question of the plaintiff's rights. Therefore, the lower appellate court is not right in thinking that because the plaintiff professed ignorance about the other properties owned by his judgment-debtor or because the defendant stated that the judgment-debtor owns a house not only in the village, but also a house worth Rs 6000 at Pudukottai, and that he also owns other landed properties that would disentitle the plaintiff to a rateable distribution. The requirements of Section 73, C. P. Code are clearly satisfied in this case. When the defendant was executing his decree and realising his amount, the execution petition of the plaintiff was pending and therefore, he is entitled to a rateable distribution. The possession of other items of properties by the judgment-debtor is wholly irrelevant to the question of the plaintiff's bona fides.

4. It is, however, urged that full satisfaction of the defendant's decree had already been entered and he is without remedy, if the plaintiff is given the right to claim the rateable distribution out of the assets realised by the defendant. This is not quite correct. It would be open to the defendant to have the order entering full satisfaction set aside on rateable distribution being ordered in favour of the plaintiff and to proceed to execute his decree for the balance due to him from out of the assets that might still be with the judgment-debtor. In any case, the fact that the full satisfaction of the defendant's decree was entered is no ground for denying the plaintiff's rights.

5. The only authority which was relied upon by the defendant was the one in *Gogaram v. Kartik Chunder Singh*, 9 WR 514 (Cal), where it was held that while an action will lie in the Civil Courts on behalf of one decree-holder against another for obtaining a refund of money that has been paid away to the latter under an order passed in the execution department contrary to the provisions of Section 270 of the C. P. Code, the plaintiff in such a suit would not under all circumstances be entitled to recover and there may be circumstances by which he may be equitably precluded from recovering and it will be for the court which decides the suit to determine whether having regard to all the equities between the parties, the plaintiff is entitled to recover

or not. In that case, the plaintiff and the defendant were two rival decree-holders against one and the same judgment-debtor. Certain properties belonging to the judgment-debtor having been sold in execution, the plaintiff applied to have his decree satisfied, first from out of proceeds realised by the sale. This was refused and an appeal against that refusal succeeded; meantime money was paid to the defendant and the plaintiff thereupon filed a suit to obtain a refund of the sale amount upon the ground that the process of attachment taken out by him being prior in point of date to that taken by the defendant, he and not the defendant had a preferential right to the sale proceeds. It was contended that such a suit will not lie and it was in that connection that it was held that a suit would lie. The decision was rendered under the old Civil Procedure Code under which only a decree-holder who first attached the properties belonging to the judgment-debtor was to be paid the amount realised in execution and there was no provision, as in the present Section 73, for rateable distribution in favour of a person who attaches the properties subsequently even if his execution petition was pending at the same time as the other decree-holder's execution petition.

The Civil Procedure Code has subsequently been amended under which the only requirement for claiming a rateable distribution is that the execution petition by the decree-holder claiming rateable distribution should be pending at the time when the assets are realised. The decision relied upon by the respondent has, therefore, really no application to the facts of this case. But it is urged that if a person, under the law as it then prevailed, was entitled to be paid all the assets realised in execution and even in such a case there may be equities available against him, the equities should be available all the more in a case where a person is entitled only to a rateable distribution. The judgment of the Bench of the Calcutta High Court is cryptic on the point and does not say what are the equities that the Bench was thinking.

But it can still be understood on the basis that the provision of law under which a person who first attached was entitled to all the assets was very hard on the other decree-holders and therefore certain equities must be allowed. Those equities cannot prevail against the express provision of the present law which is equitable to all decree-holders. Under the express provision of Section 73, as it exists, the plaintiff is entitled to a rateable distribution of the assets realised by the defendant and there can be no question of any equities in this case. Indeed to allow the respondents to plead and to hold that he is entitled to all the assets

realised in execution to the exclusion of other decree-holders would be to deny equities. In the Calcutta case again there was no clear right of suit provided and that is why they had to consider the question of equities. Under the present section, there is a clear remedy provided by way of suit. Therefore, again no question of equities can arise in this case. It follows, therefore, that the conclusion of the lower appellate court that there was collusion between the plaintiff and his judgment-debtor is wholly unsustainable as it is one arrived at by a wrong approach to the question, on the assumption that because the plaintiff has not proceeded against the other assets of his judgment-debtor he is not entitled to any remedy; and this as I have shown already is clearly wrong. It follows, therefore, that the plaintiff is entitled to succeed in his suit.

6. The second appeal is, therefore, allowed and the plaintiff's suit will stand decreed. The parties will, however, bear their own costs in this court because the defendant is placed rather in a difficult position as a result of the plaintiff's suit. Plaintiff will however get his costs in the courts below. No leave.

Appeal allowed.

AIR 1970 MADRAS 507 (V 57 C 148)

ISMAIL, J.

Smt. S. R. Y. Bhavani Devi, Petitioner v. Commissioner, Corporation of Madras and another, Respondents.

Writ Petn. No. 2239 of 1966, D/- 17-6-1969.

Municipalities — Madras City Municipal Corporation Act, 1919, S. 105 — Vacancy remission — Allowable only if building is entirely vacant.

On the language of Section 105 and Section 3(4) defining "building", it must be held that the owner of a building is entitled to a remission of property tax only if the building remains wholly vacant or unlet. If any portion of the building is in occupation or let out, however the small that portion may be, then the provisions of Section 105 are not attracted. The contrary contention based on a consideration of hardship or injustice cannot be accepted. (Para 4)

G. K. Damodar Rao and S. R. Vittal, for Petitioner; T. Chengalvarayan, for Respondents.

ORDER:— The petitioner is the owner of premises No. 23 Nungambakkam High Road, Madras 34. The total area of the building with the adjacent vacant site all round is about 34 grounds, out of which

the building portion alone occupies an area of about ten grounds. The entire main building of the total plinth area of about 16000 sq. ft. excepting a small area of about 1000 sq. ft. in the north-east corner of the main building was let out to the Madras Industrial Investment Corporation on a monthly rental of Rs. 1400 from 1-2-1963. The north-east corner of the building has been let out to M/s. Sarathi Films on a rental of Rs. 50 per month. But there is an out-house in the north-eastern extremity of the compound and that out-house is in the occupation of a tenant by name Kohinur Confectionary, paying a monthly rent of Rs. 50. The Madras Industrial Investment Corporation vacated the premises under its occupation on 31-1-1966 and as such the portion in its occupation has remained vacant from 1-2-1966 until 31-8-1966. During this period the petitioner was getting a rent of Rs. 100 only made up of Rs. 50 from Sarathi Films occupying a portion of the main building and Rs. 50 from Kohinur Confectionary occupying the out-house. It is under these circumstances the petitioner even on 20-1-1966, before the major portion of the main building actually fell vacant, wrote to the Revenue Officer of the Corporation of Madras about the impending vacancy and the likelihood of the main building remaining vacant and prayed for waiving the property tax for the period of vacancy. She wrote another letter on 3-3-1966. Not having any reply even to this letter, she wrote a third letter on 9-5-1966. Without sending any reply to any of these letters, the Assistant Revenue Officer by a notice dated 14-6-1966 called upon her to pay the property tax of Rs. 2,520-94 within 15 days. On 20-8-1966, an officer of the Corporation approached the petitioner with a distress warrant to distrain her goods, and chattels at the place of her residence in Gandhinagar and demanded from her payment of Rs. 5181-78 together with warrant fees. The petitioner then sent a revision petition to the Commissioner of the Corporation and according to the petitioner she has not received any reply from the Commissioner. Four days after the distress warrant by communication R. D. C. 33485/66 dated 24-8-1966, the Assistant Revenue Officer of the Corporation informed the petitioner that her request for vacancy remission could not be granted as it is only a partial vacancy. It is to quash this communication of the Assistant Revenue Officer, the present writ petition has been filed.

2. Mr. G. K. Damodar Rao, the learned counsel for the petitioner, in support of the writ petition, put forward two contentions. The first contention is that, while granting or refusing to give remission of the property tax, the authorities were acting in a quasi-judicial capacity

and that no opportunity was given to the petitioner for pressing her case before any final decision was arrived at by them. The second contention is that even though the vacancy is a partial one, the petitioner is entitled to vacancy remission by virtue of Section 105 of the Madras City Municipal Corporation Act, 1919.

3. I shall take up the second contention first. Section 105(1) of the Act says:

"When any building whether ordinarily let or occupied by the owner himself has been vacant and unlet for thirty or more consecutive days in any half year, the Commissioner shall remit so much, not exceeding one-half of such portion of the tax as relates to the building only as is proportionate to the number of days during which the building was vacant and unlet in the half-year."

It is necessary to refer to the definition of the term building as contained in Section 3(4) of the Act. That definition says that 'building' includes—

"(a) a house, out-house, stable, latrine, godown, shed, hut, wall (other than a boundary wall not exceeding 8 ft. in height) and any other structure whether of masonry, bricks, mud, wood, metal or any other material whatever;

(b) a structure on wheels or simply resting on the ground without foundations; and

(c) a ship, vessel, boat, tent, van and any other structure used for human habitation or used for keeping or storing any article or goods."

It is an admitted fact that the portion occupied by M/s Sarathi Films on a monthly rental Rs 50 constitutes a portion of the main building, though only a small portion. In this context, the question arises, whether the petitioner is entitled to any vacancy remission under Section 105 of the Act in relation to the major portion of the main building vacated by the Madras Industrial Investment Corporation and remaining vacant for the relevant period. As the language of the statute stands, I am unable to accept the contention of the learned counsel for the petitioner that, notwithstanding a small portion in the main building being in the occupation of a tenant, the petitioner is entitled to vacancy remission, because the major portion of the building remained vacant. The definition of the term 'building' in the Act does not support any such contention. It is useful in this context to compare the definition of the term building occurring in the Madras Buildings (Lease and Rent Control) Act 1960 and the definition of the term "building" in the Madras City Municipal Corporation Act, 1919, extracted by me already. The definition of 'building' in the Madras Buildings (Lease and Rent Control) Act,

1960, as given in Section 2(2) of the said Act is as follows:

"'building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes (a) the garden, grounds and out-houses, if any, appurtenant to such buildings, hut or part of such building or hut and let or to be let along with such building or hut" (the other portions of the definition are not necessary for the purpose of this case).

4. To accept the argument of the learned counsel for the petitioner is to incorporate the definition of the term building in the Madras Buildings (Lease and Rent Control) Act, 1960 into the Madras City Municipal Corporation Act, 1919, while the statute itself has not done so. Why the statute has not done so, can be easily understood from the fact that under Section 100 of the Madras City Municipal Corporation Act, 1919, property tax is payable in respect of buildings not only in the occupation of the tenants but also in the occupation of the owners. Therefore whether a building is let or not is wholly immaterial and irrelevant for the purpose of liability to pay property tax under the Madras City Municipal Corporation Act, 1919. Hence, a portion of a building is capable of being let out and has been so let out and subsequently remained vacant is wholly irrelevant for the purpose of levy of property tax under the Madras City Municipal Corporation Act, 1919 and consequently for the purpose of remission under Section 105 of the Act. Therefore, irrespective of any consideration of hardship or injustice on which great stress was laid by the learned counsel for the petitioner, on the language of Section 105 and with reference to the definition of the term 'building' occurring in Section 3(4) of the City Municipal Act, 1919, it must be held that the owner of a building is entitled to a remission of the property tax only if the building remains wholly vacant or unlet; and if any portion of the building is in occupation or let out, then the provisions of Section 105 of the Madras City Municipal Corporation Act, 1919, are not attracted and the owner of the building is not entitled to any remission. Consequently I am unable to accept the second contention of the learned counsel.

5. As far as the first contention is concerned, no doubt the Corporation authorities would have been well advised in informing the petitioner, before taking any coercive steps, that she was not entitled to any remission of the tax, and certainly the conduct of the Corporation authorities cannot be commended from any point of view. At the same time I am of the view, that no purpose will be served by giving an opportunity to the

petitioner in the context of the facts of this case. With regard to the facts, it is admitted that the portion in the occupation of M/s. Sarathi Films is part of the main building, though a small part. Consequently with reference to the claim for remission under Section 105 of the Act, there is no point of fact to be enquired into or investigated for the purpose of arriving at a decision whether the petitioner is entitled to remission of property tax or not. Hence I am not satisfied that any case has been made for directing the Corporation authorities now to give an opportunity to the petitioner before taking or enforcing their decision that the petitioner is not entitled to the vacancy remission because the vacancy that occurred was only a partial vacancy. Under these circumstances the writ petition fails and is dismissed. There will be no order as to costs.

Petition dismissed.

AIR 1970 MADRAS 509 (V 57 C 149)

KRISHNASWAMY REDDY, J.

S. C. C. Anthony Pillai, Petitioner v. W. R. Nedanchezian, Respondent.

Criminal Revn. Case No. 536 of 1967 and Criminal Revn. Petn. No. 529 of 1967, D/-1-7-1969 against order of 8 Presidency Magistrate, Madras, D/-17-4-1967.

Penal Code (1860), Ss. 171-G, 499, 500 — Distinction between Ss. 171-G and 499 — Prosecution for offence under S. 500 — Magistrate has jurisdiction to proceed with complaint without sanction though facts of complaint disclose offence under Section 171-G for which sanction is necessary — (Criminal P. C. (1898), S. 196).

The offences under Sections 500 and 171-G, I. P. C., are separate and distinct offences. It cannot be said that the ingredients of Section 499, I. P. C., are the same as the ingredients of S. 171-G, I. P. C. The main distinction between these two sections is that under S. 171-G, I. P. C., the allegations must be false whereas under Section 499, I. P. C., even if the allegations are true, the complaint for defamation will lie unless the person who makes such defamation comes under any one of the exceptions. Section 499, I. P. C. covers a wider field. In a prosecution under Section 171-G, I. P. C., if the accused is able to show the allegations made by him are true, the matter ends there. But in a prosecution under Section 500, I. P. C., even if the accused contends it is true, it may not be a full defence for him unless he comes under any one of the Exceptions, for instance, that the statement has been made in the interests of public. Only when two offences are of the same category and the ingredients

of one are found in the other, then the question of obtaining sanction for the offence for which it is necessary, would arise. Therefore, if the facts do disclose an offence under Section 500, I. P. C., the complaint is in order and the Magistrate has jurisdiction to proceed with the complaint under Section 500, I. P. C. Even apart from this, Section 500, I. P. C. provides a more deterrent sentence than what is provided under Section 171-G, I. P. C. The complainant will have the option of preferring complaint under that offence, which provides a more deterrent sentence, though the facts of such complaint may disclose an offence, for which sanction is necessary, in respect of which a lesser punishment is provided. (Para 5)

Dolia, for Petitioner; N. Sivalingam assisted by Calvin Jacob, for Public Prosecutor, for State.

ORDER:— This petition has been filed by the complainant S. C. C. Anthony Pillai against the order of the VIII Presidency Magistrate in M. P. No. 143 of 1967 in C. C. No. 898 of 1967 dismissing the complaint of defamation filed by him against the respondent on the ground that sanction under Section 196, Criminal P. C. was not obtained as the facts of the complaint disclosed an offence under Section 171-G, I. P. C.

2. The order of the VIII Presidency Magistrate is clearly wrong.

3. The petitioner was former Member of Parliament and an active Trade Union leader for about 28 years. He contested in the last General Elections from the North Madras Parliamentary Constituency for a seat in Lok Sabha. While the election campaign was going on, in the issue bearing date 17-1-1967, in the Tamil Daily "Nam Nadu", of which the respondent was the Editor, Printer and Publisher, certain allegations were made affecting the conduct and character of the petitioner, the extracts of which were filed along with the complaint. Before the complaint was filed, the petitioner issued a notice to the respondent through his counsel drawing his attention to the defamatory statements made in the said issue and claiming damages of Rs. 10,000/- for having defamed him and also asking him to withdraw the articles published in the said issue and tender unconditional apology to him, failing which criminal and civil proceedings would be taken against him for vindicating the rights of the petitioner. The respondent sent a reply notice in which he admitted the publication made in his paper, but definitely stated that there was nothing defamatory and that they were made in good faith and in the interests of the public, claiming the benefit of exception to Section 499, I. P. C.

4. Subsequently, the complaint was filed by the petitioner. The Magistrate,

took the complaint on file under Sec. 500, I. P. C., and issued process to the respondent. After the petitioner was examined, the respondent filed an application stating that the allegations in the complaint would amount to an offence under Section 171-G, I. P. C., for which sanction would be necessary under Section 196, Criminal P. C. and as such sanction was not obtained, the Court had no jurisdiction to proceed with the complaint. The learned Magistrate accepted the contention of the respondent and held that the allegations would amount to an offence under Section 171-G, I. P. C., and that as no sanction was obtained as required under Section 196, Criminal P. C., he had no jurisdiction to proceed with the case.

5. The offences under Sections 500 and 171-G, I. P. C., are separate and distinct offences. It cannot be said that the ingredients of Section 499, I. P. C., are the same as the ingredients of Section 171-G, I. P. C. The main distinction between these two sections is that under Section 171-G, I. P. C., the allegations must be false whereas under S. 499, I. P. C., even if the allegations are true, the complaint for defamation will lie unless the person who makes such defamation comes under any one of the exceptions. Section 499, I. P. C. covers a wider field. In a prosecution under Section 171-G, I. P. C., if the accused is able to show the allegations made by him are true, the matter ends there. But in a prosecution under S. 500, I. P. C., as pointed out earlier, even if the accused contends it is true, it may not be a full defence for him unless he comes under any one of the Exceptions, for instance, that the statement has been made in the interests of public. Only when two offences are of the same category and the ingredients of one are found in the other, then the question of obtaining sanction for the offence for which it is necessary, would arise. Therefore, in this case, as I find that both the offences are separate and distinct offences and the facts, if true, do disclose an offence under S. 500, I.P.C., I hold that the complaint was in order and the Magistrate had jurisdiction to proceed with the complaint under Section 500, I. P. C. Even apart from this, Sec. 500, I. P. C. provides a more deterrent sentence than what is provided under Sec. 171-G, I. P. C. The complainant will have the option of preferring complaint under that offence, which provides a more deterrent sentence, though the facts of such complaint may disclose an offence, for which sanction is necessary, in respect of which a lesser punishment is provided.

6. In the result, I hold that the order of the learned Magistrate is wrong and it is, therefore, set aside. I do not order retrial in this case in view of the fact that the respondent expressed regret for the publication made in the issue, to the peti-

tioner and the petitioner accepted the same.

7. The revision petition is accordingly ordered.

Order accordingly.

AIR 1970 MADRAS 510 (V 57 C 150)

M. ANANTANARAYANAN, C. J. AND
NATESAN, J.

Mohamed Mansour, Appellant v. N. Abdul Cader alias Ibrahim and another, Respondents.

Special Appeals (Civil) Nos 421 and 422 of 1964 D/- 21-1-1969, from decree of Tribunal, Pondicherry D/- 14-4-1964.

Civil P. C. (1908), S. 9 — Jurisdiction — Arts. 59 and 69 of Procedure Code of Pondicherry — Fraud during liquidation proceedings on Foreign Court having jurisdiction — Fraud part of affairs of firm before its liquidation — Proper forum for seeking redress is Foreign Court homologating liquidation or its successor court — Court of domicile will not exercise jurisdiction over matters which earlier were the subject of proper decision by a Foreign Court. (Para 6)

N. Arunachalam, for Appellant; V. Thyagarajan for K. Raja Aiyar, C. A. Md. Ibrahim and M. Khaja Mohideen, for Respondents.

ANANTANARAYANAN, C. J.: Though these special appeals instituted by virtue of our jurisdiction over the Tribunals at Pondicherry, involve only a short preliminary issue, the matter is not without some degree of interest. Very briefly stated, the appeals before us are by the second wife and her son of a certain Abdul Hamid (deceased) who was a partner in a firm with extensive transactions. As will be clear from the judgment of the Superior Court of appeal at Pondicherry, the action related to the alleged purchase of certain sovereigns made in May 1950, and it was established that the funds realised by this, namely, 873,000 paistres, had been paid to the Saigon shop, after advance deductions in the account of the shop at Hanoi.

2. Upon the facts of this alleged claim, which was, basically, a claim that the moneys of this transaction had been fraudulently suppressed in the liquidation proceeding admittedly homologated by the Court at Hanoi, the Tribunal of First Instance (Commerce) at Pondicherry came to the conclusion that the Pondicherry Court had no jurisdiction and that the present parties must seek further redress in the Court which homologated the liquidation proceedings at Hanoi alone.

3. Aggrieved by this judgment, the present parties preferred an appeal to the
GM/EN/C882/69/NNH/P

Superior Court of Appeal at Pondicherry. In the judgment of that court, the facts have been set out at some length. After stating the facts, the learned Judges of that court observed that the dispute was with regard to the transaction of purchase of sovereigns involving a considerable sum, which occurred during the existence of the company which subsequently suffered liquidation. This transaction ought to have been placed before the court seized of the liquidation proceedings, and should have formed part of the subject-matter of those proceedings. If, as contended by the present parties, there was a fraudulent concealment in that respect, the matter fell within the exclusive jurisdiction of the Tribunal at Hanoi. The Superior Court of Appeal also referred to Art. 33 of the Bye-laws of the company, which explicitly states that all disputes arising between the partners during the existence of the company, or in the course of the liquidation operations connected with the affairs of the Company, must be submitted to the Tribunal within whose jurisdiction the head office of the company is situate; here, admittedly, Hanoi. The appeal was dismissed, and these related Special Appeals have now been filed before us, one appeal from the main judgment of dismissal itself, and another from the ancillary judgment vacating the stay order in regard to garnishee proceedings obtained by the appellants.

4. We have carefully considered the arguments of the learned counsel (Sri Arunachalam), for invoking our jurisdiction. Learned counsel sought to contend, at one stage of the arguments that it is not clear that the liquidation court at Hanoi is now functioning as a successor Tribunal to the Tribunal originally seized of the liquidation proceedings, or that it is accessible to parties. But he was unable to produce any authoritative material, on which we could accept such averments. Normally, whatever might be the political exigencies of the foreign State wherein the Court is situate, we must assume that there has been a continuity of the judicial administration unimpaired, and that the successor court if any, will exercise the same jurisdiction and recognise those matters concerning which a predecessor court might have exercised a judicial function or power. We have no reason whatever to assume that this continuity of the judicial administration has been irretrievably impaired or broken, in the present instance. The other arguments of Sri Arunachalam are briefly these. Firstly, he contends that the balance sheet filed in the liquidation court which has been produced before us, *ex facie* shows a fraudulent concealment in respect of the transaction relating to this purchase of sovereigns. Actually, according to him, the widow and the son had no knowledge of these trans-

sactions for a considerable time after the death of Mr. Abdul Hamid, and they discovered the facts only after an interval of about seven years, when they promptly instituted the proceedings. These averments are denied by the respondents. But the argument of learned counsel for the appellants is that this fraud, which is *ex facie* evident, will clothe us with the requisite jurisdiction to investigate the matter, though the liquidation proceedings were completed before the Hanoi court. The second argument is that, conceivably, Arts. 59 and 69 of the Code Procedure Civile, which was the statute then being applied to this matter by the Court at Pondicherry, will justify the interpretation that we have the necessary jurisdiction.

5. We have carefully examined both these arguments and we are quite unable to accept them. As regards the first argument, it is clearly fallacious, for it amounts to an invitation to exercise our jurisdiction by assuming the facts, when the facts themselves have been denied. We must here record it as the contention or defence of the respondents that, according to their case, there was no fraud or fraudulent concealment. The relevant facts were taken note of in the liquidation proceedings, or were available for scrutiny in the record, and must therefore be held to have been adjudicated upon in the course of the homologation. We are quite unable to see how we can first proceed into controverted facts of that nature, assuming our jurisdiction, and then exercise a jurisdiction which clearly we do not possess. The argument has therefore, to be repelled.

6. As regards Arts. 59 and 69 of the Procedure Code of Pondicherry, a scrutiny of these articles (translated text) shows that they relate only to the ordinary exercise of jurisdiction, by a court of the domicile of the defendant so long as the 'commercial societies' are in existence. The present argument of Sri Arunachalam is that rule may not apply, where the societies have ceased to exist. Such an argument could conceivably have some force, if the proceeding relates to transactions which arose subsequent to the liquidation, as between the erstwhile partners. But, in the present case, the transactions were admittedly part of the affairs of the firm which went into liquidation before the liquidation proceedings, and were comprised, or should have been comprised, in the accounts and records of the firm, which were the subject of scrutiny by the court of liquidation. If a fraud had been practised on that court, as averred, obviously the parties aggrieved by the fraud would have to seek redress in that court, for reopening the liquidation proceedings, and getting the necessary relief. We find from the Commentary of Dallaz that this is the proper interpretation of Arts. 59 and

69, and that those Articles do not justify any view that the court of domicile will exercise a jurisdiction over matters which were the subject of proper decision earlier by a Foreign court. We must reiterate that we have no means whatever for assuming that the court at Hanoi is inaccessible, that it does not function as a successor court or that its decision cannot be exercised. We must also record that it is the specific case of the respondents that the court of Hanoi possesses the necessary jurisdiction. If for any reason, the appellants seek redress in that court, and find that the court is not accessible by reasonable means or efforts, or that no recognition can be obtained in that court with regard to proceedings of a predecessor Tribunal of this character, then it will be time enough for the appellants to initiate fresh steps for such legal remedies as they are advised to pursue, and as may be available in law, including Private International Law.

7. With these remarks in clarification, the special appeals are dismissed. No order as to costs.

8. We desire to record that the first appellant does not press the appeals and hence, that, as far as he is concerned, both the appeals are dismissed as not pressed by him.

C M. P. 8462 to 8465 and 10730 and 30731 of 1966 are ordered.

Appeals dismissed.

AIR 1970 MADRAS 512 (V 57 C 151)

K. N. MUDALIYAR, J.

In re, Srinivasan and another, Petitioners.

Criminal Revn. Case No. 407 of 1968 and CrI. Revn. Petn. No 401 of 1968, D/- 3-10-1969 against Judgment of Dist.

LM/EN/F869/69/HGP/C

Magistrate (J.) First Class, Tiruchirappalli, D/- 27-3-1968.

Criminal P. C. (1898). Section 510 — Report of Chemical Examiner etc. — Report used as evidence to convict accused — No oral evidence given by analyst — No opportunity to accused to cross-examine analyst — Infirmary sufficient to vitiate conviction. (Para 1)

Fyze Mahmood, for Petitioners; K. R. Natarajan, for Public Prosecutor, for State.

ORDER:— Mr. Fyze Mahmood, appearing for accused 1 and 3 in this revision petition argues that the contraband in this case, namely, M Os Nos. 1 to 7 contained brandy is not proved in the court of the trial Magistrate, although the appellate Court has acted upon the report of analysis by the Assistant Director and Assistant Chemical Examiner to Government for Excise and Prohibition. The appellate Court has erred in acting on this document without giving opportunity to the accused to cross-examine the concerned witness on the relevant report. The appellate court proceeded on the footing that M Os. 1 to 7 contained brandy, a prohibited liquor. This has got to be proved by the author of the analysis report by giving evidence and marking the said document. This infirmity alone vitiates the conviction of the petitioners. I set aside the conviction of the petitioners and the sentences imposed on them and direct retrial of the case. It is open to the petitioners at the conclusion of their retrial to raise their contentions both on facts and law for their acquittal.

Revision allowed.

END

that finding is amply supported by the evidence on record. Consequently, I see no justification for interfering with that finding which looks to be proper and sound. As a result, I decline the reference on upholding the order of the Sub-Divisional Magistrate.

Reference rejected.

AIR 1970 MANIPUR 81 (V 57 C 25)

R. S. BINDRA, J. C.

Subedar Major Birakumar Singh, Petitioner
v. Sagolsem Mera Singh, Respondent.

Civil Revn. Case No. 10 of 1968, D/- 10-3-1970, from order of Munsiff III, Imphal, D/- 29-2-1968.

Civil P. C. (1908), Order 6, Rule 17 — Amendment of plaint — Suit for eviction of trespasser from land belonging to Association — Amendment application to incorporate in plaint history of Association and details of acquisition of land by it from Government — By proposed amendments neither new case nor new cause of action would be introduced — Rejection of amendment on ground that it would change basic structure of suit held not proper — AIR 1967 SC 96, Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 96 (V 54) =
1966-1 SCR 796, A. K. Gupta and
Sons Ltd. v. Damodar Valley Corporation 5

L. Nandakumar Singh, for Petitioner; S. Somorendra Singh, for Respondent.

ORDER: This revision petition by Subedar Major Birakumar Singh is directed against the order dated 29th February, 1968 by which Shri H. Jugeswar Singh, Munsiff III, Imphal, rejected his application for amendment of the plaint. It is contended that the Munsiff had gone wrong in not permitting the petitioner to amend the plaint.

2. The suit out of which this revision petition arises had been instituted by the petitioner in his capacity as President of Manipur Rifles Ex-servicemen's Colony, hereinafter called the Association, and permission of the Court was secured in terms of Order 1 Rule 8 of the Civil Procedure Code. The prayer made in the suit was for eviction of the defendant-respondent S. Mera Singh from a piece of land described in the schedule appended to the plaint. It was alleged in Para 1 of the plaint that the members of the Association had chosen the plaintiff Birakumar Singh to file the suit in representative capacity since they had all common interest in the subject-matter of the suit. In the next para it was pleaded that the Manipur Government settled 300 bighas of paddy land at Saiton under patta No. 55/229 B. T. to the Association in the year 1954 and that since then the members of the Association

had been in possession of that land against payment of revenue to the Government.

By the amendment application the plaintiff wanted to substitute Paras Nos. 1 and 2 of the plaint on the plea that "through inadvertence certain facts have not been incorporated in the plaint" and on the assertion "that the proposed amendment will not change the character of the suit." In substance, what plaintiff wanted to state in the proposed Para No. 1 of the plaint was that in or about the year 1953 some members of the Manipur Rifles formed an Association under the name and style of "Manipur Rifles Ex-servicemen's Association" with the object of looking after the affairs of the employees of the Manipur Rifles after their retirement from service, that the plaintiff is the President of the said Association, and that the members had selected him for filing the suit in a representative capacity. And in the proposed para 2 of the plaint the plaintiff wanted to allege that the Association after its constitution moved the Government of Manipur for settlement of some land with it for the use of the members of the Association on their retirement, that the Government consequently settled 300 bighas of land at Saiton under patta No. 55/229 B. T. in favour of the Association and delivered possession to them, and that Association had been holding and possessing that land in the nature of trust for the members of the Association and the Association had been paying revenue to the Government regularly. Another fact which was meant to be stated in the proposed para 2 of the plaint was that the entire piece of land measuring 300 bighas is known as "Manipur Rifles Ex-servicemen's Colony".

3. The learned Munsiff rejected the prayer for amendment on the following grounds:

(a) That in the original plaint it was stated that Ex-servicemen's Colony at Saiton had come into existence before the land was allotted by the Government, while in the proposed amendment it was stated that the Colony came into being after the land had been settled;

(b) That according to the title of the suit the Ex-servicemen's Colony is situate at Imphal, that according to the proposed amendment it is located at Saiton, and that no amendment of the title of the plaint had been asked for along with the amendment of paras Nos. 1 and 2 of the plaint; and

(c) that in view of the amendments sought the character of the suit would be changed.

4. Shri L. Nandakumar Singh urged vehemently for the petitioner that the trial Court had rejected the prayer for amendment without appreciating its nature or comprehending the principles that govern the applications made under Order 6, Rule 17 of the Code. He submitted further that it was wrong for the Munsiff to hold that the proposed amendments would change the character of the suit. I think this criticism

is completely valid and wholly justified. The suit had been filed by the Association through its representative for eviction of S. Mera Singh, a trespasser, from a piece of land belonging to the Association. This basic structure of the suit would remain unchanged even if the amendments are allowed. The amendments only narrate the history of the Association and details of acquisition by it of the land measuring 300 bighas from the Government of Manipur. I think the learned Munsiff completely went out of his way in rejecting the prayer for amendment.

5. In a recent decision reported in *A. K. Gupta v. Damodar Valley Corporation*, AIR 1967 SC 98, the Supreme Court observed that the general rule governing the amendments of the pleadings is that a party is not allowed by amendment to set up a "new case" or a "new cause of action", particularly when a suit on new case or cause of action is barred by time. But it is also well recognised, the Supreme Court observed further, that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation. The principal reasons that have led to this rule, the Supreme Court emphasised, are, first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes, and, secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended. The expressions "cause of action" and "new case" were also defined by the Supreme Court in the same judgment. The expression "cause of action", it was held, in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed", for if it were so, no material fact could ever be amended or added. Therefore, it was pointed out the expression for the purpose of amendment only means, "a new claim made on a new basis constituted by new facts". The expression "new case" was defined to mean "new set of ideas".

6. Applying the aforementioned principles governing the amendment of the pleadings, I see no escape from the conclusion that by the proposed amendments in the instant case neither a new case would be set up nor a new cause of action introduced. The amendments only relate to most preliminary or elementary matters and the basic structure of the suit would not be affected by them. The suit as at present is, I may repeat, for the eviction of the defendant from a land which is claimed to be the property of the Association, and it shall continue to be so even after the amendments are introduced.

The amendments, in other words, would have no material bearing either on the real matters in controversy or on the final outcome of the dispute.

7. As a result, I allow the petition and direct the trial Court to permit the Association to amend paras 1 and 2 of the plaint in the manner prayed for. The plaintiff may also amend the title of the suit if he feels so inclined. I allow him permission to do so. The plaintiff shall get costs from the respondent. Advocates' fee Rs. 16/-.

Petition allowed.

AIR 1970 MANIPUR 82 (V 57 C 25)

R. S. BINDRA, J. C.

Md. Hasamad Mia, Petitioner v. The State (Union Territory of Manipur), Respondent.

Criminal Misc. Appln. No. 42 of 1970, D/-15-7-1970.

(A) Constitution of India, Arts. 134(1) (c) and 136(1) — Point of law not argued before High Court — Cannot be raised for first time before Supreme Court in appeal under Art. 134(1) (c) though it can be raised in appeal under Art. 136(1) — High Court cannot grant certificate for urging the point not argued before it. (Para 6)

(B) Constitution of India, Art. 134(1) (c) — Leave to appeal — Power to grant Certificate — Nature and exercise of.

The matter of issuing certificate is within the discretion of the High Court. The power to grant certificate has to be exercised after considering what difficult questions of law or principle are involved in the case which require further consideration by the Supreme Court. The High Court would be justified in issuing the Certificate only if some "substantial question of law or principle" is involved for consideration on the part of the Supreme Court. But certificate cannot be granted only for the reason that the Supreme Court may assess whether the penalty of death or the alternative sentence of life imprisonment was the proper sentence to pass in a particular case. Case law discussed. (Paras 4, 7)

Cases Referred:	Chronological	Paras
(1965) AIR 1965 SC 722 (V 52) —		
1965 (1) Cri LJ 641, State of Maharashtra v. Mayer Hans George		Y
(1965) AIR 1965 SC 1467 (V 52) —		
1965 (2) Cri LJ 539, Babu v. State of U. P.		3, X
(1961) AIR 1961 SC 196 (V 48) —		
1961-1 SCR 779, Sudhansusekhar v. State of Orissa		5
(1961) AIR 1961 SC 647 (V 48) —		
1961-3 SCR 297, Alembic Chemical Works Ltd. v. Workmen		2

- (1961) AIR 1961 SC 928 (V 48) =
1961 (2) Cri LJ 24, Bhagwati
Saran v. State of U. P.
(1960) AIR 1960 SC 882 (V 47) =
1960 Cri LJ 1246, Nand Lal Misra
v. Kanhaiya Lal Misra
(1959) AIR 1959 SC 1118 (V 46) =
1959 Cri LJ 1368, Narayandas v.
State of W. B.
(1957) AIR 1957 SC 389 (V 44) =
1957 Cri LJ 567, State of Bihar v.
Ram Naresh Pandey
(1957) AIR 1957 SC 469 (V 44) =
1957 Cri LJ 583, Jumman v. State
of Punjab
(1956) AIR 1956 SC 181 (V 43) =
1956 Cri LJ 345, Baladin v. State
of U. P.
(1956) AIR 1956 SC 411 (V 43) =
1956 Cri LJ 801, Sunder Singh v.
State of U. P.
(1955) AIR 1955 SC 65 (V 42) =
1955 SCR 941, Dhakeswari Cotton
Mills Ltd. v. Commr. of I. T. W.
Bengal
(1954) AIR 1954 Bom 206 (V 41) =
1954 Cri LJ 576, Jairam v. State
of Bombay
(1950) AIR 1950 SC 188 (V 37) =
1950 SCR 459, Bharat Bank Ltd.
v. Employees of Bharat Bank
Ltd.
A. Nilamani Singh, for Petitioner.

ORDER:— This is an application by Md. Hasamad Mia, condemned to death, under sub-clause (c) of Cl. (1) of Art. 134 of the Constitution for a certificate that the present case is a fit one for appeal to the Supreme Court. In the application as originally presented through the Jail only questions of fact bearing on the appreciation of evidence led in the case were relied upon in support of the prayer for the certificate. However, after this Court had appointed Shri A. Nilamani Singh, Advocate, as amicus curiae, to help the Court in deciding the application that Advocate presented a new set of grounds in justification of that prayer. Since it was stated at the bar that the original application had not been prepared by the prisoner with competent legal aid, I have decided to take into consideration the supplementary grounds while adjudging the merits of the application for certificate. In the supplementary grounds a question of law raised is that the learned Sessions Judge had not taken the statements made by the prosecution witnesses before the Committing Magistrate, and which statements are in contradiction to their averments made at the trial, as constituting substantive piece of evidence.

2. Relying on the principles enunciated in State of Bihar v. Ram Naresh Pandey, AIR 1957 SC 389; Jumman v. State of Punjab, AIR 1957 SC 469; Nand Lal Misra v. Kanhaiya Lal Misra, AIR 1960 SC 882 and Alembic Chemical Works Co., Ltd. v.

Workmen, AIR 1961 SC 647, Shri Nilamani Singh strenuously canvassed for the applicant that it is open to an aggrieved party to pray for certificate if he has a point of law to urge before the Supreme Court even though that point had not been agitated before the High Court when the appeal was argued. Undoubtedly, the Supreme Court held in the cases cited that a pure point of law can be permitted to be argued before it even if it had not been urged before the High Court. However, that view was taken and subsequently reiterated by the Supreme Court only in respect of appeals instituted on special leave granted under Art. 136(1) of the Constitution. But I think the analogy of Art. 136(1) cannot be legitimately availed of for interpreting sub-clause (c) of Article 134(1).

Clause (1) of Art. 136 enacts that notwithstanding anything contained in Chapter IV, Part V, of the Constitution, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. Sub-clause (c) of Article 134(1), on the other hand, provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court "certifies that the case is a fit one for appeal to the Supreme Court." Obviously, the Supreme Court is given a completely free hand in granting special leave to appeal under Art. 136 of the Constitution, while the High Court can issue the certificate under Cl. (c) of Art. 134 (1) if "the case is a fit one for appeal to the Supreme Court." Moreover, the exact scope of the two constitutional provisions has been almost precisely defined by the Supreme Court in a large number of judicial pronouncements made by it, and this Court is bound in terms of Art. 141 of the Constitution by the interpretation placed by the Supreme Court on those provisions.

As early as in October 1954, the Supreme Court held in the case of Dhakeswari Cotton Mills Ltd. v. Commr. of Income-tax West Bengal, AIR 1955 SC 65, that it is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in the Supreme Court by the constitutional provision made in Art. 136, that the limitations, whatever they be, are implicit in the nature and character of the power itself, that it being an exceptional and over-riding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations, and that beyond that it is not possible to fetter the exercise of this power by any formula or rule. The Supreme

Court observed further that all that can be said is that the Constitution having trusted the wisdom and good sense of the Judges of the Supreme Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice, and that its exercise will be governed by well-established principles which govern the exercise of overriding constitutional powers.

Another pertinent proposition laid in that case was that it is "plain that when the Court reaches the conclusion that a person has been dealt with arbitrarily or that a Court or Tribunal has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this special power because the whole intent and purpose of the article is that it is the duty of the Supreme Court to see that injustice is not perpetuated or perpetrated by decisions of Courts and tribunals because certain laws have made the decisions of those Courts or tribunals final and conclusive."

3. It follows from these observations that the powers given by Art 136 are in the nature of special or residuary powers which are exercisable outside the purview of the ordinary law relating to appeals, and in cases where needs of justice demand interference by the Supreme Court of the land. The Article is worded in the widest possible terms and it apparently vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by grant of special leave, against any kind of judgment or order made by a Court or tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. Tersely put, the Constitution does not for the best of reasons choose to fetter or circumscribe the powers exercisable under Art. 136(1) in any way. That there is real and palpable difference in the scope of Art 136(1) and sub-clause (c) of Art. 134 (1) was made clear by the Supreme Court in the case of Babu v. State of Uttar Pradesh, AIR 1965 SC 1467, where it was held that under Art. 134(1) (c) the Supreme Court has not been made an ordinary Court of Criminal Appeal and the High Courts should not by the certificates attempt to create a jurisdiction which was not intended, that the High Courts should, therefore, exercise their discretion sparingly and with care, that the certificate should not be granted to afford another hearing on facts unless there is some error of a fundamental character, and that the High Court "should not overlook that there is a further remedy by way of special leave which may be invoked in cases where the certificate is refused."

These observations of the Supreme Court leave no room for doubt on the point that the circumstances which should weigh with the High Court in issuing the certificate under Art. 134(1) (c) are fundamentally different from those which may influence the Supreme Court in granting special leave to appeal under Art. 136(1) in exercise of its unfettered authority to exercise judicial superintendence over the Courts and tribunals in the realm. It was held in the case of Bharat Bank Ltd. v. Employees of Bharat Bank Ltd., AIR 1950 SC 188, that the opening non obstante clause of Art 136 emphasised the fact that the power there conferred overrode the limitations contained in the previous Articles on the Court's power to entertain appeals. As the word "final" is not used in Art 136(1) to qualify the words "Judgment, Orders, etc.", the Supreme Court has power in appropriate cases to grant special leave even in respect of interlocutory orders, which obviously cannot be done by the High Court under Art 134 (1) (c).

Consequently, I have no difficulty in repelling the contention of Shri Nilaman Singh that since the Supreme Court can permit a pure question of law to be argued while hearing an appeal instituted on special leave granted under Art. 136 (1), the High Court is bound to grant a certificate under Art. 134 (1) (c) once a question of law is said to arise for determination.

4. This takes me to determine what principles should be kept in view while deciding a prayer made for a certificate under Art. 134(1). The sub-clause (c) is worded: "If the High Court certifies that the case is a fit one for appeal to the Supreme Court." Apparently, the matter of issuing certificate is within the discretion of the High Court. It was, however held in the case of Baladin v. State of Uttar Pradesh, AIR 1956 SC 181, that the word "certifies" is a strong word and that it indicates that the High Court must bring its mind to bear on the question and, as in all cases of judicial orders and certificates, the reasons for the order must be apparent on the face of the order itself. The Supreme Court, it was emphasised, must be in a position to know, first, that the High Court has applied its mind to the matter and not acted mechanically, and, secondly, exactly what the High Court's difficulty is and exactly what question of outstanding difficulty or importance the High Court feels the Supreme Court ought to settle.

Another relevant observation made in the same case was that a certificate cannot be granted under Cl. (c) if the High Court is in doubt about the facts and that if there is doubt in the minds of the Judges about the facts, their duty is to acquit. The Judges cannot convict, the Supreme Court pointed out, and then issue a certi-

ificate because they cannot make up their minds about the facts. It is abundantly clear from these observations of the Supreme Court that the grant of a certificate under Cl. (c) is not a matter of course and that the power has to be exercised after considering what difficult questions of law or principle are involved in the case which require further consideration at the hands of the Supreme Court. In the case of AIR 1965 SC 1467, the Supreme Court held that the power which is granted to the High Court is no doubt discretionary but in view of the word "certifies" it is clear that such power must be exercised with great circumspection, sparingly, and only in a case which is really fit for appeal.

It was observed further that the Constitution does not contemplate a criminal jurisdiction for the Supreme Court except in the two cases covered by sub-clauses (a) and (b) of Article 134 (1) which provide for appeals as of right and that consequently the High Court before it certifies the case must be satisfied that it involves some substantial question of law or principle. It has been pointed out more than once by the Supreme Court that it is not an ordinary Court of Criminal Appeal and that the High Court should not by issuing certificate attempt to create a jurisdiction which was not intended. AIR 1956 SC 411, *Sunder Singh v. State of Uttar Pradesh*, is an authority for the proposition that ordinarily in a case which does not involve a substantial question of law or principle in an affirming judgment the High Court would not be justified in granting a certificate under sub-clause (c) of Article 134 (1) of the Constitution. Therefore, the conclusion that follows is that this Court would be justified in issuing the certificate only if some "substantial question of law or principle" is involved for consideration on the part of the Supreme Court.

5. I have mentioned above that in the original application for certificate only questions relating to the appreciation of evidence were raised. However, it is settled beyond dispute that ordinarily the Supreme Court will not convert itself into a third Court of fact in criminal cases. Hence, I do not see any valid justification for the prayer to issue a certificate for reappraisal of the facts on the part of the Supreme Court with the object of determining whether the charge of murder had been clearly brought home to the applicant on the basis of the material on record. A perusal of this Court's judgment dated 6-2-1970 would bring out that not much of argument was raised on the question of the guilt of the accused. The only point seriously debated in the Court was whether the capital sentence was justified under the circumstances proved in the case. In an application for certificate

under sub-clause (c) the High Court is solely concerned with the question whether on the judgment given by it any question of law or principle arises requiring an authoritative interpretation by the Supreme Court. Since the question of conviction was not challenged in a serious manner when the present case was argued in this Court, I cannot persuade myself to grant the certificate on the footing that there was not enough of material to justify the verdict of guilty.

6. The question of law raised in the supplementary grounds was not pressed when the appeal was argued, nor it had even been mentioned in the grounds of appeal in the manner it is now sought to be raised. The only relevant ground stated in the memorandum of appeal was that the trial Court "gave undue credence to the witnesses though they had given contradictory and inconsistent statements before the Police, Committing Magistrate and the Court of Session." The point now emphasised is that "the evidence given under Chapter VIII in the Committing Magistrate's Court has not been treated as substantive evidence to contradict and discredit the prosecution witnesses in the Sessions Court by reason of the non-compliance with Section 288, Criminal P. C." The two points, one raised in the memorandum of appeal and the other set out in the supplementary grounds, are of completely different nature. Therefore, the latter point can properly be described as a point taken for the first time in the application for certificate.

However, it is the settled practice of the Supreme Court that normally it will not allow a new point to be raised before it for the first time. Reference in this connection is invited to the case of *Narayandas v. State of West Bengal*, AIR 1959 SC 1118; *Sudhansusekhar v. State of Orissa*, AIR 1961 SC 196 and *Bhagwati Saran v. State of U. P.*, AIR 1961 SC 928. The High Court of Bombay held in the case of *Jairam v. State of Bombay*, AIR 1954 Bom 206, that in an application for leave to appeal to Supreme Court, a new point the decision of which would depend upon the questions of fact which were not placed before the High Court whose order is sought to be appealed, cannot be allowed to be raised for the first time. Therefore, the legal point mentioned in the supplementary grounds for the first time cannot be raised before the Supreme Court for the first time. Nor do I think that that point is of any substantial importance. The verdict of guilty having not been seriously challenged in this Court, it may be presumed that the point now sought to be raised has been adopted only to strengthen the case for a certificate. However, no Court can permit itself to be dodged in that manner.

7. The last point which requires determination is whether the certificate can be granted on the basis that the proper sentence to award in the case was one of imprisonment for life and not the capital penalty. In the supplementary grounds it is admitted that "in principle the question of awarding sentence.....is a matter of discretion of the Trial and Confirming Courts and there are no hard and fast rules for the exercise of such discretion....." Apart from that admission we have the authoritative pronouncement of the Supreme Court in the case of State of Maharashtra v. Mayer Hans George, AIR 1965 SC 722, that "It is the settled rule of the Supreme Court that it would not interfere with the sentence passed by the Courts below unless there is an illegality in it or the same involves any question of principle" Consequently, I am reluctant to grant certificate only for the reason that the Supreme Court may assess whether the penalty of death or the alternative sentence of life imprisonment was the proper sentence to pass in the present case.

8. No other point was argued in support of the prayer for certificate.

9. As a result, the application fails and is dismissed.

Application dismissed.

AIR 1970 MANIPLR 86 (V 57 C 27)

R. S. BINDRA, J. C.

Yumnam Amudombi Singh and another, Appellants v. Chabungbam Maipak Singh and others, Respondents.

Misc Civil Appeal Case No. 1 of 1969, D/-15-6-1970 against Order of Sub. J., Manipur, D/-8-1-1969.

(A) Civil P. C. (1908), S. 47 — Questions to be considered by executing Court — Validity of decree — Question as to, can be raised only on the ground that Court passing decree lacked inherent jurisdiction as to subject-matter or over parties arrayed before it. AIR 1954 SC 340 and AIR 1962 SC 199, Rel. on. (Para 7)

(B) Co-operative Societies — Assam Co-operative Societies Act (1 of 1950), S. 63 — Jurisdiction of Registrar to entertain disputes — Registrar can entertain disputes concerning such properties if it touches business of society.

The decision whether a dispute can be referred to the Registrar does not depend on whether it relates to money transaction or immovable property, but rests on whether that dispute is "touching the business of the registered society" — Therefore the Registrar has jurisdiction to decide dispute relating to title or right over immovable property if such dispute touches business of the society.

(Paras 3, 9)

(C) Civil P. C. (1908), S. 47 — Execution proceedings — Objection as to defect in plaint or application cannot be raised.

Objection as to the defect in the form of application or filing of plaint cannot be raised for the first time in the executing Court as such objection merely relates to a matter of form and is not one indicating lack of inherent jurisdiction in the forum seized of the case. (Para 10)

(D) Co-operative Societies — Assam Co-operative Societies Act (1 of 1950) (as extended to Manipur), Ss. 85 and 100 — Manipur Co-operative Societies Rules (1959), R. 61, Form No. 5 — Reference of dispute by society to Registrar — Signing of by Chairman and Secretary of Society by adopting form 5 is not in contravention of S. 85 or O. 29. R. 1 — Civil P. C. (1908), O. 29, R. 1. (Para 10A)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 199 (V 49) =
1962-2 SCR 747, Hiralal v. Kali Nath. 7, 8

(1954) AIR 1954 SC 340 (V 41) =
1955 SCR 117, Kiran Singh v. Chaman Paswan. 7, 8

R. K. Manisana Singh, for Appellants;
Y. Imo Singh, for Respondents.

JUDGMENT:— In this Execution First Appeal the legality and the validity of order dated 8th of January 1969 passed by Shri M. C. Roy, Subordinate Judge, Manipur, by which he accepted the objections of the respondents under Sec. 47 of the Civil P. C., hereinafter called the Code, against the execution application filed by the appellants is challenged.

2. The facts bearing on the appeal are not much in dispute. On 21-3-1968 the present appellants petitioned the Registrar of the Co-operative Societies, Manipur, for arbitration between themselves and the respondents herein respecting the dispute arising out of an agreement dated 17-8-1967. That agreement was made between the appellants Y. Amudombi Singh and Ch. Ibohal Singh, respectively the Chairman and the Secretary of the Managing Committee of Kharungpat Lamjaokhong Khong Ahanbi Fishing Co-operative Society Limited, hereinafter called the Society, and the respondents. The agreement was in regard to the enjoyment of the sub-fishery called Soirel forming part of Kharungpat Fishery No. 164 for the period 1-4-1967 to 31-3-1968. The reliefs claimed were for the recovery of balance lease-money, immediate cessation by the respondents of the enjoyment of the sub-fishery and vacating the possession thereof and for future mesne profits. The claim made on behalf of the Society was resisted on various grounds. By his award dated 24-7-1968 the Registrar decreed a sum of Rs. 4,950/- in favour of the Society and directed that the amount should be paid by the respondents within two

months. The respondents were ordered, in addition, to cease enjoying the sub-fishery forthwith and to deliver the vacant possession thereof to the Society.

On the basis of that award the decree-holders made an execution application in the Court of the Subordinate Judge, Manipur, praying for delivery of possession of the sub-fishery. That prayer was opposed by the judgment-debtors (the respondents of this appeal) who filed objections under Section 47 read with Section 151 of the Code. They pleaded that the Registrar had no jurisdiction to make an award respecting immovable property and that the appropriate authority to which the decree-holders could approach for securing vacant possession of the fishery was either the Deputy Commissioner or the Sub-Deputy Collector of the area concerned. The decree-holders, in their reply, controverted the validity of the legal objections raised by the judgment-debtors.

3. The only point debated before the executing Court, as revealed by para 6 of the order under appeal, was whether the part of the award "regarding cessation of the enjoyment of Soirel sub-fishery and vacating its possession by the judgment-debtors be (is?) executable or not."

The learned Subordinate Judge held that the Registrar lacked jurisdiction to decide a dispute respecting title to or right over any immovable property, such as, sub-fishery, that the Registrar had been moved for giving the award not by the Society but by its Chairman and the Secretary, that the latter had no authority to do so in view of Section 85 of the Assam Co-operative Societies Act, 1949, herein-after referred to as the Act, as extended to Manipur, and that on account of these two legal defects the award made by the Registrar respecting the sub-fishery is unexecutable. In para 8 of the order the Subordinate Judge happened to observe, obviously unintentionally that "In view of above finding and decision it is to be held that the decree as passed by the Registrar, Co-operative Societies, is without jurisdiction and as such a nullity, which cannot be acted upon in execution." It may be recalled that the only point canvassed before the executing Court on behalf of the judgment-debtors was that the part of the award in regard to the delivery of possession of the sub-fishery to the decree-holders was invalid and that it was never the case of the judgment-debtors that the award was also invalid respecting the sum of Rs. 4,950/- decreed against them.

4. Aggrieved by the order of the Subordinate Judge the decree-holders came up in appeal to this Court.

5. It was commonly admitted by the parties' counsel during the course of arguments that the judgment-debtors had re-

linquished the possession of the sub-fishery in favour of the decree-holders after the impugned order was made by the executing Court and that as such there was no live dispute between the parties respecting that part of the decree. However, Shri Manisana Singh, representing the decree-holders, submitted that since the Subordinate Judge had held in para 8 of his order that the whole of the decree was a nullity, it was necessary that this Court should give its verdict on that point to obviate any further dispute regarding the executability of the money-part of the decree. Shri Y. Imo Singh, appearing for the judgment-debtors, did not join issue with Shri Manisana Singh on that point and I think he was right in adopting that stand.

6. The learned Subordinate Judge held that the decree to be a nullity on the double finding that the suit before the Registrar had been filed not by the Society but by its Chairman and the Secretary and that was in violation of Section 85 of the Act and Order 29, Rule 1 of the Code, and, secondly, that in terms of Sections 63, 64 and 82 of the Act the Registrar has jurisdiction only to decide disputes relating to "financial matters and recovery of dues" and that he has no jurisdiction "to decide the question regarding the title or right over immovables as, for instance, the sub-fishery in the present case." Shri Manisana Singh vehemently criticised these findings of the Subordinate Judge. He submitted that an executing Court cannot go behind the decree and that it must take the decree as it stands and execute the same. Shri Manisana Singh was however fair enough to concede that there is one exception to the broad proposition propounded by him, it being that if the Court which passed the decree lacked inherent jurisdiction respecting the matter in dispute then the decree shall be a nullity and the judgment-debtors entitled to raise an objection even before the executing Court. Shri Y. Imo Singh, opposite counsel, urged equally forcefully that it is open to the judgment-debtors to raise an objection in the executing Court if the decree suffers from any legal or other infirmities besides the lack of inherent jurisdiction in the Court passing the decree respecting the subject-matter of dispute. Shri Y. Imo Singh, however, could not cite any authority to support that proposition. He undertook at the conclusion of the arguments to send some authorities to the Court after bringing the same to the notice of Shri Manisana Singh, but he failed to do so. Therefore, I am left to decide the fate of the appeal on the basis of arguments addressed in open Court.

7. Shri Manisana Singh cited two Supreme Court authorities reported in

AIR 1954 SC 340, Kiran Singh v. Chaman Paswan, and AIR 1962 SC 199, Hira Lal v. Kali Nath, to support his proposition set out above. The two authorities lay down identical principle though in the case of Kiran Singh, AIR 1954 SC 340 the matter was examined in detail in the context of Section 21 of the Code and Section 11 of the Suits Valuation Act. It was held in the case of Hira Lal, AIR 1962 SC 199 that it is well settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, it was added, an objection as to the local jurisdiction of a Court can be waived and that principle has been given a statutory recognition by enactments like Section 21 of the Code.

The validity of a decree can be challenged in execution proceedings, the Supreme Court observed, only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. As a matter of fact, Shri Imo Singh also placed reliance on these two authorities of the Supreme Court but he was unable to indicate how they helped him in establishing the proposition canvassed by him. The underlined word 'only' used by the Supreme Court clinches the issue. The decree can be assailed at the execution stage only on the footing that the Court which passed it lacked inherent jurisdiction either in regard to the subject-matter or over the parties arrayed before it.

8. An objection bearing on the question of jurisdiction can possibly fall in three categories, namely, pecuniary, territorial, or in respect of the subject-matter of the dispute, Section 21 of the Code enacts that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice. Section 11 of the Suits Valuation Act provides that notwithstanding anything contained in Section 578 of the Code (now Section 99) an objection that a

Court which had no jurisdiction over a suit or appeal had exercised it by reason of overvaluation or undervaluation, should not be entertained by an appellate Court, except as provided in the section. These two statutory provisions were thoroughly examined by the Supreme Court in the case of Kiran Singh, AIR 1954 SC 340 and the proposition enunciated was that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings, but where the defect in jurisdiction is of a kind which falls within the saving provisions of Section 21 of the Code or Section 11 of the Suits Valuation Act, it cannot be raised except in the manner and subject to the conditions mentioned therein. By this method of elimination as pointed by the High Court, we are led to the conclusion that at the execution stage only an objection relating to the inherent lack of jurisdiction in the Court passing the decree can be raised and none else. This is exactly what was held by the Supreme Court in the case of Hira Lal, AIR 1962 SC 199 (supra).

9. It is in the light of the aforementioned principles of law that I proceed to determine the validity or otherwise of the decree made by the Registrar. Section 63 of the Act provides that any dispute touching business of a registered society, other than a dispute regarding disciplinary action taken by a society against an employee of the society, or of the liquidator of a society shall be referred to the Registrar for decision if the parties thereto are from among the categories mentioned therein. Shri Y. Imo Singh did not contest the proposition that a dispute between a Society and its members can be referred for arbitration to the Registrar. His only contention was that a dispute relating to immovable property cannot be referred to the Registrar in terms of Section 63.

However, on plain reading of the Section it is not possible to accept that contention. The section very unequivocally provides that any dispute touching business of a registered society shall be referred to the Registrar. In other words if the dispute is touching the business of the Society and it is between the parties listed in the section, there is no alternative but to refer the same to the arbitration of the Registrar as is made clear by the verb 'shall' used in the section. Therefore, the decision whether a dispute can be referred to the Registrar under Section 63 will not depend on the fact whether it relates to money transaction or immovable property, but will rest on the fact whether that dispute is "touching business of the registered Society." A

particular Society may legitimately undertake the business of dealing in immovable properties or running of cinema houses. In reference to such business, a dispute may and can arise between the Society and members thereof respecting immovable properties. If so, then in terms of Section 63 of the Act it would be open to the Society to refer such a dispute to the Registrar.

The section does not provide in terms that the dispute contemplated by it must relate to financial transactions. Therefore, I cannot subscribe to the view taken by the executing Court in the impugned order and which has been urged by Shri Imo Singh in this Court. Hence, I repel the contention that the Registrar could not have given an award in regard to the sub-fishery in dispute. In other words, the Registrar did not lack inherent jurisdiction in giving the award about the sub-fishery.

10. I may also refer in brief to the second point on which the learned Subordinate Judge rested his conclusion that the decree was a nullity. That point is that the submission of the dispute to the Registrar for arbitration had been made not in the name of the Society but in the names of its Chairman and the Secretary. I have gone through the relevant application made to the Registrar for that purpose. It is marked Ext. A/1. It clearly indicates that the dispute referred to the Arbitration was one which had cropped up between the Society on the one hand and the judgment-debtors on the other.

It is correct that the application was made in the names of the Chairman and the Secretary representing the Managing Committee of the Society but in doing so the Society only complied with the requirements of the form No. V prescribed by Rule No. 61 of the Manipur Co-operative Societies Rules, 1959. The form No. V does not envisage that the application to Registrar should be made in the name of the Society. According to that form, the application has to be signed inter alia by the Chairman and the Secretary and this was done. It is also mentioned in the application that the two signatories had been authorised by resolution No. 1 dated 6-3-1968 of the Managing Committee of the Society to make the application. Hence, I can find no fault with that application. Moreover, the manner in which an application is made or a plaint is filed relates to a matter of form and not of substance. If the application or the plaint suffers from any such defect, the aggrieved party must raise an objection before whom the proceedings are initiated or before the appellant or revisional authority. Such an objection cannot be raised in the executing Court for the first time because it does not fall in the

category of an objection indicating lack of inherent jurisdiction by the forum seized of the case.

If the contention of Shri Imo Singh were to prevail, there would be no end to litigation even with the final decision in a suit or proceeding. That is a situation which cannot be contemplated with equanimity. All disputes, legal or factual, barring the one relating to inherent lack of jurisdiction, must be considered as concluded after they have been disposed of by competent authorities and have assumed finality by passage of time. In this view of the legal position, the second point relied upon by the Subordinate Judge in support of his finding is also without substance.

10A. Before I conclude a brief reference may be made to Section 85 of the Code (Act?) and Rule 1 of Order XXIX of the Code. Section 85 declares that every registered Society shall be deemed to be a body corporate and it shall have power, inter alia, to institute and defend suits and other legal proceedings. The section does not enjoin that the suit must of necessity be filed in the name of the Society. Section 100 of the Act authorises the Chief Commissioner to make rules "to carry out the purpose and objects of the Act, and Rule 61 of the Rules formulated by him prescribes the form (No. V) in which reference of a dispute shall be made to the Registrar. That form was adopted by the appellants in making the reference. Therefore, I cannot discern any violation of Section 85 of the Act. Likewise, the provisions of Rule 1 of Order XXIX do not appear to have been infringed. That Rule enacts that in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the Secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. Apparently, the Rule relates to signing and verification of the pleadings and does not embrace the subject in whose name the suit should be brought on behalf of the corporation. Indeed, the marginal note of the Rule "Subscription and verification of pleading" makes the legislative intentment pretty clear and puts the matter beyond the pale of controversy. Moreover, the Rule is permissive and not of mandatory nature. Hence, neither of the two provisions cited by Shri Imo Singh is of any help to him.

11. As a result of the conclusions recorded above, I accept the appeal on holding that the award given by the Registrar is perfectly valid and executable. The order made by the Subordinate Judge is quashed. Taking all the circumstances into consideration, I leave the parties to bear their own costs

in this Court as also in the executing Court respecting the objections filed by the judgment-debtors.

Appeal allowed.

AIR 1970 MANIPUR 90 (V 57 C 28)

R. S. BINDRA, J. C.

Union of India, New Delhi and others, Appellants v. R. K. Binodo Singh and others, Respondents.

Misc. Civil Appeal No. 6 of 1969, D/- 15-7-1970 against Order of Second Sub. J. Manipur, D/- 8-9-1968.

Civil P. C. (1908), S. 80 — Expression "any act purporting to be done by such public officer" — Expression refers to past as well as future acts of public officer — AIR 1961 Guj 85 & AIR 1960 Pat 530, Dissented from.

The expression "any act purporting to be done by such public officer in his official capacity" used in Section 80 can surely include past as well as future acts of the public officer concerned. If the Legislature actually meant Section 80 to cover only past acts of public officers then the relevant words in the section would have read something like: "any act purported to have been done by such public officer in his official capacity". AIR 1961 Guj 85 & AIR 1960 Pat 530, Dissented from. Case law discussed.

(Para 6)
Cases Referred: Chronological Paras

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| (1969) AIR 1969 SC 227 (V 56) — 1969-1 SCR 430, Amalgamated Electricity Co. v. Municipal Committee | 3, 8 |
| (1961) AIR 1961 Guj 85 (V 48), Bai Jilekhabai v. Competent Officer | 7 |
| (1960) AIR 1960 SC 1309 (V 47), State of Madras v. C. P. Agencies | 3, 4 |
| (1960) AIR 1960 Pat 530 (V 47) — 1960 BLJR 432, State of Bihar v. Raghunandan Singh | 3, 7 |
| (1959) AIR 1959 AH 675 (V 46) — 1959 All LJ 704, Smt. Abida Begum v. Rent Control and Eviction Officer | 3 |
| (1957) AIR 1957 Andh Pra 675 (V 44) — ILR (1956) Andh 114, State of Madras v. Chitturi Venkata | 3, 7 |
| (1955) AIR 1955 Madh Bha 75 (V 42) — Madh B LJ 1955 HCR 339, Babulal v. State | 7 |
| (1946) AIR 1946 Lah 247 (V 33) — ILR (1947) Lah 22 (SB), Subedar Shingara Singh v. Brigadier Callaghan | 7 |
| (1927) AIR 1927 PC 176 (V 14) — 54 Ind App 338, Bhagchand v. Secy. of State for India | 3, 4 |
| N. Ibotombi Singh, Govt. Advocate, for Appellants; Y. Imo Singh, for Respondents. | |

JUDGMENT:— This Misc. Civil Appeal by the Union of India, the Chief Commissioner, Manipur, the Deputy Commissioner, Manipur, and the Sub-Deputy Collector, Imphal West, is directed against the order dated 8-9-1969 by which the Subordinate Judge, Manipur, issued temporary injunction restraining them, at the instance of the plaintiffs-respondents of Suit No. 48 of 1969, from executing against the latter the orders dated 4-5-1959 (passed by the Deputy Commissioner) and 4-8-1969 (made by the Chief Commissioner), or taking action pursuant to notices dated 19-8-1969 issued by the Sub-deputy Collector, Imphal West, calling upon them (Plaintiffs-respondents) to vacate the plots in dispute by dismantling the buildings standing thereon.

2. The facts of the suit brought by the plaintiffs, briefly summarised, are that they had constructed some buildings on plots bearing C. S. Dag Nos. 758 to 763, measuring .15 acres in all, as lessees and had been in possession thereof for a long time. The Deputy Commissioner, Manipur, made an order on 4-5-1959 directing that the plaintiffs should be evicted from the possession of those plots by dismantling the buildings constructed by them. The plaintiffs having felt aggrieved challenged the validity of that order by filing Revenue Appeal No. 26 of 1959 in the Court of the Chief Commissioner. That appeal was dismissed on 4-8-1969, almost 10 years after it was instituted. After the dismissal of that appeal, the Sub-deputy Collector issued notices to the plaintiffs on 19-8-1969 intimating them that they shall be evicted from the plots on 25th or 26th or 28th or 30th of August 1969. It appears that a part of the buildings was dismantled by the plaintiffs after the receipt of notices dated 19th August and the land underneath vacated. However, apprehending that part dismantling of the buildings and partial surrender of the land would not meet the requirements of the notices dated 19-8-1969, the plaintiffs filed a suit on 23-8-1969, claiming the relief of permanent injunction restraining the defendants from executing the orders dated 4-5-1959 and 4-8-1969 or giving effect to the notices dated 19-8-1969. Along with the plaint of the suit, the plaintiffs filed an application under Rules 1, 2 and 3 of Order XXXIX, Civil Procedure Code, hereinafter called the Code, claiming temporary injunction until the disposal of the suit. That prayer having been allowed by the trial Court by order dated 8-9-1969, the defendants have come up in appeal to assail the validity thereof.

3. The fate of this appeal will depend on reply to the question whether the suit of the nature instituted by the plaintiffs is maintainable without first giving notice

enjoined by Section 80 of the Code. That section provides in substance that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered to, or left at the office of, the Government or the public officer. The dispute between the parties' counsel centred around the true meaning of the expression "any act" used in Section 80. Shri Imo Singh urged for the plaintiffs-respondents that the word "act" of that expression means and connotes a past act and not an act threatened to be done but not yet done. Shri Ibotombi Singh, representing the defendants-appellants, submitted, on the other hand, that the terms of Section 80 are of imperative nature and admit of no exceptions or implications. In other words, his contention was that the Section takes in acts both past and future. Shri Imo Singh placed reliance on AIR 1960 Pat 530, *State of Bihar v. Raghunandan Singh*, in support of his contention, whereas Shri Ibotombi Singh cited AIR 1927 PC 176, *Bhagchand v. Secy. of States for India*, AIR 1960 SC 1309, *State of Madras v. C. P. Agencies*, AIR 1957 Andh Pra 675, *State of Madras v. Chitturi Venkata*, and AIR 1959 All 675, *Smt. Abida Begum v. Rent Control and Eviction Officer*, to shore up his submission. He also invited the attention of this Court to the latest authority of the Supreme Court bearing on the scope of Section 80 which is reported in AIR 1969 SC 227, *Amalgamated Electricity Co. v. Municipal Committee*. After examining the rival contentions in the light of the authorities relied upon in support thereof, I have reached the conclusion that the stand taken by Shri Ibotombi Singh appears to be more sound and in accord with the letter and spirit of Section 80 of the Code and so it must prevail.

4. The Privy Council held in the case of *Bhagchand*, AIR 1927 PC 176 (*supra*) that Section 80 is to be strictly complied with and that it is applicable to all forms of action and all kinds of relief including that of injunction. This view of the Privy Council was approved by the Supreme Court in the case reported in AIR 1960 SC 1309. The Supreme Court held therein that Section 80 is express, explicit and mandatory and admits of no implications or exceptions, and that object of the Section is manifestly to give the Government or the public officer concerned sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. It was observed further that in order to enable the Gov-

ernment or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for. It is apparent that it is in the context of this object of Section 80 and on the plain reading of its phraseology that the expression "any act" has to be interpreted.

5. Firstly, I would like to discuss the merits of the suit on the basis of interpretation of the expression "any act" as canvassed by Shri Imo Singh. I have reproduced above the salient allegations made in the plaint and the nature of the relief sought. The plaintiffs have assailed the validity of the orders dated 4-5-1959 and 4-8-1969 and also prayed that the defendants be restrained from executing those orders. Both the orders, it is obvious, had been made before the suit was filed on 23-8-1969. The notices which were issued by the Sub-deputy Collector were in compliance with the direction given in the order made by the Deputy Commissioner on 4-5-1959 which was subsequently confirmed by the Chief Commissioner on 4-8-1969. Therefore, on the pleadings of the plaintiffs themselves it is manifest that it is not a threatened act in future mentioned in the notices dated 19-8-1969 which alone is the subject of dispute, but two previous orders of which that threatened act, if I may so, is the offspring which are really in question. The facts of the instant case, I believe are on all fours identical with the case of *Bhagchand* which the Privy Council happened to decide in 1927. I reproduce a part of the first para of the Privy Council's judgment to illustrate the point. That part of the para runs as under:

"In this action forty-eight plaintiffs joined in suing the Secretary of State for India and the Collector and District Magistrate of Nasik for two kinds of relief: (a) a declaration that certain official notices and orders were ultra vires and invalid, and (b) an injunction permanently restraining all executive action thereunder. Unless the right to the first relief was made out, the prayer for the second necessarily failed. The suit was begun less than two months after notice of the intention to bring it had been given to the respondents."

Likewise, in our case unless the order made by the Deputy Commissioner on 4-5-1959, as confirmed by the Chief Commissioner on 4-8-1969, is declared invalid, the notices issued by the Sub-deputy Collector on 19-8-1969 will hold good. Therefore, assuming that the expression "any act" relates to acts done in past and does not embrace the acts threatened to be done in future, the plaint filed by the plaintiffs shall have to be rejected for

want of notice under Section 80 of the Code.

6. However, since elaborate arguments had been addressed at the bar respecting the true import of the expression "any act" used in Section 80, I deem it necessary to express my opinion as to which of the two rival contentions is sound in law. In the case of Bhagchand the Privy Council repelled the contention that any additional words should or can be read into Section 80 to find out its exact scope. The precise point that arose for determination before the Privy Council was whether Section 80 includes within its ambit suits for injunction. The Privy Council gave the reply in the affirmative because on its plain reading no variety of suits were excluded. The Privy Council emphatically observed that the section "is applicable to all forms of action and to all kinds of relief". The Privy Council appears to be of the opinion that if any exceptions were contemplated by the Legislature some suitable words would have been used by it to give practical shape to that intention. As an instance of such an exception, I may cite the proviso to Section 233 of the Ajmer Merwara Municipality Regulation. The main body of that section respecting suits against public officials is an exact reproduction of Section 80 of the Code. The proviso to the section enacts that nothing in the section shall apply to any suit instituted under Section 54 of the Specific Relief Act, 1877. It looks reasonable to assume that if the Central Legislature meant to graft any exception of the nature contained in the proviso to Section 233 of the Municipality Regulation just mentioned, to Section 80 of the Code, it would have done so quite easily. Therefore, according to the accepted principles of interpretation of statutes there is no justification for reading more than what is evident from the plain words used in Section 80 of the Code. The expression "any act purporting to be done by such public officer in his official capacity" used in Section 80 can surely include past as well as future acts of the public officer concerned. If the Legislature actually meant Section 80 to cover only past acts of public officers then the relevant words in the section would have read something like: "any act purported to have been done by such public officer in his official capacity." Therefore, the contention canvassed on behalf of the plaintiffs-respondents looks to be without substance and so has to be negated.

7. There appears to be some judicial conflict on the precise import of the word "act" used in Section 80. It was held in the case of Bai Jilekhabai v. Competent Officer, AIR 1961 Guj 85, that the words "purporting to be done by such public officer" in Section 80 of the Code refer to

some act already done by the public officer. Likewise, it was held by the Patna High Court in the case of AIR 1960 Pat 530, that the true meaning and the correct interpretation of the words "in respect of any act purporting to be done" occurring in Section 80 is that they cover only a past act and do not include a future act. It was stated further that S. 80, as such, comes into play only when the suit begun is in respect of past acts, completed, or begun but incomplete, and that it does not apply to future or threatened acts. It may be mentioned that whereas the Gujarat High Court relied upon the Privy Council case of Bhagchand in support of its conclusion reproduced above, the Patna High Court distinguished that case on facts and so obviously it did not draw any help therefrom to strengthen its own view. The Lahore High Court, however, relied upon the same Privy Council decision in support of the view that Section 80 applies to suits which relate to mandatory injunctions in respect of the acts which have already been performed as well as suits in which prohibitory injunctions in respect of threatened acts are asked for, vide AIR 1946 Lah 247, Subedar Shingara Singh v. Brigadier Callaghan. The reason given by the Lahore High Court in support of its view is that "since protection was by statute intended by the Legislature to be given to the Crown or its public officers to make amends for the act if they would care so to do or for taking legal advice before deciding their course of action in regard to an action which had already been taken or to a contemplated action, it could not be taken away simply because a plaintiff considered that he would suffer an irreparable injury or because he chose to add a prayer for an injunction in his suit." This view of the Lahore High Court was shared by the High Court of Madhya Bharat in the case of Babulal v. State, AIR 1955 Madh Bha 75, and that of Andhra Pradesh in the case of AIR 1957 Andh Pra 675. I am inclined to agree, if I may say so with respect, with the view taken by the High Courts of Lahore, Madhya Bharat and Andhra Pradesh. That view has the advantage that it is not in conflict with the plain wording of the section, and, in addition, it serves the object with which Section 80 was enacted inasmuch as the Government and public officers can get an opportunity to re-assess the situation and settle the dispute with the potential plaintiff, if they so desire, before they are dragged to the Court, and it also draws support from the Privy Council decision in the case of Bhagchand. It can bear repetition to state that the Privy Council held in that case that Section 80 is to be strictly complied with and that it is applicable to all forms of action and all

kinds of relief. These words of the Privy Council are of such wide amplitude as to encompass suits brought against public officers to restrain them from executing the threatened acts. The public officers, it looks highly desirable, must be afforded an opportunity to examine the advisability of dispute being taken to a Court of law in respect of acts they have got to do as in respect of acts already done by them. Therefore, the view expressed by the Lahore, Madhya Bharat and Andhra Pradesh High Courts looks to be more practical and in accord with the phraseology as well as the object of Section 80 and so has to be preferred.

8. Before parting with the case I would like to point out that Section 80 refers to, firstly, suits against the Government, and, in the second place, to suits against the public officers. In terms of the section, no suit against the Government can be instituted until the notice of the nature and the duration mentioned therein is given. In other words, if the suit is to be filed against the Government the notice is a sine qua non, irrespective of the fact what is the nature of the suit. However, if the suit has to be filed against a public officer then one of the essential conditions is that the suit should be "in respect of any act purporting to be done by such public officer in his official capacity." Since in the present suit the Union of India is a party, therefore the suit against it is altogether incompetent because of want of notice under Section 80. In this respect I invite attention to the latest pronouncement of the Supreme Court in the case of Amalgamated Electricity Co., AIR 1969 SC 227 (supra) wherein it was held that so far as suits against the Government are concerned, they cannot be validly instituted without giving a notice as required by Section 80 of the Code.

9. If the suit instituted by the plaintiffs-respondents cannot proceed, as held above, in the absence of a notice under Section 80 of the Code, the trial Court could not have accepted their prayer for temporary injunction because one of the essential conditions for granting that relief is that the plaintiff should have a prima facie good case. Since the suit instituted by the plaintiffs cannot proceed for the legal lacuna mentioned, it cannot be contended that the plaintiffs have a prima facie good case for trial.

10. In the result, I allow the appeal and on setting aside the order dated 8-9-1969 of the trial Court I reject the application for temporary injunction made by the plaintiffs. The appellants shall also get the costs of this appeal. Advocate's fee Rs. 32/-.

Appeal allowed.

AIR 1970 MANIPUR 93 (V 57 C 29)

R. S. BINDRA, J. C.

R. K. Sanahal Singh and another, Appellants v. Minor R. K. Priyakumar Singh and others, Respondents.

Second Appeal No. 7 of 1968, D/- 3-7-1970 against decree of Addl. Dist. J. Manipur, D/- 10-6-1968.

Limitation Act (1963), Arts. 64 and 65 — Possession of co-owners — Ouster of co-heir by adverse possession — Proof.

The test to determine if there is ouster of one co-owner by another is to see if the co-owner in possession has openly and unequivocally and to the knowledge of the other owners denied the title of the latter to the property. Until the ouster in that sense is established the co-owner is in possession on behalf of all the co-owners. The burden of making out ouster is on the person claiming lawful title of a co-heir by adverse possession. AIR 1957 SC 314 & AIR 1956 SC 548, Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1957) AIR 1957 SC 314 (V 44) =
1957 SCR 195, P. Lakshmi Reddy
v. L. Lakshmi Reddy 7
(1956) AIR 1956 SC 548 (V 43) =
Mohd. Baqar v. Naim-Un-Nisa 7
Bibi

B. B. Sen, for Appellant; T. Bhubon Singh, for Respondent No. 1.

JUDGMENT:— This second appeal by the plaintiffs is directed against the judgment and decree dated 10-6-1968 by which the Additional District Judge Shri P. N. Roy dismissed with costs their first appeal arising out of the trial Court's decree, dated 9th of November 1966, dismissing with costs their suit for possession by partition of one half share in the ingkhol (homestead) bearing patta No. 85/51-I.W.

2. The following pedigree table will help in appreciating the facts of the case: (For pedigree table see page 94)

According to the allegations set out in the plaint the ingkhol in dispute was the ownership of Angousana Singh and on his death it was inherited equally by his two sons Atonsana Singh and Sanatomba Singh. Since Sanatomba Singh happened to be minor at the time of the death of his father, the ingkhol was mutated solely in the name of Atonsana Singh in the year 1908-09 subject, it was alleged, to the understanding that Sanatomba Singh's name shall also be incorporated in the revenue records no sooner he attained majority. However, before that understanding could take practical shape, the two brothers (Atonsana Singh and Sanatomba Singh) died. It was further alleged that firstly Sanatomba Singh and after his death his two sons, the plaintiffs, enjoyed joint pos-

R. K. Angousana Singh

R. K. Atonsana Singh

R. K. Sanatomba Singh

R. K. Priyakumar Singh
(Defdt. No. 1)R. K. Sanahal Singh
(Pltff. No. 1)R. K. Manisana Singh
(Pltff. No. 2)

session of the ingkhol along with Atonsana Singh and Priyakumar Singh. The plaintiffs as well as their father's possession, it was added, was confined to the northern one half of the ingkhol where they used to grow vegetables, while the defendant No. 1 and his father had built a house in the southern half of the ingkhol. This arrangement by which the descendants of Angousana Singh had been jointly owning and possessing the ingkhol was disturbed by Priyakumar Singh after he managed to secure the mutation of the ingkhol in his own name in the year 1960. The plaintiffs challenged the validity of that mutation by appropriate proceedings before the Revenue Authorities but they failed to get the same reversed with the consequence that they were forced to file the suit resulting in the instant second appeal.

3. Another fact mentioned in the plaint was that the plaintiff's father Sanatomba Singh had purchased another ingkhol, bearing patta No. 85/52-1 W, with his own money on the adjacent north of the ingkhol in dispute. This fact was stated in the plaint probably to forestall the plea of defendant No. 1 that ingkhol No. 85/52 had been inherited by the family from Angousana Singh.

4. Priyakumar Singh alone resisted the suit, the other defendants having been proceeded against ex parte. He admitted the correctness of the pedigree table given above. In substance, his defence was that the two ingkhols covered by patta Nos. 85/51 and 85/52 were the ownership of their grand-father Angousana Singh, that on the death of the latter the ingkhol under patta No. 85/51 was inherited by his father Atonsana Singh while the other ingkhol was inherited by his uncle Sanatomba Singh, that right from the date of the death of Angousana Singh the plaintiffs or their father had never enjoyed the possession of the ingkhol in dispute, and that as such their suit was barred by time. In the alternative he pleaded that he had acquired ownership of the entire ingkhol by prescriptive title. Quite a few other technical and legal objections were also adopted by the defendant No. 1.

5. The trial Court settled the following issues between the parties:

- (1) Whether R. K. Sanatomba Singh, the father of the plaintiffs, and R. K. Atonsana Singh had jointly inherit-

ed the ingkhol under patta No. 85/51 I. W. T., each having equal interest in it, from their deceased father R. K. Angousana Singh?

- (2) Whether the plaintiffs and the defendant No. 1 are the joint owners of the suit land under patta No. 85/51 by right of inheritance? And have they been continuing to possess the suit land jointly, the defendant No. 1 by constructing a house in the southern portion and the plaintiff by growing vegetables, etc. in the northern portion of the suit land?
- (3) Whether the ingkhol under patta 85/52 I W T. was the heritable share of R. K. Sanatomba Singh, or whether he got the same by purchase which was the heritable share of R. K. Angousana Singh?
- (4) Was R. K. Sanatomba Singh a minor in 1908-1909, and as such the entire land under patta No. 85/51 was recorded in the name of the elder brother R. K. Atonsana Singh above?
- (5) Is the suit maintainable in the present form?
- (6) Is the suit bad for defect of parties?
- (7) Is the suit barred by limitation?
- (8) Are the plaintiffs entitled to the reliefs as claimed?

Issue No. 1 was decided by the trial Court against the plaintiffs by a process of reasoning which is not quite intelligible. It was held that the ingkhol was owned by Angousana Singh, it had been inherited equally by his two sons, that since Sanatomba Singh permitted the ingkhol to be entered in the name of Atonsana Singh he must be deemed to have acquiesced in the complete ownership of the latter and also to have waived his own right therein, that as a consequence of acquiescence and waiver of the two brothers Atonsana Singh and Sanatomba Singh had not jointly inherited the ingkhol, and that as such the plaintiff had no right therein. The finding given on issue No. 2 was that the plaintiffs had never enjoyed the joint possession of the ingkhol and so their suit merited dismissal. The contention of defendant No. 1 that the ingkhol bearing patta No. 85/52 was also the ownership of Angousana Singh his grandfather, was negatived while deciding issue No. 3, the finding being that the ingkhol had been purchased exclusively by the father of the plaintiffs in the name of their mother.

The issue was consequently decided against the defendant No. 1. Issues Nos. 4 and 7 were found against the plaintiffs while issues Nos. 5 and 7 against defendant No. 1. In the result the suit of the plaintiffs was dismissed with costs.

6. The learned Additional District Judge expressed the opinion, while dismissing of the appeal, that the only question that arose for decision before him was, to quote his own words, "whether the plaintiffs or their father were in joint possession with the defendant No. 1 or his father since the year 1908" — vide para 11 of the judgment. In the preceding para 10 he happened to observe that "The plaintiffs could get their shares in the suit land if they were in possession over the suit land since the year 1908-1909." Shri B. B. Sen, representing the plaintiffs-appellants, vehemently criticised the approach of the learned Additional District Judge to the entire case. He submitted that since it had been held by the trial Court that the ingkhol in question had been inherited by Atonsana Singh and Sanatomba Singh from their father Angousana Singh, a finding which was not challenged by defendant No. 1, the learned Additional District Judge should have considered Atonsana Singh and Sanatomba Singh as tenants-in-common of the ingkhol and presumed, as required by well settled principles of law, that they were in joint possession of the land although Atonsana Singh may alone have been in occupation thereof, until, if at all, there had been ouster of Sanatomba Singh from the enjoyment of ingkhol either at the hands of his brother Atonsana Singh or the latter's son Priyakumar Singh. Shri Sen submitted further, on the basis of the premises just stated, that the fate of the appeal before the Additional District Judge rested not on the point whether the plaintiffs' suit was within time but on the plea raised by the contesting defendant that he had acquired ownership of one half share in the ingkhol, which once belonged to the plaintiffs' father Sanatomba Singh, by adverse possession. Shri T. Bhubon Singh, appearing for Priyakumar Singh, urged equally forcefully, on the other hand, that before the plaintiffs could succeed in the case it was obligatory on them to establish that they had come to the Court within time and as such the learned Additional District Judge had rightly posed the question for decision as mentioned in paras 10 and 11 of his judgment. I think the submissions made by Shri Sen appear to be sound in law and so must prevail. It may be appropriately mentioned that in the short concluding para No. 20 of his judgment the learned Additional District Judge took note of and then made a passing reference to the argument raised before him on behalf of the plaintiffs that the possession of one co-sharer

is presumed in law to be the possession on behalf of all the co-sharers. It was admitted before him that the parties were governed by Dayabhaga system of Hindu Law in the matters of succession and inheritance. On this latter basis the Additional District Judge held, while dealing with that argument, that on the death of Angousana Singh his two sons would be merely co-owners of the land in dispute, that the plaintiffs had not been in possession of that land for a long time, and that consequently "even if they had any right or title in the disputed land it has been extinguished by lapse of time."

7. The principles bearing on the nature of possession of one co-owner vis-a-vis the other co-owners and when the possession of one co-owner becomes adverse to the other co-owners were clearly enunciated by the Supreme Court in the case of P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314. It was held in that case that "it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties", and that "Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out". The Supreme Court emphasised further that "the possession of one co-heir is considered in law, as possession of all the co-heirs", and that "when one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title." It was further observed that "The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heirs' title." Another two propositions laid down by the Supreme Court in the same case were: (1) "It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them, to the knowledge of the other so as to constitute ouster", and (2) that "The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession." The Supreme Court had held earlier in the case of Mohd. Baqar v. Naim-un-Nisa Bibi, AIR 1956 SC 548, that since "under the law possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period." It would follow from these principles that the test to determine if there is ouster of one co-owner by another is to see if the co-owner in possession has openly and unequivocally

and to the knowledge of the other owners denied the title of the latter to the property. Until the ouster in that sense is established, the co-owner in possession must be presumed to be in possession on behalf of all the co-owners. Therefore, the two Courts below were not justified in the present case in deciding the fate of the suit only on the footing that it was barred by time. After the Courts had found that the plaintiffs' father and his brother Atonsana Singh had inherited the ingkhol in dispute in equal shares on the demise of their father Angousana Singh and that the plaintiffs had inherited the estate of their father Sanatomba Singh, they were bound in law to presume the possession of the plaintiffs over the ingkhol in virtue of the fact that the physical possession was admittedly firstly with Atonsana Singh and after his death with the defendant No. 1 Priyakumar Singh each of whom was a co-owner in the ingkhol. In that context the proper course for the Courts to adopt was to find out if either the plaintiffs' father or after his death the plaintiffs had been ousted from the enjoyment of the property and that ouster had lasted for 12 years. This obviously has not been done. It will be noticed that though defendant No. 1 had adopted the plea of prescriptive title, the trial Court had not cared to formulate any issue in that respect, and that possibly accounts for considerable prejudice caused to the plaintiffs.

8. The learned counsel for the parties agreed at the bar that this Court should set aside the judgment and decree of the Additional District Judge and remand the case to him for fresh decision in the light of the observations made above. However, I have decided to adopt a somewhat different course. I think a specific issue bearing on the plea of adverse possession should be settled between the parties and the case remanded to the trial Court for fresh decision after allowing the parties to lead evidence on that issue. Hence, I allow the appeal, set aside the judgments and decrees of the two Courts below, and remand the case to the trial Court on framing the following additional issue, bearing No. 7A:

Whether the defendant No. 1 had acquired ownership of the land pertaining to ingkhol under patta No. 85/51-L. W. by adverse possession lasting for the statutory period? Onus on defendant No. 1. The trial Court will give reasonable opportunity to the plaintiffs and defendant No. 1 for leading evidence in support and rebuttal of this additional issue and then decide the suit anew after taking the entire evidence into consideration. I leave the parties to bear their own costs in this Court as also in the Court of the Additional District Judge.

Order accordingly.

END

purposes, viz., relief of the poor, education and medical relief. When a purpose appears to fall within one of the first three above categories, the court will assume it to be for the benefit of the community and charitable unless the contrary is shown. In the case of new or unfamiliar categories of purposes which fall under the 4th category viz., the advancement of any other object of general public utility, the question whether or not the purpose is for the benefit of the community has to be considered by the court as to whether it is for a charitable purpose. In regard to the residuary head of charitable purpose, the Parliament has restricted the scope of that head by providing that in order to fall under the residuary head of 'general public utility' it should not involve the carrying on of any activity for profit. A business undertaking is an activity for profit. Where a business undertaking is held under a trust and the object of the trust provides for carrying on of the business undertaking, it involves the carrying on of any activity for profit and therefore ceases to be a charitable purpose under the Act. The Parliament has deliberately added the restrictive words 'not involving the carrying on of any activity for profit' which qualify the residuary head of charitable purpose and effect has to be given to the same. The restrictive clause does not apply to trusts created for the purpose of relief of the poor, education and medical relief. Where the trust is for the first three purposes, income derived from a business undertaking held under trust is exempt from taxation; but where a trust is for an object of general public utility and a business undertaking is held under the trust, it involves the carrying on of a commercial activity for profit and such a case ceases to be trust for charitable purposes under the Act. When Sections 11 and Section 2 (15) of the Act are so construed, there ceases to be any conflict between sub-sections (1) (a) and (4) of Section 11 of the Act. We are also unable to accede to the argument of Sri Kolsh that the word 'profit' in Section 2 (15) has to be understood as 'private profit'. If that was the intention, the Parliament need not have made any changes in the definition of 'charitable purpose'. As the old definition stood, the Judicial Committee of the Privy Council had held that the words 'any other object of general public utility' exclude the object of private gain, such as an undertaking for commercial profit. We have to give effect to the deliberate words used by the Parliament in Section 2 (15).

17. In the instant case, the main object of the Trust is supplying the Kannada speaking people with an organ of educated public opinion. The statement of income and expenditure of the Trust shows that the income of the Trust is largely from the newspaper undertaking. Carrying out the Trust necessarily involves the commercial activity

of running a newspaper organisation which in our opinion is not a charitable purpose as defined under the Act.

18. It was pointed out by the learned counsel for the assessee that the object of the Trust was 'education'. Reliance was placed on Clause (2) of the Trust deed which states that the object of the Trust shall be to educate the people of India in general and of Karnataka in particular.

19. In re: The Trustees of the Tribune, (1939) 7 ITR 415 = (AIR 1939 PC 208), the Judicial Committee of the Privy Council rejected the contention that the object of the trust was for the purpose of education. We are unable to see as to how the instant case is different from the Tribune Trust case where the Judicial Committee was of the opinion that the object of the trust may fairly be described as the object of supplying the province with an organ of educated public opinion. The trust deed in the instant case provides for its object the supplying of an organ of educated public opinion to the Kannada speaking people. It was contended by Sri Naidu the learned counsel for the Commissioner, that the assessee is not entitled to raise this question as no such question was referred for our opinion. It is seen from the statement of the case, that the assessee sought the reference of the question whether the Tribunal erred in coming to the conclusion that the main object of the trust could not be put in the category of 'education'. The Tribunal while referring the question set out earlier was of the opinion, that it would cover all aspects of disputes raised by both the parties. In our opinion, the assessee is entitled to urge in the reference that the object of the Trust is 'education'. Though newspapers have an educative value, advancement of education results only indirectly. Advancement of education resulting indirectly, in our opinion, does not come under the head of 'education'.

20. For the above reasons, our answer to the question of law referred to is in the negative and in favour of the Department. In the circumstances of the case, there will be no order as to costs.

Answer in negative.

AIR 1970 MYSORE 289 (V 57 C 69)

M. SADASIVAYYA, C. J. AND
D. M. CHANDRASHEKHAR, J.

M/s. A. K. Appanna Setty and Sons and others, Petitioners v. The State of Mysore, by its Chief Secretary, Govt. of Mysore Vidhana Soudha, Vidhana Veedhi, Bangalore, 1 and others, Respondents.

Writ Petns. Nos. 7342 to 7367, 7528 of 1969 and 468 of 1970, D/- 1-4-1970.

EN/EN/C201/70/BNP/D

(A) Essential Commodities Act (1955), Section 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order (1964) — Condition No. 2 (a) in Form B of the wholesale licence, is invalid in so far as it prohibits a wholesale dealer from purchasing foodgrains at places other than those specified in such licence for carrying on business. (Para 22)

(B) Constitution of India, Art. 19 (1) (g) and (6) — Right to carry on business — Condition No. 2 (a) in Form-B of the wholesale licence, is invalid in so far as it prohibits a wholesale dealer from purchasing foodgrains at places other than those specified in such licence for carrying on business. (Para 22)

(C) Essential Commodities Act (1955), Section 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order (1964) — Mysore Foodgrains (Retail) Dealers Licensing Order 1964 — No criteria for determining what transactions are speculative — Condition No. 7 (i) in the licence is void on account of vagueness and uncertainty. (Para 27)

(D) Constitution of India, Art. 14 — Equality before law — Condition 7 of Mysore Foodgrains Wholesale Licence and retail Licence — No criteria for determining what transactions are speculative — Condition No. 7 (i) in the licence is void on account of vagueness and uncertainty. (Para 27)

(E) Essential Commodities Act (1955), Section 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order (1964) — Condition No. 9 in Licence of Form B is reasonable. (Para 34)

Having regard to the necessity for preventing hoarding and cornering of foodgrains and sending them outside the State, the prohibition against a wholesale dealer selling foodgrains to another wholesale dealer in the State except under a permit, cannot be said to be an unreasonable restriction. (Para 34)

(F) Constitution of India, Art. 19 (1) (g) and (6) — Right to carry on business — Condition No. 9 in Licence as prescribed by Mysore Foodgrains Licensing Order, 1964, is reasonable. (Para 34)

(G) Essential Commodities Act (1955), Section 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order (1964) — Mysore Foodgrains (Retail) Dealers Licensing Order 1964 — The restrictions imposed by Conditions Nos. 3, 4 and 10, of the wholesale and retail licences, are not unreasonable restrictions. (Para 44)

Unless dealers maintain daily accounts of stocks and strike the closing stock balance each day, issue receipts or invoices and submit periodical returns, proper enforcement of the provisions of the Licensing Orders and conditions of the licences, would not be possible. (Para 44)

(H) Constitution of India, Art. 19 (1) (g) and (6) — Right to carry on business — Conditions 3, 4 and 10 of wholesale and re-

tail licences under Licensing Orders, 1964 of Mysore are not unreasonable restrictions. (Para 44)

(I) Essential Commodities Act (1955), Section 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order (1964) — Mysore Foodgrains (Retail) Dealers Licensing Order, 1964 — Clause 11 (d) violates Article 19 of Constitution. (Para 55)

Sub-clause (d) of Clause 11 of both the Licensing Orders, which empowers search and seizure even without the safeguard that the Enforcement Officer should have reason to believe or suspect contravention of the provisions of the Licensing Orders or the conditions of licence, cannot but be regarded as being arbitrary, unguided and uncontrolled and violative of the fundamental rights of dealers under Article 19 of the Constitution to carry on trade and to hold property. (Para 55)

(J) Constitution of India, Art. 19 (1) (g) and (6) — Clause 11 (d) of Licensing Orders of Mysore, 1964 are arbitrary, unguided and uncontrolled and violative of Article 19. (Para 55)

(K) Essential Commodities Act (1955), Section 3 — Mysore Foodgrains (Wholesale) Dealers Licensing Order, 1964 — Mysore Foodgrains (Retail) Dealers Licensing Order 1964 — The power of search under sub-clause (b) of Clause 11 of both these Orders, is valid. (Para 55)

(L) Constitution of India, Art. 19 (1) (g) and (6) — Power of search under Cl. 11 (b) of Licensing Orders of Mysore of 1964 is valid. (Para 55)

K. M. Jagadeesa Sastry, for Petitioners; D. S. Hulgur, High Court Govt. Pleader (for Nos. 1 and 3 in all the W. Ps. Nos. and B. S. Keshva Iyengar (for No. 3 in all W. Ps. Nos.), for Respondents.

ORDER: The petitioners are wholesale and/or retail dealers in foodgrains in Mysore State. In these petitions under Article 226 of the Constitution, they have assailed the constitutionality of certain provisions of—

(i) The Mysore Foodgrains (Wholesale) Dealers Licensing Order, 1964 (hereinafter referred to as the Wholesale Licensing Order); and

(ii) The Mysore Foodgrains (Retail) Dealers Licensing Order, 1964 (hereinafter referred to as the Retail Licensing Order).

2. These two Orders were made by the Government of Mysore in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the Act), and delegated by the Central Government to the State Government under Section 5 of the Act.

3. Before dealing with the contentions of the petitioners, it is useful to set out the salient features of these two orders.

4. Sub-clause (e) of Cl. 2 of the wholesale Licensing Order defines the term 'Whole-

sale dealer' as a person engaged in the business of purchase, sale or storage for sale, of any one of the foodgrains in quantity of ten quintals or more at any one time or in quantity of twenty-five quintals or more, of all foodgrains taken together. Persons engaged in the business of sale of foodgrains to consumers only, the Food Corporation of India and Commission Agents who do not hold stocks, are excluded from this definition of wholesale dealer.

5. Sub-clause (e) of clause 2 of the Retail Licencing Order defines the term 'Retail dealer' as a person engaged in the business of sale of foodgrains to consumers only and who keeps for such sale at any one time ten quintals or more of any one foodgrains or twenty-five quintals or more of all foodgrains taken together.

6. Clause 3 of each of these two Orders, provides that no person shall carry on business as a wholesale or retail dealer respectively except under and in accordance with the terms and conditions of a licence issued in this behalf by the licencing authority.

7. Clause 4 of each of these Orders, provides that every application for a licence or renewal thereof, shall be made in the prescribed form i. e., Form-A, and that every licence issued or renewed shall be in the prescribed form i. e. Form-B.

8. Clause 8 of each of these Orders provides that no holder of a licence shall contravene any of the terms or conditions of the licence and that if such holder or his agent or servant or any other person acting on his behalf, contravenes the said terms or conditions, then, without prejudice to any other action that may be taken against him, his licence may be cancelled or suspended by order in writing of the licencing authority.

9. Clause 11 of each of these Orders empowers calling the production of books of accounts and documents, for entry, inspection, search and seizure. We shall set out later that clause.

10. Form-B in Schedule II to each of these two Orders, contains the terms and conditions subject to which a licence is issued under the respective Order and many of these terms and conditions are common in both categories of licences.

11. Though several contentions had been raised in the petitioners' affidavits in support of their petitions, at the stage of hearing of these petitions, Mr. K. N. Jagadisha Sastry, learned counsel for the petitioners, advanced only the following contentions:

(i) Exclusion of dealers whose transactions or stocks are below certain minimum quantity, from the purview of these two Orders, is discriminatory and violative of Article 14 of the Constitution.

(ii) Conditions No. 2 (a) of the Wholesale Licence, imposes an unreasonable restriction

on the freedom of dealers to purchase foodgrains;

(iii) Condition No. 7 of both Wholesale and Retail Licences purporting to prohibit transactions in a speculative manner, is vague and uncertain and imposes an unreasonable restriction on the freedom of trade;

(iv) The prohibition under Condition No. 9, of the Wholesale Licence, against sale of foodgrains to a person other than a retail dealer, imposes unreasonable restriction on the freedom of trade of wholesale dealers;

(v) Conditions Nos. 3, 4 and 10 of Wholesale as well as retail licences, which require licensee to maintain stock registers of daily accounts and to submit returns and to issue receipts and invoices, impose needless, excessive and unreasonable restrictions; and

(vi) Clause 11 of both the Orders, confers unguided, uncontrolled and arbitrary powers of search and seizure and hence that Clause is unconstitutional.

We shall now deal with these contentions.

12. Mr. Jagadisha Sastry submitted that dealers who keep for sale, at any one time, less than ten quintals of any one foodgrain and less than twenty-five quintals of all foodgrains taken together, do not come within the definition of either 'Wholesale Dealer' or 'Retail Dealer', and are totally outside the purview of these two Licencing Orders. Mr. Jagadisha Sastry argued that the classification of dealers, based on the quantity of foodgrains held by them at any one particular point of time, has no rational relation to the object sought to be achieved by these two Licencing Orders, and hence these two Orders are discriminatory and violative of Article 14 of the Constitution. Elaborating this argument, Mr. Jagadisha Sastry said that it is possible that a dealer who keeps less than ten quintals of any one kind of foodgrains at any one time, may still have a large turn-over, while a dealer who keeps more than ten quintals at any one time, may have a smaller turnover and that the quantity of stock held by a dealer at any one time, cannot be a measure of the size or volume of business of a dealer.

13. Ordinarily bigger dealers hold bigger stocks and smaller dealers hold smaller stocks. The maximum stocks of foodgrains held by a dealer at any one time, is a rough and ready index of the size of a dealer. Hence, it cannot be said that the criterion of maximum stock held by a dealer at any one time, is irrelevant to classify dealers as petty dealers and bigger dealers.

14. It is well settled that every law need not have universal applicability to all persons who are not by nature, attainment or circumstances in the same position. Legislation enacted for the achievement of a particular object need not be all embracing; the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

15. A dealer who keeps at any one time, less than ten quintals of any one foodgrain or less than twenty-five quintals of all foodgrains taken together, will generally be a petty dealer in foodgrains. The dangers of hoarding and creating artificial scarcity of foodgrains, may be less from them than from bigger dealers. Moreover, it will be difficult for such petty dealers to apply for licences and for their renewal, to maintain accounts, to issue receipts or invoices and to submit returns. Having regard to these factors, it cannot be said to be unreasonable to exempt such petty dealers from applicability of these two Licencing Orders.

16. Clause (a) of Condition No. 2 of the Wholesale Licence (in Form-B), reads:

2 (a) The licensee shall carry on the afore-said business at the following places;

17. Mr Jagadisha Sastry submitted that a wholesale dealer has generally to purchase foodgrains from growers spread over a large part of the State or from millers who purchase foodgrains from growers and sell the same after milling, that it would not reasonably be practicable for a wholesale dealer to specify, at the time of applying for licence, all the places at which he may have to buy foodgrains from growers or such millers, and that if he buys foodgrains at any place not specified in Condition No. 2 (a) of the licence he will be contravening the conditions of the licence. Mr. Jagadisha Sastry added that it would be practically impossible for a wholesale dealer to know in advance from which growers he may buy foodgrains and to specify at the time of applying for renewal thereof, the places at which such purchases may have to be made by him.

18. But the learned Government Pleader submitted that the places of business referred to in Condition No. 2 (a) of the wholesale licence, have been understood by the authorities as referring only to places where a wholesale dealer sells foodgrains and not to places where he purchases foodgrains. On the other hand, it was stated by Mr. Jagadisha Sastry that in some places the authorities have found fault with wholesale dealers for purchasing foodgrains at places not mentioned in Condition No. 2 (a) of their Licences.

19. Whatever may be understanding of the meaning of the term, 'place of business', by the authorities, it is clear that in the case of a wholesale dealer, his activity of purchasing foodgrains is as much a part of his business as the activity of selling foodgrains. Without purchasing foodgrains he cannot sell them. Hence, the term, 'the place of business', refers as much to the place where he purchases, as to the place where he sells.

20. We think Mr. Jagadisha Sastry is right in contending that the restriction that a wholesale dealer should purchase foodgrains only at the places specified in the

licence for stocking and selling, would make it very difficult for him to secure foodgrains required for his business of selling.

21. When a wholesale dealer is required (under Condition No. 3) to show in his stock register, the places from which he purchases foodgrains and when even a miller has to obtain a permit (under Condition No. 9 (3)) to sell foodgrains to a wholesale dealer, we are unable to see what necessity there is for the restriction that a wholesale dealer should not buy foodgrains at places other than those specified in his licence for carrying on business. The State has also not filed any counter-affidavit explaining why such restriction is necessary.

22. It is well settled, a legislation has to strike a proper balance between the freedom guaranteed under Article 19 (1) (g) and the social control permitted by Clause (6) of Article 19. A restriction which is arbitrary or of an excessive nature beyond what is required in the interest of the general public, cannot be said to contain the quality of reasonableness and does not come within the protection of clause (6) of Article 19. Hence, we hold that Condition No. 2 (a) in Form-B of the wholesale licence, is invalid in so far as it prohibits a wholesale dealer from purchasing foodgrains at places other than those specified in such licence for carrying on business.

23. Clause (i) of Condition No. 7 of both the wholesale and retail licences (in Form-B) reads:

7. The licensee shall not—

(i) enter into any transaction involving purchase, sale or storage for sale of foodgrains in a speculative manner, prejudicial to the maintenance and easy availability of supplies of foodgrains in the market.

24. Neither the word, 'speculation', nor the word, 'speculative', has been defined in the Act or in either of two Licencing Orders. According to the Shorter Oxford Dictionary, the word, 'speculate', means to engage in buying and selling of commodities or effects in order to profit by rise or fall in market.

25. It is, no doubt, undesirable that dealers should either buy or sell foodgrains not for the normal purpose of furthering distribution thereof but merely to take advantage of anticipated rise or fall in prices thereof. The aforesaid condition may, no doubt, embody a laudable moral injunction to dealers. But the question is how to find out whether any buying or selling by a dealer, is not in the course of normal trade but merely for the purpose of making profit by anticipated rise or fall in price. Even a bona fide trade transaction carries with it an element of risk on account of rise or fall in prices, whether anticipated or not.

26. The learned Government Pleader did not dispute that it is extremely difficult, if not impossible, to find out which transaction of a dealer, is normal and bona fide and which transaction, is speculative. How-

ever, he said that the existence of this condition is desirable because it warns a dealer as to what he ought not to do. The learned Government Pleader added that, at any rate, the said condition is harmless.

27. On the other hand, Mr. Jagadisha Sastry argued that such a vague condition in the licence, will subject dealers to needless uncertainty and harassment by the authorities. We think the criticism of Mr. Jagadisha Sastry is well founded. In the absence of specified criteria for determining what transactions are speculative, the Condition No. 7 (i) in the licence must be held to be void on account of vagueness of uncertainty.

28. The relevant part of Condition No. 9 of the Wholesale Licence, reads:

9. The licensee shall not sell foodgrains to any person other than a person registered with him as a retail dealer (including himself if he also sells in retail);

Provided that—

(1) The licensee may sell at wholesale rates direct to consumers who purchase in bulk a bag of one quintal or more....

(2) x x x x x x x x

(3) The licensing authority may permit a wholesale dealer to sell foodgrains to another licensed wholesale dealer in the State.

x x x x x x x x

29. Thus, a wholesale dealer is prohibited from selling foodgrains to another wholesale dealer except under a permit issued by the licensing authority.

30. Mr. Jagadisha Sastry argued that the need to obtain a permit on every occasion when a wholesale dealer wants to sell foodgrains to another wholesale dealer, causes unnecessary delay and trouble and imposes an unreasonable restriction on the freedom to sell foodgrains. Mr. Jagadisha Sastry also said that a wholesale dealer in rice, very often purchases it from a miller who is also regarded as a wholesale dealer and that every time a miller wants to sell rice to a wholesale dealer who is not a miller, Condition No. 9 (3) requires the former to apply to the licensing authority for a permit.

31. Apart from sales of rice by a miller to a wholesale dealer who is not a miller, ordinarily, there appears to be no necessity for a wholesale dealer selling foodgrains to another wholesale dealer. When there is shortage of foodgrains, it is desirable that there should be free and quick flow of foodgrains from growers or importers to consumers without passing through too many intermediaries. Sales by one wholesale dealer to another may cause delay in foodgrains reaching ultimate consumers and there will also be danger of speculative buying and selling, and concerning (cornering—Ed.) of foodgrains by some wholesale dealers in anticipation of rise in prices. If in any special circumstances a wholesale dealer finds it necessary to sell foodgrains to another

wholesale dealer, he can apply to the licensing authority for a permit for the same, explaining the reason therefor.

32. Even when a miller wants to sell rice to wholesale dealers who are not millers, it should not be difficult for him to obtain permits from the licensing authority. Unless such sales are prohibited except under permits, it will be, difficult for the authorities to keep track of movement of foodgrains.

33. But Mr. Jagadisha Sastry submitted that every wholesale dealer has to maintain a stock register showing, inter alia, from which he purchases goods and to whom he sells goods and the quantities of such purchase and sale, and hence there is no need for the authorities prohibiting sales between wholesale dealers. But mere maintenance of stock registers by dealers, may not be sufficient to keep track of movement of foodgrains from dealers to dealers and to prevent hoarding or cornering of foodgrains, or sending them outside the State.

34. Having regard to the necessity for preventing hoarding and cornering of foodgrains and sending them outside the State, the prohibition against a wholesale dealer selling foodgrains to another wholesale dealer in the State except under a permit, cannot be said to be an unreasonable restriction.

35. Condition No. 3 of the wholesale as well as retail licenses, requires that the licensee shall except when specially exempted by the State Government or by the licensing authority in this behalf, maintain a register of daily accounts for each of the foodgrains he has been licensed to deal showing correctly—

- (a) the opening stock on each day;
- (b) the quantities received on each day showing the place from where and the source from which received;
- (c) the quantities delivered or otherwise removed on each day showing the places of destination; and
- (d) the closing stock on each day.

36. The licensee is also required to complete his stock accounts for each day on the day to which they relate, unless prevented by reasonable cause, the burden of proving which, shall be upon him.

37. Condition No. 4 of both the wholesale and the retail licenses, requires the licensee (except when specially exempted by the State Government or by a duly authorised officer) to submit to the concerned licensing authority a true return, in Form 'C' (contained in Schedule II to each of the Licensing Orders), of the stocks, receipts and deliveries of each of the foodgrains. Such return shall be fortnightly, in the case of a wholesale dealer and monthly, in the case of a retail dealer. Such return shall be sent within 5 days after the close of the fortnight or within 10 days after the close of the month, as the case may be.

38. Condition No. 10 of both the wholesale licence and the retail licence, requires

the licensee (except when specially exempted by the Government or by a duly authorised officer), to issue to every customer a correct receipt or invoice, as the case may be, giving certain particulars of himself and of the purchaser, the date of the transaction, the price per quintal and the total amount charged. The licensee is required to keep duplicates of such receipt or invoice to be available for inspection by the authorities.

39. Mr Jagadhisha Sastry contended that the aforesaid conditions requiring maintenance of stock register, submission of returns and issue of receipts and invoices, constitute excessive unnecessary and unreasonable restrictions and that the requirements of those conditions are unworkable and impossible of performance.

40. Mr Jagadhisha Sastry complained that it would be very difficult for a dealer to complete his stock accounts for each day on that day itself because he might receive goods in lorries just at the close of the day and that it would not be practicable to enter into stock register the particulars of the quantities so received and to close the stock account on that day itself. Mr Jagadhisha Sastry added that likewise a dealer may effect a very large number of sales on a day and that it would not be practicable to enter in the stock register all the particulars of the quantities delivered on that day and to close the stock accounts on that day itself.

41. Ordinarily, it should not be difficult for a dealer to enter in his stock register the aforesaid particulars of goods received and goods sold and to strike the balance of stock at the close of each day. Even if his transactions are very numerous, he should see that each day the transactions are closed sometime before the close of his working hours of that day so that he will have sufficient interval of time to make necessary entries in the stock register and to strike the closing balance of stock on that day. If in an unusual situation he is not able to do so, Clause (2) of Condition No 3 protects him if he establishes that he was prevented by reasonable cause from making such entries and striking the stock balance for that day. Hence, it cannot be said that the requirement of Condition No. 3 is an unreasonable restriction.

42. We are unable to see how the requirement (under Condition No. 10) that dealers should issue receipts or invoices and keep duplicates thereof for inspection, can be said to be an unreasonable restriction. Petty dealers are outside the purview of these Licensing Orders. Even under the provisions of the Sales Tax Act, dealers who have a taxable turnover, have to issue such receipts or invoices.

43. The requirement (under Condition No 4) that dealers should submit periodical returns to the authorities, also cannot be

said to impose any excessive burden on them (dealers).

44. Unless dealers maintain daily accounts of stocks and strike the closing stock balance each day, issue receipts or invoices and submit periodical returns, proper enforcement of the provisions of the Licensing Orders and conditions of the licences, would not be possible. We have no hesitation in holding that the restrictions imposed by Conditions Nos 3, 4 and 10, of the wholesale and retail licences, are not unreasonable restrictions.

45. We shall now deal with Clause II of both the Licensing Orders empowering entry, search and seizures.

46. In W P No 3876 of 1968 and connected petitions we considered the validity of the corresponding provision i.e., Cl 8, in the Mysore Essential Commodities (other than Foodstuffs) (Maintenance of Accounts, Display of Prices and Stocks) (Second) Order, 1967 (hereinafter referred to as the Non-edible Essential Commodities Control Order). There we held that the powers of entry and search under Clause 8 of that Order, are valid. But we held that the power of seizure under that clause, is valid only when such seizure is made by an enforcement Officer who is also a Police Officer and not when such seizure is by an Enforcement Officer who is not a Police Officer.

47-48. The circumstances which inclined us to the view that such seizure by an Enforcement Officer other than a Police Officer, is invalid, were briefly as follows:—

Clause 8 is silent as to what an Enforcement Officer is required to do after seizing the articles mentioned in that Clause. It is not provided therein that he should produce such articles before a Magistrate or any higher authority within any particular time or return them to persons from whom they are seized. Nor is there any provision regulating the custody of such articles. But where seizure is made by a Police Officer who has been appointed as Enforcement Officer, provisions of Section 523 of the Code of Criminal Procedure are attracted. If he seizes any articles under Clause 8, he has to report the same to a Magistrate under that section and such property will be regulated by judicial orders of such Magistrate. The owner of such property can approach the Magistrate for their return if there is any unreasonable delay in placing a charge-sheet for any offence in connection with the alleged commission of which they were seized. But the provisions of Section 523, Criminal Procedure Code, are not attracted where such seizure is made by an Enforcement Officer who is not a Police Officer. If after such seizure he takes no further steps, the owner of those articles will be deprived of the use thereof, they will be exposed to deterioration, decay or loss of value. Such owner has no remedy under the Act or the Non-

edible Essential Commodities Control Order. Such was our view in the aforesaid petitions.

49. When we rendered our decision in W. P. No. 3876 of 1968 and connected petitions, we had over-looked the amendment of Section 6-A of the Act by the Essential Commodities (Second Amendment) Act, 1967 (hereinafter referred to as the Second Amendment Act). Section 6-A, as it stood before such amendment, provided that where any foodgrains, edible oil seeds or edible oils are seized in pursuance of an order made under Section 3 in relation thereto, they may be produced without unreasonable delay before the Collector of the District or the Presidency Town in which the foodgrains, edible oilseeds or edible oils are seized and whether or not a prosecution is instituted for the con-

(Contd. on Col. 2)

travention of that order, may order confiscation of foodgrains, edible oil seeds or edible oils. By the Second Amendment Act, the words 'foodgrains, edible oilseeds or edible oils', occurring in Section 6-A, have been substituted by the words, 'essential commodity'. It is not necessary here to say what our decision in W. P. No. 3876 of 1968 and connected petitions, would have been if the amendment had been brought to our notice and we had considered the effect thereof.

50. Though Clause 11 of the Wholesale Licensing Order and the Retail Licensing Order as well as Clause 8 of the Non-edible Essential Commodities Control Order, provide, for entry, search and seizure there is material difference in the language of said Cl. 11 and that of said Clause 8. We have set out both these Clauses hereunder:

Clause 11 of Wholesale and Retail
Licensing Order.

Clause 8 of the Non-edible Essential
Commodities Control Order.

11. Powers of entry, search and seizure,
etc.—

(1) The licensing authority or any other officer authorised by the State Government in this behalf, may with such assistance, if any as he thinks fit,—

(a) require the owner, occupier or any other person in charge of any place, premises, vehicles, or vessels in which he has reason to believe that any contravention of the provisions of this Order or of the Conditions of any licence issued thereunder has been, is being, or is about to be committed to produce any book, accounts, or other documents showing transactions relating to such contraventions;

(c) take or cause to be taken, extracts from or copies, of any documents showing transactions relating to such contraventions which are produced before him;

(d) search, seize and remove stocks of foodgrains and the animals, vehicles, or other conveyances used in carrying the said foodgrains in contravention of the provisions of this Order, or of the conditions of the licences issued thereunder and thereafter take or authorise the taking of all measures necessary for securing the production of stocks of foodgrains and the animals, vehicles, vessels or other conveyances so seized, in a Court and for their safe custody pending such production.

(2) The provisions of Sections 102 and 103 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898) relating to search and seizure shall so far as may be, apply to searches and seizures under this clause.

8. Power of entry, search and seizure.—

(1) The Enforcement Officer may with a view to securing compliance with this Order, or to satisfy himself that the provisions of this Order have not been contravened—

(a) enter into or search any premises, vehicles, vessels, or other conveyances in which he has reason to believe that contravention of this Order has been, is being, or is about to be committed;

(b) seize the stock of essential commodities along with the packages, coverings or receptacles in which such essential commodity is found and the animals, vehicles, vessels or other conveyances used in carrying such essential commodity in respect of which the officer has reason to believe that a contravention of this Order has been, is being, or is about to be committed.

(2) The provisions of Sections 102 and 103 of the Code of Criminal Procedure, 1898 (Central Act 5 of 1898) relating to search and seizure shall, so far as may be, apply to searches and seizures under this clause.

51. In the said Clause 8, the words, "with a view to securing compliance with this order, or to satisfying himself that the provisions of this order have not been contravened, occur in the opening part of that Clause and hence govern sub-clauses (a) and (b) of that clause. Thus, the power of entry, search and seizure can be exercised by an Enforcement Officer only for the aforesaid purpose and such power is not an unguided, unregulated, unconditional or unqualified one.

52. But, in Clause 11 of the Wholesale and Retail Licensing Order, the words, "has reason to believe that any contravention of the provisions of this Order or of the conditions of any licence issued thereunder has been, is being, or is about to be committed do not occur in the opening part of that Clause, but occur only in sub-clauses (a) and (b) and not in sub-clause (d) which provides for search and seizure. In sub-cl (d) the words "in contravention of the provisions of this Order, or of the conditions of the licence issued thereunder" relate only to the words, "animals, vehicles or vessels or other conveyances used in carrying of the said foodgrains", but not the words, "stock of foodgrains" which also may be seized.

53. The resultant position is that the power to search any premises in which foodgrains may be stored, and the power to seize and remove stocks of foodgrains, are not regulated by any guiding principle and are not controlled by any conditions like the Enforcement Officer having reason to believe that any contravention of the provisions of the respective licence has been, is being or is about to be committed. Thus, the power, of search, seizure and removal in regard to stocks of foodgrains is unguided, uncontrolled and unqualified. There is no check on the exercise of such power by an Enforcement Officer. Thus, the powers conferred by Clause 11 are so wide as to enable the Enforcement Officer to seize stocks of foodgrains, even without the least suspicion of there being any contravention of any of the provisions of the Orders or the licence.

54. No doubt, sub-clause (2) of Clause 11 provides that the provisions of Sections 102 and 103 of the Code of Criminal Procedure relating to search and seizure shall, so far as may be, apply to searches and seizures under Clause 11 also. The only safeguards available under Sections 102 and 103, Criminal Procedure Code are:

(i) The search shall be made in the presence of two or more respective (respectable — Ed) inhabitants of the locality in which the place to be searched is situate;

(ii) A list of all things seized in the course of such search and the places in which they are respectively found, shall be prepared and signed by the said witnesses; and

(iii) A copy of list of things taken possession of, shall be delivered to the person searched or the occupant of the place searched.

55. But these safeguards are only in regard to the manner in which search and seizure should be conducted and not in regard to the conditions precedent for exercising the powers of search and seizure. These safeguards do not afford any protection against the licensing authority or an authorised officer searching any premises and seizing stocks of foodgrains without any reasonable cause. Sub-clause (d) of Clause 11 of both the Licensing Orders, which empowers search and seizure even without the safeguard that the Enforcement Officer should have reason to believe or suspect contravention of the provisions of the Licensing Orders or the conditions of licence, cannot (but—Ed) be regarded as being arbitrary, unguided and uncontrolled and violative of the fundamental rights of dealers under Art. 19 of the Constitution to carry on trade and to hold property. But the power of search under sub-cl (h) of Clause 11, does not suffer from such infirmity, as such power can be exercised only when the Enforcement Officer has reason to believe that there has been any contravention of the provisions of the Orders or the conditions of the licence.

56. To sum, up we hold that:

(i) Condition No. 2 (a) of the Wholesale Licence, is invalid in so far as it operates to prohibit a licensee from purchasing foodgrains at places other than those specified in the licence as places of his business;

(ii) Condition No. 7 (i) of the Wholesale and the Retail Licence, is invalid;

(iii) Sub-clause (d) of Clause 11 of both the Wholesale Licensing Order and the Retail Licensing Order, is invalid to the extent it empowers search of premises and seizure of stocks of foodgrains; and

(iv) The power of search under sub-cl. (b) of Clause 11 of both these Orders, is valid.

57. Clause 11 of the Wholesale Licensing Order and Clause 11 of the Retail Licensing Order, and Conditions Nos. 2 (a) of the Wholesale Licence and 7 (i) of the Wholesale Licence and the Retail Licence, are quashed only to the extent stated above.

58. As the petitioners have succeeded only partially, we direct parties to bear their own costs.

Order accordingly.

AIR 1970 MYSORE 297 (V 57 C 70)

M. SANTHOSH, J.

Mrs. C. Colaco, Petitioner v. Urban D'Silva, Respondent.

Civil Revn. Petn. No. 1041 of 1968, D/- 8-6-1970, from order of Dist. J., Mangalore, D/- 12-12-1968.

(A) T. P. Act (1882), Section 108, Cl. (o) — Lease of premises for residential purposes to businessman — Carrying on some business work during spare time in small portion of premises without running a shop — User not inconsistent with purpose of lease.

Even though a house is taken for residential purpose by a professional man it does not prevent him from carrying on some professional work in the house during spare time. Some occupation and profit-making activities by such person in a small portion of the house unostentatiously and without running a shop or causing any nuisance do not amount to conversion of a residential premises into a non-residential one. (1959) 2 Mad LJ 240 and AIR 1949 Mad 785, Rel. on. (Paras 4, 8)

(B) Houses and Rents — Mysore Rent Control Act (22 of 1961), Section 21 (1) (d) — Ground for eviction — Nuisance to neighbouring occupiers—Sound of sewing machine does not by itself constitute a nuisance.

(Para 9)

Cases Referred:	Chronological	Paras
(1969) 1969-1 SCWR 1142 = 1969 Ren CJ 702, Central Tobacco Co., Bangalore v. Chandra Prakash		3
(1964) 1964-2 Mad LJ 288 = 77 Mad LW 503, Abdul Khader v. G. H. Rao		2
(1959) 1959-2 Mad LJ 240 = 72 Mad LW 519, Jugraj Jain v. Ambikapathi Pillai		2, 3, 4
(1954) AIR 1954 Mad 514 (V 41) = 1953-2 Mad LJ 625, Bhogilal M. Davay v. S. R. Subramania Iyer		2
(1952) AIR 1952 Trav. Co. 290 (V 39) = ILR (1951) Trav. Co. 597, Kesavan v. State		2
(1949) AIR 1949 Mad 785 (V 36) = 1949-1 Mad LJ 74, Krishnan Nair v. Valliammal		3, 4
(1944) 1944-2 All ER 167 = 1944 KB 679, Vickery v. Martin		3, 5
(1928) 93 J. P. 55 = 73 SJ 43, Hicks v. Snook		5

P. Ganapathy Bhat, for Petitioner; K. Balakrishna Rao, for Respondent.

ORDER: The petitioner before this Court is the landlord. Petitioner filed a petition under Section 21 (1) (b), (c) and (d) of the Mysore Rent Control Act of 1961 (hereinafter referred to as the Act) against the respondent-tenant and prayed that because the tenant had contravened said provisions, the tenant is liable to be evicted from the said

premises. The trial Court held that the petitioner has made out the contravention of the provisions of sub-clauses (b) and (d) of Section 21 (1) of the Act and passed an order of eviction. The appeal filed by the tenant was allowed by the learned District Judge of South Kanara. The learned District Judge held that the petitioner has not made out the contravention of provisions of sub-cl. (b) and (d) of Section 21 (1) and allowed the appeal. In this revision petition, the petitioner challenges the said order passed by the learned District Judge.

2. Shri Ganapathy Bhat, learned Counsel appearing on behalf of the petitioner has contended that the learned District Judge has not considered the evidence of all the witnesses examined on behalf of the petitioner. It is also stressed that the learned District Judge had not adverted to the admissions made by the respondent and his witnesses. If the evidence of the petitioner's witnesses and the admissions made by the respondent are taken into consideration, he submits, there cannot be any doubt that the respondent was carrying on tailoring business in the premises let out to him for residential purposes. He argues that the petitioner has clearly made out contravention of Clause (o) of Section 108 of the Transfer of Property Act and undoubtedly the premises have been used for a purpose other than that for which it was leased. It is also contended, if tailoring work is carried on in a residential premises late in the night it will cause nuisance to the neighbours and the petitioner had also made out a case under Section 21 (1) (d) of the Act. Shri Ganapathy Bhat has relied on (1953) 2 Mad LJ 625 = (AIR 1954 Mad 514); (1964) 2 Mad LJ 288; (1959) 2 Mad LJ 240; AIR 1952 Trav-Co 290 in support of his contentions.

3. Shri Balakrishna Rao, learned counsel appearing on behalf of the respondent has supported the order passed by the learned District Judge. He has stressed the fact that in the quit notice (Ex. A.1) given by the petitioner dated 25th April, 1966, the petitioner has nowhere referred to the respondent carrying on tailoring business in the said premises nor had the petitioner referred to the nuisance caused by the respondent when carrying on tailoring business in his residential premises. This is an important circumstance to be borne in mind in judging evidence let in by the petitioner and the lower appellate court has considered this important factor when deciding the points at issue. It is also argued by the learned counsel for the respondent that if in a premises let out to the respondent, for residence a portion of that premises is used for carrying on business, it will not violate the provisions of clause (o) of Section 108 of the Transfer of Property Act. The learned District Judge has accepted the version of the respondent that the respondent had also been carrying on the work of a tailor in his resi-

dence for a number of years. The learned counsel has strongly relied on (1919) 1 Mad LJ 74 = (AIR 1919 Mad 785) and (1959) 2 Mad LJ 240 and 1911 (2) All ER 167 in support of his said contention. It is also contended that quit notice should have been issued to the respondent bringing to his knowledge the alleged breach, as the case of the petitioner was that there was a breach of contract under Section 108, sub-clause (o) of the Transfer of Property Act. It is argued that it is obligatory to bring to the knowledge of the other party the breach committed before the petitioner-landlord claims re-entry. It is contended that the lower appellate court has considered all the material evidence in the case. The lower appellate court did not consider P. W. 5's evidence as it was not material. This non-consideration of P. W. 5's evidence does not in any way cause injustice to the parties. It is also argued that it is open to this court under Section 50 of the Act to go into the entire evidence and arrive at its own conclusion. In support of this proposition reliance is placed on 1969 (1) SCWR 1142. It is urged that the conclusions arrived at by the appellate court are correct, and no case is made out calling for interference in revision with orders passed by the learned District Judge.

4. The important question for consideration in this case is, if in a premises leased out for residential purposes to a professional man, the said person carries on some professional work in his residence, whether he will be violating sub-clause (o) of Section 108. In *Jugraj Jain v. Ambikapathi Pillai*, (1959) 2 Mad LJ 240 this question has been considered by the Madras High Court. It has been laid down in the said decision as follows:—

"Even though a house is taken for purely residential purposes, some occupation and profit-making activities by the resident therein, in a small portion unostentatiously and without running a shop or causing any nuisance, are inevitable and permissible in these days of complex civilization."

At page 212, the court observed as follows:—

"The third contention of Mr. Inamdar was that even regarding the premises let out for purely residential purposes, a reasonable portion could be used for occupational and profit-making purposes provided there was no conversion of the residential premises to non-residential premises, and no nuisance was caused, and it is unobstructive and quiet affair not involving the running of a shop or the gathering of crowds. As laid down by me in *Krishna Nair v. Valliammal* approved by a Full Bench of this Court in (1919) 1 Mad LJ 74 = (AIR 1919 Mad 785) a premises must be deemed to be taken and used for 'residential purposes' though a portion of the premises may be used for making appalams when people are not sleeping there and used for sleeping purposes when appalams are not made there."

In the said decision it has been pointed out: "a lawyer may advise his clients in a room of his house; a doctor may give consultation to his clients in a room of his house; an astrologer may give his predictions to his clients in a room of his house, a barber may have his select and urgent clients in a room of his house; a papadam maker can make papadam in a room of his house; provided the portions so used form only a fraction of the entire premises and does not alter the nature of the premises from residential to non-residential purpose."

5. Shri Balakrishna Rao has also strongly relied on a decision of the English Court *Vickery v. Martin*, (1914) 2 All ER 167. In the said decision the observations made by Lord Greene M. R., in *Hicks v. Snook*, (1928) 93 JP 55 is quoted and it is to this effect:

"In that case the Court of Appeal held that as he was dwelling in the house and had a right to dwell in the house, the house was a dwelling-house, and the fact that besides being a dwelling house part of it was used for business premises did not prevent it being a dwelling house to which the Act applied."

In 1944-2 All ER 167 the tenant had taken the premises for residential purpose but she made use of a portion of the said residential house as a sort of boarding house taking in paying guests. At page 170, His Lordship has observed as follows:—

"Here, as I have said, this house is unquestionably in my opinion a dwelling house. On the facts, it was impossible to hold otherwise. It was a house in which this lady lives. She had the exclusive part use of it. It is her home. She has her husband to come and live there when he is available, and her children, and it is hers exclusively subject to such licences as she may from time to time grant to such persons as come as lodgers, or guests, in the house. Subject to that it is her home and her house, and there she lives. If the judge's judgment is to be read as saying this is not a dwelling house then, in my opinion, there was no justification on the evidence for so holding."

6. I will now examine the evidence in the instant case. P. W. 2 examined on behalf of the petitioner has stated that the respondent is a tailor and the respondent is doing tailoring work for the last six months inside his house itself. Some of his customers come to his house. P. W. 3 has also similarly stated that the respondent was doing tailoring work in his house since about seven months. He has also stated that, respondent is getting customers to his house. P. W. 5 has also stated that the respondent was doing tailoring work in his house since eight months. The respondent does his tailoring work during night times and he (P. W. 5.) does not get sleep due to noise

caused by the work. Nowhere the witnesses have stated that the respondent has converted the house into a tailoring shop. There is no evidence to show that the respondent had put up any board in the house nor do the witnesses say that the respondent was carrying on the profession of tailoring in this house. It is no doubt true that the learned District Judge has not made any specific reference to the evidence of P. W. 5. But as pointed out by me, the evidence of this witness is similar to that of the other witnesses examined on behalf of the petitioner so far as this question is concerned, and all that they have stated is that the respondent was doing tailoring work in his house.

7. The case of the respondent is that for the past 20 years since he has been residing in the said premises, he has been doing some tailoring work in his house during his spare time. In his counter stated, even when he was carrying on tailoring work in his shop, he was having a machine in his house to enable him to do some tailoring work in his house also. He has stated for the last 18 years he had been doing so in the said premises, to the full knowledge of the landlord and other neighbours. In his evidence also, he has stated that he had been carrying on tailoring work in his house for a number of years. He has also stated that he has closed the shop in 1966 at Pintos Gate as his eye sight was failing. He has stated that he was not doing tailoring work in his house but his son does it from 7 a. m. to 8 a. m. only. It is no doubt true, as pointed out by Shri Ganapathy Bhat, that in cross-examination, respondent has stated that all his customers come to his house after he has closed the shop. But in the very next sentence he has stated that his customers were coming to his house even when he had the shop. The two witnesses examined on behalf of the respondent, R. W. 1 and R. W. 2, have also stated that respondent has been doing tailoring work in his house for about 20 years.

8. It is clear from the evidence referred to above, the respondent was doing tailoring work in his house in his spare time. The evidence discloses that he has been doing so for about 18 to 20 years. There is no evidence before the court to show that the respondent had shifted his shop after the closure of his shop at Pintos Gate to his house, and was carrying on the tailoring business in his residential house. As already stated, no witness has stated that the respondent has put up a board in his residential house, or made any structural alterations. From what has been stated above, it is clear that the principle laid down in the two Madras decisions referred to above applies to the facts of the instant case. Even though a house is taken for residential purpose, it does not prevent the person from carrying on his profession in the said pre-

mises during his spare time as has been pointed out by Madras High Court. Simply because a lawyer meets his clients in his house and transacts some legal work, or a doctor sees some patients in his house, a residential house is not converted into a non-residential one. It is also to be borne in mind that it is not disputed that the respondent and his family members were residing in the said premises. The fact that they were incidentally carrying on tailoring work in the house does not amount to conversion of a residential premises into a non-residential one. The learned District Judge, after discussing the evidence has rightly come to the conclusion that in his opinion, the ground of user for purposes, other than that for which it has been leased out, is not made out and the provisions of clause (o) of Section 108, of Transfer of Property Act, have not been violated in the instant case.

9. The next question for consideration is, whether there has been contravention of sub-clause (d) of Section 21 of the Act. It may at once be mentioned that there is absolutely no mention in the quit notice issued by the petitioner that the carrying on of the tailoring business has been a nuisance or annoyance to the neighbours. If really, the respondent was carrying on the work of tailoring late in the night and it was disturbing the petitioner and the neighbours, one would have expected petitioner to mention it specifically in the quit notice issued by her dated 25th April, 1966. Though some of the witnesses examined on behalf of the petitioner have stated that they could not get sleep because he was carrying on the work late in the night, the evidence discloses that they are interested witnesses and much weight cannot be attached to their evidence. I agree with the learned District Judge, that it is not possible to accept the contention that the sound of a sewing machine constitutes by itself a nuisance. The learned District Judge is right in coming to the conclusion that the petitioner has not made out that the respondent had contravened provisions of sub-clause (d) of Section 21 of the Act.

10. In the result, there is no merit in this revision petition and the same is dismissed with costs.

Petition dismissed.

AIR 1970 MYSORE 299 (V 57 C 71)

V. S. MALIMATH, J.

M. A. Hussain and another, Petitioners v. M/s. Panchamal Vasudev Ganapath Kamath and Bros. and another, Respondents.

Civil Revn. Petn. No. 480 of 1967. D/- 9-6-1970 from judgment and decree passed by 2nd Addl. Civil J., Mangalore, D/- 11-10-1966.

GN/HH/D455/70/BDB/T

Partnership Act (1932), Section 69 (2) — Suit by firm against third party — Proof, that persons suing are partners — Modes of.

The two requirements which must be fulfilled before a suit can be instituted to enforce a contractual right by the firm or on behalf of the firm are (1) that the firm is a registered one and (2) that the persons suing are or have been shown in the Register of Firms as partners. The suit would be wholly incompetent if either of these conditions is not fulfilled. AIR 1909 Guj 178, Rel. on. (Para 10)

The second condition really consists of two alternatives and it is enough if one of them is fulfilled. Those alternatives are (1) that the persons suing must establish that they are partners or (2) that they are persons whose names are shown in the Register of Firms as partners. The second alternative requires production of the Register or a certified copy thereof. Oral evidence would not be allowed. But there is no bar to prove the first alternative by adducing evidence other than production of Register or its certified copy. Oral evidence can be used to prove that persons suing are partners. AIR 1952 Nag 57, Partly dissented. (Para 12)

Cases Referred: Chronological Paras
(1969) AIR 1969 Guj 178 (V 36) =
10 Guj LR 457, Bharat Sarvodaya
Mills Co. Ltd. v. M/s. Mohatta
Brothers, a firm 10
(1952) AIR 1952 Nag 57 (V 39) =
JLR (1952) Nag 764, Firm Kapur-
chand Bhagaji v. Laxman Trimbak 11, 12

P. Vasudeva Aithal, for Petitioners; U. L. Narayana Rao, for Respondents.

ORDER: This is a revision petition filed by the original defendants 2 and 3 against the decree passed by the II Additional Civil Judge, Mangalore, in Small Cause Suit No. 387 of 1963 under Section 25 of the Provincial Small Cause Courts Act.

2. It is the plaintiff's case that M/s. Panchamal Vasudev Ganapath Kamath and Bros. is a registered partnership firm. The suit has been filed by the firm and in the name of the firm by its partner Sri Panchamal Vasudev Kamath. The case of the plaintiff is that defendants 1 to 3 who were doing business in the name and style of "National Trading Co. Bunder Mangalore" purchased from the plaintiff goods worth Rs. 4,077-87 P. on credit on 6-10-1960. The defendants having paid only a sum of Rs. 2,400 they are, according to the plaintiff, liable to pay the balance of Rs. 1,677-87 P. and interest thereon.

3. Defendant No. 1 denied his liability by contending that he was never a partner of 'National Trading Company' and that he had no dealings in any capacity with the plaintiff. The lower Court accepting the case of defendant no. 1 has dismissed the

suit as against defendant no. 1. That part of the decree has not been challenged by the plaintiff and hence the same has become final.

4. Defendants 2 and 3 resisted the suit on various grounds. Defendants 2 and 3 have averred that they were not the partners having any business dealings with the plaintiff, they denied the suit transaction and the liability arising therefrom. They further denied that the plaintiff is a Registered firm or that Sri Panchamal Vasudev Kamath is a partner of the firm entitled to represent the alleged firm. They, therefore, contended that the suit is not maintainable in view of Section 69 (2) of the Indian Partnership Act.

5. The learned Civil Judge framed the following points for determination in the suit:

(i) Whether the suit is maintainable in view of the provisions of Section 69 (2) of the Indian Partnership Act; and

(ii) Whether the amount claimed by the plaintiff is payable by the defendants?

6. In view of the production of the acknowledgement of Registration, Ex. A-1, by the plaintiff, defendants 2 and 3 did not press their contention that the plaintiff was not a Registered firm on the date of suit. The defendants however contended that the suit is not maintainable as the plaintiff has not produced the extract of the Register of Firms showing Sri Panchamal Vasudev Kamath as a partner of the firm on the date of suit as required by Section 69 (2) of the Indian Partnership Act.

The learned Civil Judge held that under Section 69 (2), it is not incumbent upon the plaintiff-firm to produce the extract of Register of firms showing the names of the partners. He held that production of a certificate showing the registration of the firm is sufficient. He held that Ex. A.1 established that the plaintiff is a registered firm. He further held that Sri Panchamal Vasudev Kamath is a partner of the firm on the basis of the sworn testimony of Sri Panchamal which has not at all been challenged in cross-examination by any of the defendants. After analysing the evidence placed by the parties the learned Civil Judge came to the conclusion that defendants 2 and 3 are liable to the plaintiff to the extent of Rs. 1,986-09 P. and interest on Rs. 1,677-87 at 6% p. a. from 3-10-1963. The learned Civil Judge passed a decree accordingly against defendants 2 and 3 only on 11-10-1966, in the above referred Small Cause Suit No. 387 of 1963.

7. It is the correctness of the aforesaid decree that is challenged by defendants 2 and 3 in this revision petition filed under Section 25 of the Provincial Small Cause Courts Act.

8. Sri P. Basudev Aithal, the learned counsel for the petitioner contended that the suit ought to have been dismissed by the trial court as the mandatory requirements of

Section 69 (2) of the Indian Partnership Act have not been fulfilled on the ground that the plaintiff has not produced the extract of Register of firms showing Sri Panchamal Vasudev Kamath as a partner of the plaintiff firm. The learned counsel contends that Section 69 (2) is mandatory and that as there is non-compliance with the same, the suit ought to be dismissed. The two mandatory requirements of Section 69 (2) according to the learned counsel are:

(1) That the firm is a registered one:

and

(2) that the persons suing are or have been shown in the Register of Firms as partners in the firm.

The learned counsel for the petitioners does not dispute that the suit has been instituted by the firm to enforce a right arising from a contract against a third party. He also does not dispute that the firm is a registered one. He conceded that the provisions of Order 30, Rule 1 of the Civil P. C. have been complied with. The learned counsel for the petitioners urges that the suit ought to be dismissed on the ground that the plaintiff has not produced an extract of the Register of firms showing Sri Panchamal as a partner of the firm on the date of suit.

9. Section 69 (2) on which reliance is placed by the petitioner's counsel reads as follows:

"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as Partners in the Firm."

10. This provision specifically bars the institution of a suit by or on behalf of a firm to enforce a right arising from a contract makes (unless?) the conditions specified in Section 69 (2) are satisfied. The use of the expression "No suit shall be instituted in any court...." clearly indicates the intention of the Legislature to make this provision mandatory. The two requirements which must be fulfilled before a suit can be instituted to enforce a contractual right by the firm or on behalf of the firm are: (1) that the firm is a registered one and (2) that the persons suing are or have been shown in the register of firms as partners of the firm. As these are the conditions for the institution of the suit, the relevant date with respect to which these conditions must be satisfied is the date of the institution of the suit. On the date of the institution of the suit, the firm must be a registered one and the persons suing must either be partners or persons whose names are shown in the register of firms as partners. Both the conditions are mandatory and must be fulfilled. The suit would be wholly incompetent if either of these conditions is not fulfilled. The learned counsel

for the petitioners invited my attention to a decision of the Gujarat High Court reported in *Bharat Sarvodaya Mills Co. Ltd. v. M/s. Mohatta Brothers A Firm*, AIR 1969 Guj 178. The view taken by their Lordships of the Gujarat High Court in this behalf accords with the view I have taken above. I therefore respectfully agree with the said decision.

11. The learned counsel for the petitioners contends that the second condition mentioned in Section 69 (2) has not been satisfied in this case as admittedly the respondent has not produced the extract from the Register of firms showing Sri Panchamal Vasudev Kamath as a partner of the firm. Dealing with this aspect of the matter, this is what the learned Civil Judge has observed in this case:

"In view of the case law cited by the learned advocate for the plaintiff, I hold that the suit is maintainable even though the extract of Register of firms showing the partners has not been filed by the plaintiff as Ex. A.1 clearly shows that the plaintiff is a registered firm and P. W. 1 has stated on oath that he is a partner of that firm and he has not been cross-examined by any of the defendants regarding the fact of his being a partner of the plaintiff firm."

The learned counsel for the petitioners fairly conceded that there is no cross-examination whatsoever of P. W. 1 challenging the sworn statement of P. W. 1 that he is a partner of the plaintiff firm. P. W. 1 is no other than Sri Panchamal Vasudev Kamath.

The learned counsel also fairly conceded that barring the averment in the written statement there is no other evidence to indicate that Sri Panchamal Vasudev Kamath was not a partner of the plaintiff firm on the date of suit. But the learned counsel for the petitioners urges that the second condition cannot be satisfied by any evidence other than the extract of the register of firms. He further contends that as no such extract has been produced in this case, the second condition which is a mandatory condition has not been fulfilled in this case.

He therefore contends that the suit ought to be dismissed. In support of his contention, the learned counsel for the petitioners relied on a decision of the Nagpur High Court reported in *Kapurchand Bhagaji Firm v. Laxman Trimbak*, AIR 1952 Nag 57. The relevant portion of the aforesaid decision on which reliance was placed by the learned counsel for the petitioners is extracted below:

"Para (4)

There can be no doubt that the Register of Firms is a public document and the requirements of Section 69 (2) are complied with by producing a certified copy of an entry from this register. The primary evidence of a document is the document produced for the inspection of the Court and

secondary evidence means and includes certified copies given under Section 76 of the Evidence Act. Under Section 64 of that Act documents must be proved by primary evidence except in cases mentioned in Sec 65. Under Section 65 (c) a certified copy of a public document but no other kind of secondary evidence is admissible to prove the original.

Para (5)

It will thus be clear that the evidence of P. W. 1 is not admissible as secondary evidence to prove the fact of registration. It is not enough to prove that the firm was registered but it must also be proved that the persons suing are or have been shown in the Register of Firms as partners of the firm. There is no evidence that the three partners have been shown in the Register of Firms. That fact could be proved only by producing a copy of the entry from the Register of Firms. The lower Court thus fell into error in relying on the evidence of P. W. 1 and holding that the requirements of Sec 69 (2) of the Partnership Act were satisfied. The plaintiff's suit should have been dismissed on this ground.

This decision no doubt supports the case of the petitioners. I agree with the view expressed by Justice Deo that the only evidence that can be produced to prove that the persons suing have been shown in the Register of Firms as partners in the firm is the relevant register of firms or a certified copy of the same. I also agree that oral evidence cannot be adduced to prove that the names of the persons suing have been shown in the register of Firms as partners in the firm. But with great respect, I do not agree with the view that oral evidence cannot at all be adduced to prove the second condition. The second condition really consists of two alternatives and it is enough if one of them is fulfilled. The second condition of Sec. 69 (2) reads as follows.

".... and the persons suing are or have been shown in the Register of firms as partners in the firm."

12. It is clear from this provision that there are two alternatives available in the second condition. The persons suing may establish either that they are partners on the date of suit or that they are persons whose names are shown in the register of firms as partners in the firm. As already observed, the second alternative, namely, the fact that the names of the persons suing have been shown in the Register of firms as partners of the firm can be established either by producing relevant Register of firms or a certified copy of the same and not by adducing oral evidence. But there is no legal bar to prove the first alternative, namely, that the persons suing are partners of the firm by adducing evidence other than the register of firms or its certified copy. It appears that pointed attention of the court has not been

invited to the first alternative of the second condition in above referred case decided by the Nagpur High Court. In my opinion the persons suing must either in fact be partners on the date of suit or must be persons whose names are shown as on the date of suit in the Register of Firms as partners of the firm. Even if the names of the partners suing have not yet been entered in the Register of firms, they can still institute the suit by proving that they are in fact partners of the firm on the date of suit. That can only be proved by evidence other than the Register of firms. I therefore respectfully disagree with the view taken by Justice Deo in the decision reported in AIR 1952 Nag 57. In my opinion, oral evidence other than the Register of Firms or its extract can be adduced to prove that the persons suing are partners of the firm as on the date of suit.

13. In the present case, P. W. 1 Sri Panchamil has stated on oath that he is the partner of the plaintiff firm. There is no cross examination of this witness on this point. Barring a general averment in the written statement of the defendants, there is no other material to doubt the testimony of P. W. 1. The learned Civil Judge has therefore rightly believed P. W. 1 and held that Sri Panchamil is a partner of the firm. Consequently both the conditions specified in Section 69 (2) have been satisfied in this case. The contention of the learned counsel for the petitioner that the suit is not maintainable must therefore fail.

14. The learned Civil Judge has after appreciating the evidence on record decreed the suit. The learned counsel for the petitioners has not been able to invite my attention to any infirmities in the judgment of the lower court in this behalf. I do not find any grounds to interfere with the decree passed by the lower court.

15. For the reasons stated above, this revision petition is dismissed with costs.

Revision dismissed.

AIR 1970 MYSORE 302 (V 57 C 72)

A. NARAYANA PAI AND C. HONNIAH, JJ.

Verghese George, Petitioner, v. The Officer Commanding, T. T. W. A. F. Station Yalahanka, Bangalore North, Respondent.

Writ Petn. No. 4364 of 1968, D/- 10-6-1970.

Civil Services — Central Services (Temporary Services) Rules (1905), Rule 5 (1) (a) — Temporary Government Servant — Notice of termination of service under Rule 5 (1) (a) without any adverse remark — Servants junior to him retained in service — Notice challenged on grounds that it is only a cloak for actual punishment of dismissal without

HN/IN/DS76/70/XPB/B

giving opportunity and that it violates his rights under Article 16 — Held, such a notice could not be regarded as amounting to any type of punishment or even a stigma — Nor did it offend Article 16. AIR 1967 Mys 223, Explained and Distinguished. Case law discussed.

(Paras 6, 7, 8)

Cases Referred: Chronological Paras

- (1969) AIR 1969 NSC 155 (V 56) =
Civil Appeal No. 865 of 1966, D/-
14-8-1969 = 1969 Ser LR 655,
Union of India v. Prem Prakash
Midha 8, 9
- (1968) AIR 1968 SC 1089 (V 55) =
1968 Lab IC 1286, State of Punjab
v. Sukh Raj 6, 7
- (1967) AIR 1967 Mys 223 (V 54) =
1967-2 Mys LJ 100, Doddiah v.
State of Mysore 9
- (1964) AIR 1964 SC 449 (V 51) =
1964 Cur LJ (SC) 66, Jagdish Mitter
v. Union of India 7
- (1964) AIR 1964 SC 1854 (V 51) =
1964-5 SCR 190, Champaklal Chiman-
lal Shah v. Union of India 9
- (1963) AIR 1963 SC 531 (V 50) =
1963-3 SCR 716, Madan Gopal v.
State of Punjab 7
- M. Balachandran, for Petitioner; B. S.
Keshava Iyengar, Central Govt. Pleader, for
Respondent.

NARAYANA PAI, J.: The petitioner who was working as a civilian motor transport driver attached to the Airforce Station at Yelahanka, was served with a notice dated 11-11-1968, issued by the Officer Commanding the Station, under Rule 5 (1) (a) of the Central Services (Temporary Service) Rules, 1965, terminating his services with effect from the date of expiry of a period of one month from the date of service or tender of the notice. The petitioner impugns the validity of the said notice, and contends that it is illegal as well as violative of his fundamental rights under the Constitution and that therefore, it should be quashed by the issue of an appropriate writ.

2. That the petitioner was entertained as a temporary Government servant is an admitted fact. It is also admitted that though he had completed four and a half years of service at the time of notice was issued, he had not been invested with the status of a quasi-permanent Government servant. Although it is a minimum qualification for such a status to complete three years of service, it is well established that unless an express order is made declaring such a status, no temporary Government servant acquires quasi-permanency of service. Hence the petitioner has to be considered only as a temporary Government servant and his rights, if any, allegedly violated by the impugned notice have also to be ascertained on that basis.

3. The rule under which the impugned notice was issued, reads:—

"5. (1) (a) The services of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority, or by the appointing authority to the Government servant."

The rest of the Rule is not relevant.

4. The impugned notice reads as follows: "In pursuance of sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, I hereby give notice to Shri Varghese George that his service shall stand terminated with effect from the date of expiry of a period of one month the date on which this notice is served, or as the case may be, tendered to him."

5. The arguments in support of the prayer for the issue of a writ are only two,— (1) that though the notice purports to be one of termination of service under Rule 5 (1) (a) of the Rules, it is only a cloak for actual punishment of dismissal without giving an opportunity to the petitioner to defend himself against such proposed action; (2) that it violates his fundamental right under Article 16 because, twenty seven persons who were appointed subsequent to himself and therefore juniors to him, had been retained in service.

6. On both these matters, the law is now well settled by the rulings of the Supreme Court. Hence, no discussion of principles is called for. On the first point, all the cases bearing thereon have been discussed by the Supreme Court in the case of State of Punjab v. Sukh Raj, AIR 1968 SC 1089 and the general effect thereof summarised in paragraph 16 of the Judgment is as follows:—

"On a conspectus of these cases, the following propositions are clear:—

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry— "enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service,

does not attract the operation of Article 311 of the Constitution.

5. If there be a full scale departmental enquiry envisaged by Article 311, i. e., an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article.

7. Now, in this case, if one reads only the notice, no exception whatever can be taken to it. It does not even say, as was stated in a similar case considered by the Supreme Court in Jagdish Mitter v. Union of India, AIR 1964 SC 449 that the petitioner is an undesirable person. The argument strongly pressed on behalf of the petitioner before us, however, is that in the counter affidavit filed on behalf of the respondent, certain previous instances of misconduct or misdemeanour on his part have been set out resulting in punishment by way of warning or censure having been imposed and also a statement that action to terminate his service under Rule 5 (1) (a) was decided upon after he became incorrigible. These circumstances, according to the argument, must be regarded as giving quite a different complexion to the notice which on the face of it, may appear perfectly innocent or innocuous. It is difficult to accept this contention, because, so far as the previous cases of misdemeanour or misconduct are concerned, they had already terminated by the imposition of warning or censure by way of punishment. At the time the notice was issued, it is not the case that there was any enquiry pending in which a finding of guilt had been recorded against him. If there had been any such finding, then the issue of a notice may be logically connected therewith and termination regarded as punishment. In the case of Sukh Raj, AIR 1968 SC 1089 referred to above, there was, in fact, such an enquiry instituted by the issue of a charge-sheet and followed by the receipt of explanation from the delinquent, but, no further steps were taken. In those circumstances, the Supreme Court held that there was no occasion to apply the principles stated in the previous cases of Madan Gopal v. State of Punjab, AIR 1963 SC 531 or AIR 1964 SC 449.

8. Another ruling of the Supreme Court which answers these contentions as well as the second contention of the petitioner is, the unreported case of Union of India v. Prem Prakash Midha, Civil Appeal No. 865 of 1968, D/- 14-8-1969 = (reported in AIR 1969 NSC 155). In that case, there was only a formal notice under Rule 5 (1) of the same type as in the present case without any adverse remark against the Government servant, and the Supreme Court held that such a notice cannot be regarded as amounting to any type of punishment or even a stigma. Regarding the availability of

Article 16 in cases of this type, this is what their Lordships state in that decision.

"The District Court also held that when the service of the respondent was terminated and officers junior to him were retained in service, the respondent was denied equal opportunity to public service under Art. 16 of the Constitution. But there is nothing in Article 16 of the Constitution which supports the view expressed by the learned District Judge. By Article 16 all citizens are entitled to equality of opportunity in matters relating to employment or appointment to any office under the State. By merely terminating the employment of the respondent, the respondent was not denied of equal opportunity to hold public service. Under Article 16 of Constitution, it is not one of the fundamental rights that a person who is an employee of the State shall be entitled to continue in service and that his employment shall not be terminated so long as persons junior to him remain in service."

9. Reliance however, was placed on a previous ruling of a Bench of this Court in Doddiah v. State of Mysore, 1967-2 Mys LJ 100 = (AIR 1967 Mys 223). In that case, a portion of the observation contained in the decision of the Supreme Court in Champaklal Chimanlal Shah v. Union of India, AIR 1964 SC 1854 was extracted and it was held that the retrenchment of some persons while retaining juniors in service was discriminatory and violative of Article 16. The portion of the observation relied upon was,—

".... This is not a case where services of a temporary employee are being retrenched because of the abolition of a post. In such a case a question may arise as to who should be retrenched when one out of the several posts is being retrenched in an office. In those circumstances, qualification and length of service of those holding similar temporary posts may be relevant in considering whether the retrenchment of a particular employee was as a result of discrimination.

But the decision of the Supreme Court itself in Champaklal Chimanlal's case, AIR 1964 SC 1854 did not lay down the broad proposition that termination of services of even temporary Government servant while retaining a person junior to him in service amounts to contravention of Article 16 (1) of the Constitution as the head-note of the report in Doddiah's case, 1967-2 Mys LJ 100 = (AIR 1967 Mys 223) does. What the Supreme Court held was:—

"..... This Rule (Rule 5 (1) (a) with which we are now concerned) is being attacked on the ground that it is hit by Article 16 which provides that 'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'. We have not been able to understand how this rule can possibly be hit by Article 16, which provides for equality of opportunity. These

Rules show that there are two classes of employees namely, (i) permanent employees, and (ii) temporary employees; the latter being divided into two sub-clauses (a) quasi-permanent, and (b) temporary. It is well recognised that the Government may have to employ temporary servants to satisfy the needs of the particular contingency and such employment would be perfectly legitimate. There can also be no doubt, if such a class of temporary servants could be recruited that there would be nothing discriminatory or violative of equal opportunity if the conditions of service of such servants are different in some respects from those of permanent employees. Further we see no denial of equal opportunity if out of the class of temporary employees some are made quasi-permanent depending on length of service and their suitability in all other respects for permanent employment eventually and thus assimilated to permanent employees. It has been urged on behalf of the respondent that Article 16 in any case will not apply to matters relating to termination of service. We do not think it necessary for present purposes to decide whether Article 16 would apply to rules relating to termination of service. We shall assume for the purposes of this appeal that Article 16 will apply even in the case of rules relating to termination of services. But we fail to see how the rule which applies to one class of Government Servants in the matter of termination but does not apply to the other two classes can be said to violate equality of opportunity provided in Article 16. The classification of Government servants into these classes is reasonable and differences in the matter of termination of service between these classes cannot be said to be discriminatory in the circumstances.

In view of this clear declaration of the law both in Champaklal's case, AIR 1964 SC 1854 as well as in the latest unreported case in C. A. 865 of 1966 = (reported in AIR 1969 NSC 155) we do not think it is right to regard the decision of this Court in Doddiah's case, 1967-2 Mys LJ 100 = (AIR 1967 SC 223) as an authority for the proposition set out in its headnote. The decision in that case turns upon the facts of that case namely, that there was sufficient material to hold that a certain number of persons out of the same class were discriminated against in favour of certain other persons in the same class. That is certainly not the position in this case in which we are concerned with the right or wrong of the termination of the services of a temporary servant in accordance with the Rule 5 (1), directly governing the position.

10. This writ petition therefore, fails and is dismissed.

Petition dismissed.

AIR 1970 MYSORE 305 (V 57 C 73)

M. SANTOSH, J.

Smt. Vanajakshamma and others, Petitioners v. P. Gopala Krishna, Respondent.

Criminal Revn. Petn. No. 374 of 1969, D/- 2/3-4-1970, from order of 1st Addl. Munsiff Magistrate, Bellary, D/- 30-3-1969.

(A) Criminal P. C. (1898), Section 488 — Maintenance proceedings — Summary nature — Marriage — Standard of proof — Not so high as in prosecution for bigamy or under Divorce Act — Opinion expressed by conduct of persons having special means of knowledge is sufficient — (Evidence Act (1872), Section 50).

Proceedings under S. 488, Cr. P. C. are summary in nature, meant to prevent vagrancy. The standard of proof of marriage in proceedings under the Section need not be so high as required in prosecutions for bigamy or proceedings under the Divorce Act. Thus, even opinion expressed by conduct of persons who had special means of knowledge on the subject may suffice to prove the fact of marriage in a proceeding under the Section. The proviso to Sec. 50, Evidence Act which does not refer to proceedings under Sec. 488 only says that such opinion shall not be sufficient to prove marriage in proceedings under the Divorce Act or in prosecutions under the Indian Penal Code for bigamy, etc. AIR 1953 Orissa 10 & 1967 Mad LJ (Cri) 311 (Ker), Rel. on; AIR 1965 SC 1564, Dist. (Paras 10, 12, 13)

(B) Criminal P. C. (1898), Section 489 (2) — Finality of finding as to relationship of husband and wife — Subsequent Civil Court decision — Effect — Magistrate can cancel or vary order.

Even though the Criminal Court may come to the conclusion in a proceeding under Section 488, Criminal Procedure Code that the parties are husband and wife, if a Civil Court gives a different finding on the point, the Criminal Court should alter its finding. (Para 12)

(C) Evidence Act (1872), Section 114 — Marriage — Presumption from continuous and long cohabitation — Rebuttable.

Continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable. When such presumption has arisen from evidence, mere total denial of the husband that he ever lived with her cannot rebut the presumption. AIR 1952 SC 231, Rel. on. (Para 6)

(D) Evidence Act (1872), Sections 74 and 77 — Public document — Register of births maintained by municipality is a public document — Certified copy of extract is admissible to prove contents of such public document. (Para 16)

GN/HN/D398/70/KSB/M

(E) Criminal P. C. (1898), Section 488 — Rate of maintenance — Petitioner claiming maintenance at Rs. 150 per month for herself and her two minor children — Respondent husband owning 14 acres of land and doing contract work and was also income-tax payer — Petitioner held should be granted maintenance at Rs. 35 per month for herself and Rs. 25 each for her minor children.

(Para 17)

Cases Referred: Chronological Paras
(1967) 1967 Mad LJ (Cri) 311 = 1967

Ker LT 1122, Bebi Bai v. Y.

Japamony

2, 18

(1965) AIR 1965 SC 1564 (V 52) =

1965 (2) Cri LJ 544, Bhaurao v.

State of Maharashtra 8, 10, 12

(1954) AIR 1954 Mad 657 (V 41) =

1955-1 Mad LJ 120, Deivanai Achi

v. Chidambaram Chettiar 9

(1953) AIR 1953 Orissa 10 (V 40) =

1953 Cri LJ 260, K. J. B. David

v. Nilamoni Devi 2, 11

(1952) AIR 1952 SC 231 (V 39) =

1952 SCR 825, Gokal Chand v.

Parvin Kumari 6

(1950) AIR 1950 Mad 777 (V 37) =

1950-2 Mad LJ 200, In re Ponnu-

swami 2

J. M. Riazuddin, for Petitioners; B. V. Deshpande, for Respondent.

ORDER:— This petition arises out of proceedings taken under Section 488, Criminal Procedure Code. The 1st petitioner before this Court claims to be the wife of the respondent and the petitioners 2 and 3 are said to be her minor children born to the respondent. The 1st petitioner claimed a total sum of Rs. 150/- per month towards maintenance of herself and her 3 minor children. After the enquiry the learned Magistrate dismissed the petition. The petitioners challenge the correctness of the said order passed by the learned Magistrate in this revision petition.

2. Sri Riazuddin, learned Counsel appearing on behalf of the petitioners, has contended that the learned Magistrate, after having accepted the evidence let in by the petitioners, was wrong in dismissing the petition. He has pointed out that the learned Magistrate has also rejected the evidence let in on behalf of the respondent, but yet strangely dismissed the petition. The learned Magistrate has also given a finding that it had been established in evidence that petitioner 1 was the kept mistress of the respondent. It has been argued that the standard of proof of marriage under Section 488, Criminal Procedure Code is different from that laid down either in the Divorce Act or in prosecutions under Secs. 494, 495 and 498, Indian Penal Code. The proviso to Section 50 of the Indian Evidence Act makes this clear. The learned Counsel has strongly relied on AIR 1953 Orissa 10 and 1967 Mad LJ (Cri) 311 (Ker) in support of his said contention. It is also contended that as the 1st petitioner

was a widow no specific ceremonies need be performed for a valid Hindu Marriage. The learned Counsel has relied on AIR 1950 Mad 777 in support of his contention that a Hindu marriage need not take place in the presence of a priest, and the tying of a Tali in the presence of an idol is also one of the forms of a marriage known to Hindu Law. It is argued that the evidence given by petitioner 1 and her witnesses clearly makes out a case that the petitioner 1 was the wife of the respondent and petitioners 2 and 3 are his children born to him after his marriage with petitioner 1.

3. The learned Magistrate believed the evidence of P. Ws. 1 and 2 examined on behalf of the petitioners. He has stated that P. Ws. 1 and 2 appear to be disinterested and independent witnesses. Further, there was absolutely nothing on record to suggest that they are either interested in the petitioners or that they had any ill-will against the respondent. He has stated that he had carefully examined the evidence of these witnesses and he was satisfied that their evidence is convincing and they have spoken the truth. The learned Magistrate has also disbelieved the evidence of the witnesses examined on behalf of the respondent. He has held that they are all interested witnesses and persons working under the respondent. After reviewing the evidence, he has accepted the evidence that petitioner 1 and the respondent were living together as husband and wife for a long time, and he finds that petitioner 1 was the kept mistress of the respondent. But strangely enough, after giving such a finding, he has entirely dismissed the petition filed on behalf of the children for maintenance. With regard to the question whether petitioner 1 is the wife of the respondent, he states as follows:—

"If really R. W. 4 had married P. W. 3 at Tirupathi, there was no necessity for him to keep P. W. 3 in a separate house. On the evidence placed a presumption that there was a valid marriage cannot be justified."

4-5. The first question for consideration in this case is whether the 1st petitioner is the wife of the respondent. The 1st petitioner has been examined as P. W. 3 in the case.

(After discussion of petitioner's evidence his Lordship proceeded.)

6. The learned Magistrate has also accepted the evidence of this witness (P. W. 1) that petitioner 1 and the respondent were living together for a number of years. In Gokal Chand v. Parvin Kumari, AIR 1952 SC 231, their Lordships of the Supreme Court has pointed out that continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage. But the presumption which may be drawn from long cohabitation is rebuttable. In the instant case, except denying

totally and saying that he never lived with petitioner 1, the respondent has not in any way rebutted the presumption of marriage arising out of the continuous cohabitation as alleged by petitioner 1 and her witnesses.

7. (After discussion of some more evidence His Lordship proceed.) After going through the evidence, I am satisfied that the respondent married the 1st petitioner at Tirupati and thereafter lived with her as his wife in different places and petitioners 2 and 3 were born to the respondent and petitioner 1 after their marriage.

8. It is contended by Shri Deshpande learned counsel appearing on behalf of the respondent, that there is no legal proof whatsoever that the respondent married petitioner 1. Petitioner 1 has not stated what are the ceremonies that were performed at the time of the alleged marriage. She has also not given any evidence about the custom of her community. He argues, there must be strict proof of marriage before maintenance can be awarded under Section 488, Criminal Procedure Code to the wife. He has strongly relied on *Bhaurao v. State of Maharashtra*, AIR 1965 SC 1564. In the said decision, their Lordships have laid down that Section 17 of the Hindu Marriage Act makes the marriage between 2 Hindus void if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the Act and (ii) at the date of such marriage either party had a spouse living. Their Lordships have pointed out that the word 'solemnized' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form'. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized'. It is therefore essential for the purpose of Section 17 of the Act, that the marriage to which Section 494, Indian Penal Code applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom. Their Lordships have also laid down, *prima facie*, that the expression 'whoever marries' in Section 494, Indian Penal Code must mean 'whoever marries' validly. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife.

9. Sri Deshpande has also relied on *Deivanai Achi v. Chidambaram Chettiar*, AIR 1954 Mad 657. In the said decision, their Lordships have considered what are the essential ceremonies that are necessary to con-

stitute a valid marriage under the Hindu Law. Their Lordships have referred to the various forms of marriage and the ceremonies that are necessary to be performed to constitute a valid marriage. Their Lordships have also referred to the essentials of a valid custom. The custom must be ancient, certain and reasonable and it cannot be enlarged beyond the usage by parity of reason since it is the usage that makes the law and not the reason of the thing.

10. The petitioner No. 1 has stated that she got married to the respondent at Tirupathi. She has not been asked what were the ceremonies that she underwent during the said marriage. There is no evidence to show that she has not undergone the ceremonies necessary for a valid marriage. In the notice, Ext. P-2, given by her to the respondent, she has stated that she has undergone the marriage according to the religious rites. In the Supreme Court decision mentioned above AIR 1965 SC 1564, their Lordships were considering a case of prosecution for bigamy under Section 494, Indian Penal Code and in that context their Lordships held that the prosecution should prove that the marriage has been duly solemnized. It has to be remembered that proceedings under Section 488, Criminal Procedure Code are summary in nature, meant to prevent vagrancy. The standard of proof of marriage in proceedings under Section 488, Criminal Procedure Code need not be so high as required in prosecutions for bigamy or proceedings under the Divorce Act. In this connection, reference may be made to the proviso to Section 50 of the Indian Evidence Act. Section 50 reads as follows:—

"When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."

"Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code."

Illustration (a) to the above Section says:—

"The question is, whether A and B were married. The fact that they were usually received and treated by friends as husband and wife is relevant."

It is pertinent to point out that the proviso does not refer to proceedings under Section 488, Criminal Procedure Code. It only says that such opinion shall not be sufficient to prove marriage in proceedings under the Indian Divorce Act or in prosecutions under the Indian Penal Code for bigamy, etc.

11. In AIR 1953 Orissa 10, *Narasimham, J.*, (as he then was) has pointed out that Section 488, Criminal Procedure Code is not included in the proviso to Section 50 of the Evidence Act. Hence, for proving a mar-

riage in proceedings under Section 488, Criminal Procedure Code, the standard of proof need not be so high as required in proceedings under the Indian Divorce Act or in prosecutions under Sections 494, Indian Penal Code. His Lordship observed that even an opinion expressed by conduct of persons who had special means of knowledge on the subject, may suffice to prove the fact of marriage in a proceeding under Section 488, Criminal Procedure Code.

12. It is contended by Sri Deshpande that the said Orissa decision may not be a good law in view of the later decision of the Supreme Court referred to earlier, i.e., AIR 1965 SC 1564. He also contends that after the Hindu Marriage Act came into force, the requirements laid down in Section 7 should be fully complied with to prove a marriage. As already pointed out, the Supreme Court decision dealt with the case of a prosecution for bigamy and did not consider the question of proof of marriage arising under Section 488, Criminal Procedure Code. Section 50 of the Indian Evidence Act and the proviso stand unaltered. It therefore follows that the strict proof required for proving a marriage in a criminal prosecution or in proceedings under the Divorce Act, is not necessary in a summary proceeding under Section 488, Criminal Procedure Code. It may be pointed out that even though the Criminal Court may come to the conclusion in a proceeding under Section 488, Criminal Procedure Code that the parties are husband and wife, if a Civil Court gives a different finding on the point, the Criminal Court should alter its finding. In this connection, it is pertinent to point out sub-section (2) of Section 489, Criminal Procedure Code which reads as follows:—

"Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 488, should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

This clearly shows that the finding given by the learned Magistrate is not final and if there is a decision of a competent Civil Court, the Magistrate should cancel the order or vary it.

13. After the abovementioned decision of the Supreme Court, in *Bebi Bai v. Y. Japamony*, 1967 Mad LJ (Cri) 311 (Ker), the Madras High Court held that in a proceeding under Section 488, Criminal Procedure Code, the standard of proof of marriage need not be so high as required either in a proceeding under the Indian Divorce Act or in a prosecution under Section 494, 495, 497 or 493, Indian Penal Code. Thus, even opinion expressed by conduct of persons who had special means of knowledge on the subject may suffice to prove the fact of marriage in a proceeding under the Section.

14. The learned Magistrate has not applied his mind properly to the question of marriage of petitioner 1 with the respondent. The reasons given by him for coming to the conclusion that there was no valid marriage between them cannot be supported. The finding given by the learned Magistrate is as follows:—

"If really R. W. 4 had married P. W. 3 at Tirupathi, there was no necessity for him to keep P. W. 3 in a separate house. On the evidence placed a presumption that there was a valid marriage cannot be justified."

I accept the evidence of petitioner 1 that the respondent married her at Tirupathi. This evidence of petitioner 1 is corroborated by the evidence of P. W. 2. There is no reason to reject the evidence given by these two witnesses. The fact that the respondent married the 1st petitioner at Tirupathi is also set out in the registered lawyer's notice, Ext. P-2, sent by petitioner 1 to the respondent. As already pointed out, though the respondent received the same, he did not send any reply denying the facts mentioned therein that he had married petitioner 1 at Tirupathi.

15. The next question for consideration is whether it has been proved that petitioners 2 and 3 are the children of the respondent, born to him after his marriage with the 1st petitioner. Taking first the case of petitioner No. 2, the 1st petitioner in her evidence has stated that the 2nd petitioner was born after her marriage with the respondent, when they were living together in Mariammanahalli. P. W. 1 has also been examined to prove this fact. P. W. 1 is the midwife residing at Mariammanahalli. She has stated that about 6 years back, the respondent was residing in Mariammanahalli and he was working as a railway contractor. He was in her village for 3 years. He had kept the 1st petitioner in a separate house there and they were living there together. She has also stated that she attended on the 1st petitioner when she gave birth to the second petitioner. The respondent had sent for her before the delivery and the respondent was in the house at that time. She has also stated that the respondent paid her charges. She has further stated that even after the birth of the 2nd petitioner, petitioner 1 and the respondent were living together for one more year in the said village. The evidence given by P. W. 1 has not at all been shaken in cross-examination. The learned Magistrate who had the benefit of seeing P. W. 1 in the box has held that she is an independent and disinterested witness. He has also stated that there is absolutely nothing on record to show that P. W. 1 was in anyway interested in the 1st petitioner or that she bore any ill-will towards the respondent. The learned Magistrate has held that the evidence given by P. W. 1 is convincing and that she has spoken the truth. It may be pointed out that P. W. 2, whose evidence

the learned Magistrate has accepted, has also stated that the 1st petitioner and the respondent were living as husband and wife in Mariammanahalli. He has further stated that they were so living together for 3 years in Mariammanahalli and for 2 years in Bommanahalli.

16. The evidence with regard to the birth of petitioner 3 to the respondent is again spoken to by petitioner 1. She has stated that the third petitioner was born in Bellary in the Government Women's Hospital. She has also produced Ext. P-1 the extract of the birth register relating to the birth of the third petitioner. Ext. P-1 is the certified copy of the extract from the Register of Births, registered in the Bellary Municipality during the month of July, 1966. In the said extract, the name of the mother is given as Vanajakshamma (1st petitioner) and the name of the father is mentioned as Gopalakrishna (respondent). The place of birth is mentioned as Government Women and Children Hospital, Bellary. There cannot be any doubt that Ext. P-1 is a public document and as per Section 77 of the Indian Evidence Act, certified copy of a public document may be produced in proof of the contents of the public document. From the evidence of petitioner 1 and Ext. P-1, it can be reasonably concluded that petitioner 3 was born to the respondent after his marriage with petitioner 1 when they were living at Bellary. I have therefore no hesitation in coming to the conclusion that the 2nd and 3rd petitioners are the children born to the respondent after his marriage with the 1st petitioner at Thirupathi.

17. The next question for consideration is as to what rate of maintenance petitioners 1 to 3 are entitled. Petitioner 1 in her evidence has stated that the respondent is a contractor, that he owns a house and 10 acres of land. She has also stated that he owns a lorry and he earns on an average Rs. 700/- to Rs. 800/- per month. She has also stated that she requires Rs. 150/- per month for their maintenance. The respondent in his cross-examination has admitted that he has got 14 acres of land in his own name at Kollegal. He has also admitted that he is doing contract work along with his elder brother. He has admitted that they had one lorry, but stated that they have now sold it. He has also admitted that they pay income-tax. The respondent stated that when there is work he gets about Rs. 200/- to Rs. 300/- per month from the contract work. Though he admitted that he has got 14 acres of land, he has stated that he gets an income of only Rs. 100/- per year from the land. Taking the admission of the respondent himself, it shows that he has got 14 acres of land in his own name. He has also admitted that he is doing contract work and paying income-tax. Taking the evidence let in by the parties with regard to the income of the respondent, I am of opinion that it is reason-

able to award a maintenance of Rs. 35/- (Rupees thirty five only) per month to the 1st petitioner and Rs. 25/- (Rupees twenty five) each, per month to the 2nd and 3rd petitioners, from the date of the petition.

18. In the result, for the reasons mentioned above, I allow this revision petition, set aside the order passed by the learned 1st Additional Munsiff-Magistrate, Bellary and award maintenance at Rs. 35/- per month to the 1st petitioner, and at Rs. 25/- each per month to the 2nd and the 3rd petitioners from the date of the petition.

Revision allowed.

AIR 1970 MYSORE 309 (V 57 C 74)

D. M. CHANDRASHEKHAR AND
C. HONNIAH, JJ.

Gangadhar Shivalingappa Nagmoti, Petitioner v. The State of Mysore, Respondent.

Writ Petn. No. 1313 of 1965, D/- 19-6-1970.

(A) Constitution of India, Article 235 — Disciplinary proceedings against judicial officers — High Court alone is competent to hold enquiry — Appointment of High Court Judge as enquiring authority by Governor though made at instance of Chief Justice could not be regarded even in substance an appointment made at instance of High Court when under resolution of High Court only full Court was empowered to make such appointment — Report and punishment recommended also not considered by High Court — Punishment based on report of such enquiry is void. AIR 1966 SC 447, Applied.

(Paras 20, 27, 30, 32)

(B) High Court Rules and Orders — Mysore High Court Rules (1959), Chapter III, Rule 6 — Power conferred on Chief Justice is only in regard to judicial work and not administrative matters. (Para 29)

Cases Referred: Chronological Paras
(1969) Civil Appeal 1735 of 1967, D/-
22-8-1969 (SC) 12

(1966) AIR 1966 SC 447 (V 53) =

(1966) 1 SCR 771, State of West

Bengal v. Nripendra Nath Bagchi 12, 14,
17, 19, 35

S. G. Bhat, for Petitioner; E. S. Venkataramaiah, for Respondent.

CHANDRASHEKHAR, J.:— The petitioner was a member of the Mysore Judicial Service in the rank of Subordinate Judge. In this petition, he has assailed the disciplinary proceedings against him culminating in an order retiring him from service compulsorily.

2. We may now state the material facts which are not in dispute.

3. In the year 1963 the petitioner was working as the Principal Subordinate Judge in Bangalore. On 8-10-1963 one Annappa Setty (examined as P. W. 9 in the disciplinary enquiry) submitted a complaint to the

GN/HN/D400/70/RSK/C

Director, Anti-Corruption, making certain allegations against the petitioner regarding the disposal of a steel almirah which had been attached in an execution case pending before him.

4. The said Director forwarded that complaint to the High Court on 13-10-1963. On 14-10-1963 the Hon'ble Chief Justice requested Mr. Justice Narayana Pai to hold a preliminary enquiry on that complaint and to report. After holding a preliminary enquiry, Mr. Justice Narayana Pai sent a report in which he stated that in his opinion there was a prima facie case for instituting disciplinary proceedings against the petitioner.

5. On the report of the preliminary enquiry, the Hon'ble Chief Justice directed on 19-10-1963 that the Governor might be moved to appoint Mr. Justice K. S. Hegde as the Specially Empowered Authority to hold a Departmental Enquiry against the petitioner. In pursuance of that direction the Registrar-in-charge of the High Court addressed on 23-10-1963 a demi-official letter to the Secretary to the Government of Mysore in Home Department stating that he (the Registrar-in-charge) was directed to request the Secretary to move the Governor to appoint Mr. Justice K. S. Hegde as the Specially Empowered Authority to hold a Departmental Enquiry into the conduct of the petitioner under Rule 11 of the Mysore Civil Services (Classification, Control and Appeal) Rules, 1957.

6. Purporting to act in exercise of the powers conferred by that Rule, the Governor of Mysore, by his order dated 8-11-1963, specially empowered Mr. Justice K. S. Hegde, Judge of the High Court of Mysore, to exercise the powers and perform the functions of the Specially Empowered Authority under the said Rule in respect of the disciplinary proceedings against the petitioner.

7. On 18-12-1963 the Specially Empowered Authority framed a charge against the petitioner. The said charge reads:

"That you while being the Principal Subordinate Judge, Bangalore, misused your official position with a view to secure monetary benefit either for yourself or for your father-in-law by utilising the services of the Process Nazir and the Process Staff attached to the First Munsiff's Court, Bangalore, to get up false records to show that all the six Godrej Almirahs got attached in Original Suit No. 215 of 1960 on the file of the Subordinate Judge's Court, Bangalore, were sold in the Court auction held, while actually one Godrej Almirah was not sold in auction but was merely shown to have been sold in the relevant sale papers for a low price of Rs. 150/-, but later you got the Almirah removed to the house wherein you and your father-in-law reside."

8. The petitioner filed a written statement in which he denied having committed any of the acts alleged in the charge. He asked for an oral enquiry and to be heard in person.

Accordingly, the Special Empowered Authority held an enquiry in which 9 witnesses were examined in support of the charge. The petitioner examined defence witnesses and he also gave evidence as a defence witness.

9. After such enquiry, the Special Empowered Authority, in his report dated 16-3-1964, held that the charge against the petitioner was established and found him guilty of the charge. Regarding the punishment, the Special Empowered Authority recommended that the petitioner might be reduced to the rank of Civil Judge, Junior Division (Munsiff), and that he should not be considered for promotion as Civil Judge, Senior Division, or as Subordinate Judge for a period of two years.

10. After considering the report of the Specially Empowered Authority, the Governor recorded his finding that the charge was proved. The Governor caused the issue of a notice under Article 311 (2) of the Constitution proposing to retire the petitioner compulsorily from service by way of punishment. The petitioner was asked to show cause why the proposed action should not be taken. After considering the representation of the petitioner in response to the said notice, the Governor, by his order dated 31-10-1964, directed that the petitioner be retired compulsorily from service with immediate effect. The petition for review of the aforesaid order, was dismissed by the Governor on 1-4-1965.

11. Thereafter the petitioner filed the present petition which was dismissed by this Court on 16-7-1965 at the stage of admission without notice to the respondent. Later this Court granted a certificate of fitness to appeal to the Supreme Court.

12. In the appeal, Civil Appeal No. 1735 of 1967, after hearing the petitioner and the respondent (The State of Mysore), the Supreme Court, by its order dated 22-8-1969, set aside the order of this Court dated 16-7-1965, and remanded the case to this Court for being disposed of afresh according to law. The Supreme Court directed this Court to admit this petition, to issue notice to the respondent giving it an opportunity to file any counter-affidavit and thereafter to deal with the case in accordance with the law laid down by the Supreme Court in the State of West Bengal v. Nripendra Nath Bagchi, AIR 1966 SC 447.

13. Accordingly, this Court admitted this petition on 3-10-1969 and issued notice to the respondent (the State of Mysore) which has filed a counter-affidavit. This is how the petition has now come up before us.

14. The ground on which the Supreme Court set aside the order of this Court dated 16-7-1965, is that this Court had not considered the aspect that by Article 235 of the Constitution, the High Court is made the sole custodian of the control over the judi-

ciary and as pointed out by the Supreme Court in AIR 1966 SC 447, the word, 'Control', as used in Article 235, includes disciplinary control or jurisdiction over District Judges and other subordinate Judges. Before the Supreme Court, it was, no doubt, contended on behalf of the respondent that by its letter dated 23-10-1963 the High Court had itself requested the Government to appoint Mr. Justice K. S. Hegde as the Specially Empowered Authority to hold the Departmental enquiry into the conduct of the petitioner and therefore the provisions of Article 235 of the Constitution had been substantially complied with. But the Supreme Court did not examine the validity of the plea of substantial compliance (with the provisions of Article 235 of the Constitution) as it (Supreme Court) felt that it did not have the advantage of the judgment of this Court on that disputed point.

15. Mr. S. G. Bhat, learned Counsel for the petitioner, urged the following grounds before us:

(i) The disciplinary proceedings initiated by the Governor and culminating in the order of compulsory retirement of the petitioner passed by the Governor, are void as being inconsistent with the provisions of Article 235 of the Constitution;

(ii) Rules 8, 9 and 11 of the Mysore Civil Services (Classification, Control and Appeal) Rules, 1957, in so far as they relate to the Judicial Service, are violative of Article 235 of the Constitution;

(iii) The order of compulsory retirement is not one of the punishments which falls within Article 311 of the Constitution;

(iv) The finding of the Specially Empowered Authority that the petitioner was guilty of the charge, is unsustainable as it is not based on any evidence; and

(v) The Governor should have given to the petitioner an opportunity of being heard, before recording a finding that the charge was proved."

16. Elaborating the first contention, Mr. Bhat argued that it is the High Court and not the Governor that can hold a disciplinary enquiry against a Judicial Officer, that the order of the Governor appointing Mr. Justice K. S. Hegde as the Special Empowered Authority, is void and consequently, the enquiry held by Mr. Justice K. S. Hegde has also no legal validity, and that the punishment based on an invalid enquiry is also void. It was also argued by Mr. Bhat that the Governor had no power to impose on the petitioner the punishment of compulsory retirement, in the absence of a recommendation by the High Court to that effect.

17. In AIR 1966 SC 447, the material facts were briefly these: Respondent Bagchi was an Additional District & Sessions Judge, and was acting as District & Sessions Judge. The Government of West Bengal framed certain charges against him and appointed Mr. B. Sarkar, the Commissioner (late Member,

Board of Revenue) to hold an enquiry into those charges. Mr. Sarkar held the enquiry and reported to the Government that some of those charges were proved. A notice was issued to Bagchi to show cause why he should not be dismissed. After he had shown cause and after consulting the Public Service Commission, he was dismissed from service. But the High Court was not consulted at all. On a petition by Bagchi under Articles 226 and 227 of the Constitution, the High Court at Calcutta quashed the order of dismissal as well as the enquiry.

18. In the appeal preferred by the Government of West Bengal, the Supreme Court upheld the decision of the High Court. Explaining the scope of Article 235 of the Constitution, Hidayatullah, J., (as he then was) who spoke for the Court, said that the word 'control' in Article 235 of the Constitution is not merely the power to arrange the day-to-day working of the Court but includes control over the conduct and discipline of Judges, and that the High Court is made the sole custodian of the control over judiciary.

His Lordship added:

"Control is useless if it is not accompanied by disciplinary powers. It is not to be expected that the High Court would run to the Government or the Governor in every case of discipline however small and which may not even require the punishment of dismissal or removal."

19. It was contended before the Supreme Court in Bagchi's case, AIR 1966 SC 447 that Judicial Officers who are appointed by the Governor, cannot be dismissed or removed by any authority other than the Governor and consequently an inquiry against a Judicial Officer should be made by or under the directions of the Governor or the Government. Repelling that contention, Hidayatullah, J., said that the Governor appoints District Judges and the Governor alone can dismiss or remove them, does not infringe upon the control of the High Court and does not lead to the further conclusion that the High Court must not hold the enquiry any more than that the Governor should personally hold the enquiry. His Lordship added that there is nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry, that in exercise of the control vested in the High Court, the High Court can hold enquiry, impose punishments other than dismissal or removal subject however to the conditions of service and right of appeal if granted by the conditions of service and to giving an opportunity of showing cause as required by clause (2) of Article 311, unless such opportunity is dispensed with by the Governor acting under the provisos (b) and (c) of that clause. His Lordship concluded that the High Court alone could have held the enquiry in that case.

20. In view of the above pronouncement of the Supreme Court, it is clear that an enquiry held by or under the authority of the High Court, forms, the foundation for any punishment that may be imposed on a judicial Officer. It follows from the above decision that in the present case also it is High Court that could have held the enquiry against the petitioner. The Governor had no power to order such enquiry or to empower any person to hold such enquiry. Even though the Specially Empowered Authority who held the enquiry against the petitioner, was a Judge of the High Court, he was not empowered by the High Court to hold that enquiry and the enquiry held by him cannot be regarded as one by or under the authority of the High Court.

21. However, the attempt of the learned Advocate-General who appeared for the State, was a salvage as much as possible of the disciplinary proceedings against the petitioner. The learned Advocate-General submitted that even if we were to hold that the disciplinary proceedings against the petitioner subsequent to the stage of the report of the Specially Empowered Authority, are void, we should uphold the disciplinary proceedings up to the stage of the said report, so that it may be open to the High Court now to take disciplinary proceedings against the petitioner starting from the stage of that report.

22. The learned Advocate-General argued that the appointment of the Specially Empowered Authority must be regarded as being, in substance, one made by the High Court and that likewise the enquiry made by the Specially Empowered Authority must be regarded as being, in substance, one held under the authority of the High Court, in view of the following circumstances:

- (i) The initiative to take disciplinary proceedings against the petitioner, came from the High Court and not from the Governor;
- (ii) The Specially Empowered Authority who held the enquiry was a Judge of the High Court; and
- (iii) The Governor empowered the very person proposed by the High Court, as the Specially Empowered Authority.

23. It can reasonably be inferred that in empowering Mr. Justice K. S. Hegde as the Specially Empowered Authority, the Governor did not act suo motu but acted on the letter addressed by the Registrar-in-charge of the High Court to the Government stating that he (The Registrar-in-charge) had been directed to request the Government to move the Governor to so appoint Mr. Justice K. S. Hegde. It is true that the Governor empowered the very person so recommended as the Specially Empowered Authority to hold the enquiry and that the Specially Empowered Authority was a Judge of the High Court. But are these circumstances sufficient to hold that Mr. Justice K. S. Hegde was, in substance, appointed by the High Court and

the enquiry held by him was, in substance, under the authority of the High Court?

24. Mr. Bhat argued that there is nothing to show that the said letter of the Registrar-in-charge of the High Court to the Government was written under the direction of the High Court. The learned Advocate-General placed before us the relevant records of the High Court. It is seen from these records that on the report of Mr. Justice A. Narayana Pai who held the preliminary enquiry, the Hon'ble Chief Justice directed that the Governor might be moved to appoint Mr. Justice K. S. Hegde as Specially Empowered Authority.

25. It was contended by Mr. Bhat that the recommendation of the Hon'ble Chief Justice to appoint Mr. Justice K. S. Hegde as the Specially Empowered Authority, cannot be regarded as a recommendation by the High Court. This contention was sought to be met by the learned Advocate-General by the plea that in making the said recommendation the Hon'ble Chief Justice acted within the scope of the powers assigned to him by the High Court. In support of this plea, the learned Advocate-General relied on the resolution of the Full Court of the High Court at its meeting held on 11-10-1961. A copy of this resolution has been filed with a memo and the original of this resolution contained in the administrative papers of the High Court, was also shown to us.

26. The relevant parts of the proceedings of the meeting of the Full Court held on 11-10-1961, read :

"Proceedings of the Full Court meeting held at 4.30 P. M. on Wednesday the 11th October 1961 in the Judges' Common Room (High Court).

RESOLUTION

The proposed arrangement for administrative work in the High Court was finalised as follows:—

- | | | |
|---|----|----|
| I. FULL COURT: | .. | .. |
| 1. .. | .. | .. |
| 2. Disciplinary action against Judicial Officers. | .. | .. |
| 3. .. | .. | .. |
| II. C. J. & TWO JUDGES: | .. | .. |
| 1. .. | .. | .. |
| 2. Preliminary investigations to consider desirability of taking disciplinary action against Judicial Officers. | .. | .. |
| 3. .. | .. | .. |
| III. Chief Justice: | .. | .. |
| 1. .. | .. | .. |
| 2. Unspecified subjects or new subjects until they are allocated to committees or individual Judges." | .. | .. |

27. It is seen from the above resolution of the Full Court that while preliminary investigation and determination of desirability of taking disciplinary action against Judicial

Officers come within the powers of a Committee consisting of the Hon'ble Chief Justice and two other Judges, disciplinary action against Judicial Officers is a matter to be dealt with by the Full Court itself. Appointment of the Specially Empowered Authority or the Enquiry Officer to hold enquiry into charges against a Judicial Officer, comes, in our opinion, within the ambit of "disciplinary action against Judicial Officers" which is a matter to be dealt with by the Full Court itself and the Hon'ble Chief Justice has not been empowered by the said resolution to make such appointment.

28. However, the learned Advocate-General argued that appointment of the Specially Empowered Authority or the Enquiry Officer in disciplinary proceedings against a Judicial Officer, comes within Item No. 7 of the matters assigned to the Hon'ble Chief Justice by the said resolution of the Full Court. That Item reads: "Unspecified subjects or new subjects until they are allocated to Committees or individual Judges". We find it difficult to accede to this contention. Item No. 7 is a residuary item which covers only those matters which do not come within any of the matters retained by the Full Court or assigned to Committees consisting of the Hon'ble Chief Justice and two other Judges or any of the first six Items (preceding this Item) assigned to the Hon'ble Chief Justice. Appointment of the Specially Empowered Authority or the Enquiry Officer is a part of the disciplinary action against Judicial Officers and squarely falls within Item No. 2 of the matters retained by the Full Court under the said resolution.

29. In exercise of the powers conferred by Article 225 of the Constitution and under Section 19 of the Mysore High Court Act, 1961, and all other powers thereunto enabling, the High Court of Mysore has made rules, called the High Court of Mysore Rules, 1959, with respect to practice and procedure to be followed at the High Court. Rule 6 of Chapter III of these Rules provides that Benches shall be constituted and judicial work of the Court shall be allotted or distributed to them by or in accordance with the directions of the Hon'ble Chief Justice. But the power conferred on the Hon'ble Chief Justice under this Rule is only in regard to Judicial Work and not administrative matters.

30. Thus it is clear that the Hon'ble Chief Justice has not been empowered to appoint on behalf of the High Court the Specially Empowered Authority or the Enquiry Officer. The question of appointment of the Specially Empowered Authority or the Enquiry Officer to hold an enquiry against the petitioner, was not considered by the Full Court of the High Court. It follows that the direction of the Hon'ble Chief Justice on 19-10-1963 that the Governor might be moved to appoint Mr. Justice K. S. Hegde

as the Specially Empowered Authority, cannot be regarded as a recommendation or proposal made by the High Court to the Governor in regard to such appointment. When there was no recommendation or proposal of the High Court in this behalf, the appointment of Mr. Justice K. S. Hegde by the Governor cannot be regarded as being, in substance, an appointment made by the High Court, nor can the enquiry made by him be regarded as being, in substance, one made by the High Court.

31. As the very foundation for any disciplinary action against the petitioner, namely, an enquiry held by the High Court, is absent in the present case, the penalty of compulsory retirement imposed on the petitioner by the impugned order of the Governor dated 31-10-1964, is clearly unsustainable.

32. Another infirmity in the disciplinary proceedings against the petitioner, is that the report of the enquiry held by Mr. Justice K. S. Hegde, was not considered by the High Court. As stated earlier, Mr. Justice K. S. Hegde had recommended in his report that the petitioner should be reduced to the rank of Civil Judge, Junior Division (Munsiff) and that he should not be considered for promotion as Civil Judge, Senior Division, or Subordinate Judge, for a period of two years. If the High Court agreed with this proposed penalty or considered that the appropriate penalty to be imposed on the petitioner, was one other than his dismissal or removal from service, the High Court itself was competent to impose such penalty on the petitioner and the matter could not have been referred to the Governor. It is only when the High Court considers that the appropriate penalty against a Judicial Officer is dismissal or removal from service that the High Court need recommend to the Governor to impose such penalty.

33. In the view we have taken on the first ground urged by Mr. Bhat, it is unnecessary to consider the other grounds urged by him.

34. For the foregoing reasons, we quash the order of the Governor dated 31-10-1964 retiring the petitioner compulsorily from service and the enquiry held by Mr. Justice K. S. Hegde. However, it will be open to the High Court to take fresh disciplinary proceedings against the petitioner according to law.

35. As the impugned disciplinary proceedings were prior to the elucidation by the Supreme Court in Nripendranath Bagchi's case, AIR 1966 SC 447 of the respective powers of the High Court and the Governor in disciplinary matters against Judicial Officers, we direct the parties to bear their own costs in this petition.

Petition allowed.

AIR 1970 MYSORE 314 (V 57 C 75)

D. M. CHANDRASHEKHAR, J.

Rangayya Kanantha and others, Petitioners
v. Govinda Chatra and others, Respondents.Civil Revision Petition No. 1314 of 1968,
D/- 5-2-1970, against order of Civil I,
Udipi, D/- 31-8-1968.(A) Civil P. C. (1908), O. 26, R. 9 —
Object of local investigation under — In-
vestigation is merely to assist Court.

The local investigation made by the Commissioner under Order 26, Rule 9 is merely to assist the Court by placing a report of such local investigation before the Court. Such report is not, in any way, binding on the Court whose power to arrive at its own conclusion, even at variance with such report, is in no way impeded by such report.

(Para 11)

(B) Civil P. C. (1908), Order 26, Rule 9, Section 115 — Trial Court holding that appointment of Commissioner under Order 26, Rule 9 would amount to abdication or delegation of powers of court to Commissioner — By such erroneous view court held declined to exercise jurisdiction to appoint Commissioner — Failure justified interference in revision.

(Para 14)

(C) Civil P. C. (1908), Order 26, Rule 9 — Suit for partition and possession — Defendant's claim for improvements — Issue of commission — Directions to defendant and plaintiff.

Where in a suit for partition and possession the defendants apply for the appointment of commission to visit the properties and to estimate the value of improvements made by them, before issuing the commission the defendants shall be directed to set out clearly, in detail, the improvements claimed, the reasons why they are claimed and the value claimed. The plaintiffs shall then be called upon to make their rejoinder on those points. The Court shall thereafter judicially consider both the statements and then decide on what points, if any, it regards commission as necessary and will then issue a commission with detailed instructions accordingly. AIR 1929 Mad 661, Relied on.

(Para 15)

(D) Civil P. C. (1908), Order 26, Rule 9 — Suit for partition and possession — Defendants' claim that they have effected improvements on the suit properties — Question whether defendants have done so can be decided by taking evidence by Court and matter is not to be ascertained by Commissioner — Local investigation by Commissioner however will be useful in decision of the question.

(Para 12)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1493 (V 49) =
1963 Jab LJ 210, Munnalal v. Raj-
kumar

(1949) AIR 1949 PC 239 (V 36) =
76 Ind App 131, Joychand Lal Babu
v. Kamalaksha Chaudhury 14
(1929) AIR 1929 Mad 661 (V 16) =
118 Ind Cas 296, Ambi v. Kunhika-
vamma 15
B. P. Holla, for Petitioners; Kora Chandy,
for Respondents.

ORDER: This petition is for revision of the order of the Civil Judge at Udipi, rejecting an application for appointment of a Commissioner under Order 26, Rule 9, Civil P. C.

2. The suit is for partition and possession of the plaintiffs' share in certain agricultural lands and buildings. The plaintiffs who claim to be the reversioners, have contended that the alienations of the suit properties by the widow of the last male owner, are not binding on them.

3. Defendants 11, 12, 19, 22, 23 and 25 who are the alienees of the suit properties, have claimed inter alia, that they have effected improvements in the suit properties by spending several thousands of rupees and that even if the alienations in their favour are held to be not binding on the plaintiffs, they (those defendants) are entitled to some equities in respect of the said improvements.

4. The said defendants made an application I. A. III, praying for the appointment of a Commissioner to visit the said properties and to estimate the value of the improvements made by them. According to them, such appointment of a Commissioner would save a good deal of time and expenditure in proving those improvements and the value thereof.

5. That application was resisted by the plaintiffs mainly on the ground that the alienees are not entitled to the value of the alleged improvements.

6. The learned Civil Judge has said in his order that the Court can itself conduct an investigation in order to ascertain the improvements alleged to have been effected by the said defendants, that a local investigation by the Commissioner under Order 26, Rule 9, Civil P. C., presupposes the existence of independent evidence on record, that the issue whether the defendants have effected any improvements has to be tried by the Court on the evidence adduced by the parties, that the decision on this material issue can never be left to the Commissioner and that the Court cannot delegate any of its judicial functions to the Commissioner. In that view, the learned Civil Judge felt that it was improper to issue any commission to assess the value of the alleged improvements.

7. Mr. B. P. Holla, learned counsel for the petitioners, contended that the learned Civil Judge has entirely misconstrued the scope and object of the local investigation by the Commissioner appointed under O. 26, Rule 9, Civil P. C. and that on account of such erroneous view, he failed to exercise

the jurisdiction vested in him under O. 26, Rule 9, Civil Procedure Code. Mr. Holla submitted that the purpose of appointing the Commissioner is to make a local investigation of the alleged improvements to the suit properties and the value thereof, so that the report of the Commissioner may be useful to the Court in deciding as to the existence of such improvements and the value thereof and that there is no question of delegation of any power of the Court to decide any matter in dispute in the suit.

8. Mr. Holla invited my attention to the following observations of the Supreme Court in *Munnalal v. Rajkumar*, AIR 1962 SC 1493 at p. 1496:

"But it is manifest that the trial Judge only directed the Commissioner to submit his proposals for partition of the property, and for that purpose authorised him to ascertain the property which was available for partition and to ascertain the liability of the joint family. By so authorising the Commissioner, the trial Court did not abdicate its functions to the Commissioner: the Commissioner was merely called upon to make proposals for partition, on which the parties would be heard, and the Court would adjudicate upon such proposals in the light of the decree and the contentions of the parties. The proposals of the Commissioner cannot from their very nature be binding upon the parties nor the reasons in support thereof."

9. Mr. Holla submitted that the improvements claimed by the defendants were in the form of buildings and structures on the suit lands and trees and plants planted therein and that the Commissioner can, after local investigation, report whether he noticed such improvements and if so, the particulars thereof and the probable value thereof, and that such report would minimise the volume of evidence that the parties may have to adduce on those matters.

10. On the other hand, Mr. V. Tarakaram, learned Counsel for the respondents, contended that the questions whether any buildings or structures have been constructed by the defendants and whether any trees and plants have been planted by them, are not matters for local investigation but have to be established by the defendants by adducing evidence and hence it would not be appropriate to appoint a Commissioner.

11. I think Mr. Holla is right in contending that the learned Civil Judge has misconstrued the object of appointment of a Commissioner and the scope of his functions. By appointing a Commissioner who makes a local investigation and submit his report to the Court, there is neither abdication nor delegation of the powers of functions of the Court to decide the issue as to the alleged improvements and the value

thereof. The local investigation made by the Commissioner, is merely to assist the Court by placing a report of such local investigation. Such report of the Commissioner is not, in any way, binding on the Court whose power to arrive at its own conclusion, even at variance with such report, is in no way impeded by such report. The learned Civil Judge erred in thinking that by appointing the Commissioner in the present case, there would be any impediment to the Court arriving at its own conclusion as to the alleged improvements and the value thereof.

12. Mr. Tarakaram is right in contending that the question whether the said defendants have effected any improvements or whether the suit properties were in the same condition as now, when they were alienated in favour of those defendants, is a question that can be decided only by taking evidence by the Court and that it is not a matter to be ascertained by the Commissioner. But the local investigation by the Commissioner will be useful in ascertaining the existing condition of the suit properties, the particulars of the buildings, structures, trees and plants found on the suit lands, though the question whether all those buildings, structures, trees and plants were there even prior to the alienations or were added thereafter, is clearly a question which has to be decided by the Court after taking evidence. By such local investigation, the Commissioner can also state the value of buildings, structures, trees and plants alleged to have been constructed or planted by the said defendants. The learned Civil Judge was clearly in error in holding that it is not proper to issue a Commission for local investigation.

13. However, Mr. Tarakaram urged that even if the view taken by the learned Civil Judge as to whether he should exercise his discretion to appoint a Commissioner, is erroneous, there is no error of jurisdiction, illegality or material irregularity which would justify interference in revision, with the exercise of his discretion.

14. As held by the Privy Council in *Joychandlal Babu v. Kamalaksha Chaudhury* AIR 1949 PC 239, if an erroneous decision of a subordinate Court results in that Court failing to exercise a jurisdiction vested in it by law, a case for revision arises. On account of the erroneous view taken by the learned Civil Judge that the appointment of Commissioner for local investigation as to the particulars of the alleged improvements and the value thereof, would amount to abdication or delegation of the powers of the Court, the learned Civil Judge declined to exercise his jurisdiction to appoint a Commissioner. Such failure to exercise jurisdiction justifies interference in revision.

15. However, in order to define the scope of the local investigation by the

Commissioner, I think the procedure indicated by the Madras High Court in *Ambi v. Kunhikavamma*, AIR 1929 Mad 661 can conveniently be adopted in the present case also while issuing the Commission. That is, the said defendants shall be directed to set out clearly, in detail, the improvements claimed, the reasons why they are claimed and the value claimed. The plaintiffs shall then be called upon to make their rejoinder on those points. The Civil Judge shall thereafter judicially consider both the statements and then decide on what points, if any, he regards commission as necessary and will then issue a Commission with detailed instructions accordingly.

16. In the result, this revision petition is allowed, the order of the learned Civil Judge on I. A. III is reversed, and he is directed to issue a Commission following the procedure indicated above.

17. In this petition, parties are directed to bear their own costs.

Revision allowed.

AIR 1970 MYSORE 316 (V 57 C 76)

AHMED ALI KHAN, J.

Chamma, Petitioner v. Laxmichand and another, Respondents.

Criminal Revn. Petn. No. 441 of 1969, D/- 23-6-1970, from order of City Magistrate, Bangalore, D/- 6-11-1969.

Criminal P. C. (1898), Sections 190 (1) (b), 156 (3), 200 — Private complaint — Magistrate forwarding it to Police for investigation — He is not bound to examine complainant.

On receipt of a private complaint if the Magistrate forwards it to the Police for investigation and taking cognizance, the Magistrate acts under Section 156 (3) and does not take cognizance of the offence. The Magistrate, therefore, is not bound to examine the complainant on oath. He is bound to do so only when he takes cognizance of the case under Section 200.

(Paras 4, 5, 6)
Miss Vasudha Ramachandran, for Petitioner; E. Kanakasabhapathy (for No. 1) and A. K. Laxmeshwar for State; Public Prosecutor (for No. 2), for Respondents.

ORDER:— This revision petition is directed against the order of the City Magistrate, Bangalore, passed on 6-11-1969 in C. C. No. 111 of 1969 on the file of his Court, dismissing the complaint filed by the petitioner. The operative portion of the order is as follows:—

"On a careful consideration of these facts, I do not find sufficient grounds to proceed with the case and hence I refuse to take cognizance of the alleged offence."

The complaint was for an offence of house trespass punishable under Sec. 489, Indian

Penal Code. The learned Magistrate dismissed the complaint by his order referred to above.

2. Two contentions were advanced before me by the learned counsel for the petitioner. The first contention was that the Magistrate ought to have examined the complainant on oath after the complaint was filed and that the Magistrate has erred in not examining the complainant on oath. It was submitted that the provision of Section 200, Criminal Procedure Code, is mandatory and omission to examine the complainant on oath is an illegality and the order of the Magistrate is liable to be set aside on that ground.

3. The second contention was that the Magistrate has erred in dismissing a private complaint without giving the complainant an opportunity to prove her case in spite of her counsel submitting that the petitioner had evidence both oral and documentary, to support her case. After a perusal of the record, I think, there appears to be no force in the first contention.

4. Section 158 of the Code of Criminal Procedure provides:—

"156 (1) Any Officer in charge of a police-station may without the order of a Magistrate investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to enquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police Officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned."

Section 200 of the Code of Criminal Procedure lays down:—

"200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided as follows:—

(a) When the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192;

(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;

(b) where the Magistrate is a Presidency Magistrate, such examination may be on

oath or not as the Magistrate in each case thinks fit, and where the complaint is made in writing, need not be reduced to writing; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing;

(c) when the case has been transferred under Section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant."

Section 202 of the Code of Criminal Procedure reads:

"202 (1). Any Magistrate, on receipt of a complaint of an offence of which he is which has been transferred to him under Section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or, if he is a Magistrate other than a Magistrate of the third Class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint: Provided that, save where the complaint has been made by a Court no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200.

(2) If any inquiry or investigation under this Section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer-in-charge of a police station, except that he shall not have power to arrest without warrant.

(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

(3) This section applies also to the police in the towns of Calcutta and Bombay".

It is thus clear that when the complaint was filed before the Magistrate he would have adopted one of two courses; he would have examined the complainant upon oath and then issue process. On the other hand, he could, under Section 202, Criminal Procedure Code postpone the issue of process and refer the complaint to the Police for further enquiry and then take action on receipt of the report.

5. The other course open to the Magistrate was to send the complaint to the police asking them to take action under Section 156 (3) of Criminal Procedure Code. In that case, the Magistrate would not examine the complainant but merely forward the complaint to the police for investigation and taking cognizance. In the instant case, after the complaint was filed by the petitioner, the Magistrate had referred the complaint to the Police. The order of the Magistrate is as follows:—

"Referred to Police (Magadi Road Post) for investigation under Section 156 (3), Criminal Procedure Code."

It will be seen that the Magistrate in this case has forwarded the complaint to the Police for investigation and taking cognizance and it is quite clear that the Magistrate acted under Section 156 (3), Criminal Procedure Code and did not take cognizance of the offence. Therefore, the Magistrate was not bound to examine the complainant on oath. He is bound to do so only when he takes cognizance of the case under Section 200, Criminal Procedure Code. In that case, he would have to proceed under Chapter XVI of the Code. On the other hand, if the Magistrate sends the complaint to the Officer-in-charge of the Police Station directing him to proceed under Chapter XIV, he need not examine the complainant on oath. In the present case, it is quite clear that the Magistrate had referred the complaint to the Police (Under Section 156 (3), Criminal Procedure Code) directing him to proceed under Chapter XIV of the Code of Criminal Procedure. Thereafter, when 'B' report was submitted by the Police, on consideration of the material on record, he passed the order in revision. I think, the procedure followed by the Magistrate was proper and it cannot be said that the same is vitiated by any legal infirmity.

6. The second contention of the learned Counsel for the petitioner is also devoid of force. When the complaint petition was sent to the police asking them to take action under Section 156 (3), Criminal Procedure Code, the Magistrate is not bound to examine the complainant, much less, examining the evidence of the complainant. In such a situation he would merely forward the complaint to the Police for investigation and taking cognizance, which he has done. No other contention was raised before me.

7. On the grounds stated above, this revision petition must fail and the same is dismissed.

Revision dismissed.

AIR 1970 MYSORE 317 (V 57 C 77)

A. NARAYANA PAI AND K. BHIMIAH, JJ.

Patel Madegowda Agriculturist and Patel, Petitioner v. The State of Mysore by Its Chief Secy. Vidhana Soudha Bangalore and others, Respondents.

Writ Petn. No. 1191 of 1968, D/- 6-7-1970.

Land Acquisition Act (1894), Sections 3 (c) and 4 (as amended in Mysore) — Notification under Section 4 can be issued by Government or Deputy Commissioner — Notification by Deputy Commissioner appointing Assistant Commissioner to function as Deputy Commissioner under Act — Notification is

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illegal — Such appointment can be made only by the State Government. (Para 4)

S. L. Sumha, for Petitioner; S. G. Doddakalegowda, High Court Govt. Pleader, for Respondents Nos. 1 and 2.

NARAYANA PAI, J.— The petitioner Patel Madegowda, the owner of land bearing Survey No. 127 of Mandya Bommanayakana halli in Malur Hobli, Channapatna Taluk, impugnes the compulsory acquisition of the said land under the Land Acquisition Act as amended in Mysore on two main grounds

1. That the Assistant Commissioner, Ramanagaram Division, has not been duly authorised to perform the functions of the Deputy Commissioner under the Act, and

2. that the intimation of submission of report to the Government under Section 5-A had not been given to him.

2. The preliminary notification under Section 4 was prepared and published by the Deputy Commissioner of Bangalore Rural District. The said notification dated the 19th of May, 1965, appeared in the Mysore Gazette of 15th of July, 1965. The third paragraph of the notification contains the authorisation in the following terms.

"The Assistant Commissioner, Ramanagaram Sub-Division, Ramanagaram, is hereby appointed under Clause (c) of Section 3 of the said Land Acquisition Act, to perform the functions of the Deputy Commissioner for all proceedings hereafter to be taken in respect of the said land."

3. Although Section 4 as amended in Mysore permits both the appropriate Government as well as the Deputy Commissioner to issue a notification thereunder, the power to confer upon an officer other than the Deputy Commissioner, the right to function as Deputy Commissioner under the Act, is found in the definition of the expression "Deputy Commissioner" in clause (c) of Section 3, which reads:

"The expression 'Deputy Commissioner' means, the Deputy Commissioner of a District and includes an Assistant Commissioner in charge of a Sub-Division of a District and any officer specially appointed by the appropriate Government to perform the functions of a Deputy Commissioner under this Act."

4. The definition makes it clear that an Assistant Commissioner of a Sub-Division or any officer to be able to function as 'Deputy Commissioner' under the Act, must be specially appointed by the appropriate Government to perform the functions of the Deputy Commissioner under the Act. In the extract of the notification given above, the appointment is by the Deputy Commissioner and not by the State Government which is the appropriate Government in this case.

5. It follows therefore that the Assistant Commissioner had no power to function as the 'Deputy Commissioner' for the purpose of acquisition of the land in question.

6. As this is sufficient to invalidate the proceedings, we do not go into the second question of fact whether the intimation had

in fact been given to the petitioner of the submission of the report under Section 5-A.

7. We allow the writ petition and quash the notification under Section 4 referred to above, as well as the subsequent notification under Section 6 dated the 11th of October, 1967, published in the Mysore Gazette of 2nd November, 1967.

Petition allowed

AIR 1970 MYSORE 318 (V 57 C 78)

A. NARAYANA PAI, J.

Annu alias Kallappa, Plaintiff-Appellant v. Sheshu Gundappa, Defendant-Respondent.

Second Appeal No. 237 of 1965, D/- 22-8-1970, from judgment and decree of Dist. J., Belgaum, D/- 19-9-1964.

(A) Limitation Act (1908), Section 14 — Exclusion of time — Suit for recovery of possession filed beyond limitation — Proceedings taken by plaintiff in B. A. D. R. Court are beyond scope of Section 14 — (Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), Section 4).

The proceedings referred to in Section 14 are proceedings dealt with under the Code of Civil Procedure in a Court exercising general civil jurisdiction to which alone provisions of Limitation Act apply. Further, the other proceedings referred to therein must be proceedings which relate to the same matter in issue and by taking which the party bona fide believes that he might secure the relief which is under consideration.

(Paras 10, 11)

Where a person files a suit for recovery of possession of certain land beyond limitation and the only ground on which the plaintiff seeks exclusion of time under Section 14 of Limitation Act is the period spent by him in bona fide pursuing other remedies before Court under Bombay Agricultural Debtors Relief Act for adjustment of his debt, such proceedings are wholly beyond scope of Section 14 of Limitation Act. (Para 12)

(B) Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1947), Section 52 — Exclusion of period of proceeding under the Act — Benefit under Section 52 is conferred on creditor whose ordinary remedies either by way of suit or otherwise get incapable of being pursued by him. (Para 13)

Cases Referred: Chronological Paras
(1937) AIR 1937 Mad 357 (V 24) =
ILR (1937) Mad 161, Dugarajulu v. Aryan Bank, Vizagapatam 9

K. S. Savanur, for Appellant; J. S. Gungal, for Respondent.

JUDGMENT:— This second appeal is against a concurrent decision of both the Courts below.

2. The salient facts necessary for the disposal of the second appeal are as follows:

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A money decree in Original Suit No. 326 of 1936 on the file of the trial Court against the appellant's father was assigned to the respondent who put it into execution. During that period Sections 68 to 72 of the Code of Civil Procedure had not been repealed. Hence the actual conduct of the sale was made over to the Collector by the Civil Court. The Collector sold two strips of land measuring 1 acre 20 guntas and fifteen guntas respectively on 6-6-1944. They were purchased by the respondent for Rs. 1,290/- and the sale was confirmed on 22-11-1944. The respondent took possession on 8-10-1946.

3. Subsequent thereto the appellant is said to have preferred an appeal to the State Government of Bombay against an appellate Order of the Divisional Commissioner dismissing his appeal. The State Government set aside the order of sale and directed the appellant to approach the Collector for appropriate consequential reliefs.

4. The appellant instead of going to the Collector, applied to the trial Court for restitution under Section 144 of the Code of Civil Procedure. That application was made on 13-2-1954 and was dismissed on 8-2-1956.

5. Prior thereto the appellant had applied to the Court under the Bombay Agricultural Debtors Relief Act for adjustment of his debt. That application was made on 20-10-1945 and dismissed on 10-10-1951, on the ground that the appellant was not a debtor within the meaning of the Act and also on the ground that the sale had been confirmed long before the presentation of the application.

6. It was thereafter that he made the above application under Section 144 of the Code of Civil Procedure, which, as already stated, was dismissed on 8-2-1956. More than five years thereafter i.e., on 13-10-1960 the appellant filed the present suit for recovery of possession after an unsuccessful application to the Collector made on 7-3-1956, which was dismissed shortly thereafter.

7. On the dates given above, namely, taking of possession by the respondent on 8-10-1946 and the filing of the suit on 13-10-1960, there can be no doubt whatever that the suit was prima facie barred by limitation. The period of limitation was twelve years from the date of loss of possession. The actual time lag is fourteen years and five days.

8. The only ground on which the appellant tried to bring his suit within the limitation of twelve years is that he was entitled under Section 14 of the Limitation Act, 1908, to the exclusion of the periods spent by him in bona fide pursuing other remedies.

9. The first sub-section of the said section reads:—

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whe-

ther in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

The other proceeding referred to in this section is undoubtedly a proceeding in a Civil Court to which the provisions of the Code of Civil Procedure apply. The argument is that the Civil Proceedings in this section must be regarded as covering everything other than a criminal proceeding. Reliance is placed on a ruling of the Madras High Court in *Dugarajulum v. Aryan Bank, Vizagapatam*, AIR 1937 Mad 357. The other proceedings dealt with in the said Madras case were proceedings in execution of a decree and the actual declaration of law is contained in the following observations of Justice Varadachariar:—

"The Legislature has not, for purposes of computation, drawn any distinction in cl. (1) of Section 14 between the suit stage and later stages in execution, though for purposes of initiation of proceedings, a distinction has been made between a suit dealt with by clause (1) of Section 14 and an application provided for in clause (2). The principle of Section 14, Limitation Act, is that if and so long as a person has been bona fide and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalized for having instituted that action in the wrong Court. The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of Appeal; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. No express reference has been made to proceedings in execution, apparently because under the law proceedings in execution have to be taken in the Court of first instance."

10. Apart from the fact that the Court was dealing exclusively with proceedings in a Civil Court the further reference to the fact that proceedings dealt with in the section are referred to as those taken in the Court of first instance or appeal or revision, leave no room, in my opinion, for any doubt that the proceedings referred to are proceedings dealt with under the Code of Civil Procedure in a Court exercising general civil jurisdiction to which alone, it may be remembered, the provisions of the Limitation Act apply.

11. Another ingredient of this section which must be borne in mind is that the other proceedings referred to therein must be proceedings which relate to the same matter in issue, which Justice Varadachariar has understood to mean the proceedings by taking which the party bona fide believes

that he might secure the relief which is under consideration.

12. If these principles are applied, there can be no doubt that the proceedings taken by the appellant before the B. A. D. R. Court are wholly beyond the scope of Section 14 of the Limitation Act. Firstly they are not proceedings taken under the Code of Civil Procedure in a Civil Court, and secondly they are not proceedings taken for the relief sought in the present suit, namely, recovering of possession of the property. The only relief sought in the B. A. D. R. Court was the adjustment of the debt, as the only relief the appellant could have sought and which that Court was competent to give was the adjustment of the debt and not recovery of possession of the property as an ordinary Civil Court can do.

13. Finally, Section 52 of the Bombay Agricultural Debtors Relief Act contains what Mr. Gunjal for the respondent describes as complete answer to the appellant's contention. That section reads as follows:—

"In computing the period of limitation for the institution of any suit or proceeding in respect of any debt due from any person who is held not to be a debtor by the Court or the Court in appeal or an application relating to which has been dismissed by the Court or the Court in appeal, the period during which the proceedings in respect of such debt were prosecuted before the Court or the Court in appeal shall be excluded."

On the plain language of this section, the benefit thereof is intended to be conferred on the creditor whose ordinary remedies either by way of suit or otherwise get incapable of being pursued by him. Further the reason for conferring this benefit of exclusion upon the creditor expressly by Section 52 is that in the absence thereof the creditor would have been disabled from taking the benefit of Section 14 of the Limitation Act.

14. The appellant, therefore, is not entitled to the exclusion of the period occupied by the B. A. D. R. proceedings taken by him.

15. The question of law whether he could deduct the period occupied by his application under Section 144 of the Code of Civil Procedure in the trial Court, need not be gone into because even if that is deducted still the suit is beyond time.

16. Nor is it worthwhile considering the question of Government's jurisdiction to set aside the sale, because whatever may be the position in regard thereto, the undeniable fact is that the respondent took possession of the property for his own benefit and in his own right and to the exclusion of the right of everybody else on 8-10-1946 more than twelve years before the institution of the suit.

17. The second appeal fails and is dismissed with costs.

Appeal dismissed.

END

issued. There is no substance in this contention either. At the time the notification was issued only the eligibility of the member was taken into consideration. It is only on taking charge that the Chairman functions as such and ceases to be an ordinary member. In the Chambers's Dictionary the word "eligible" contains the following meanings: "fit or worthy to be chosen; legally qualified for election or appointment; desirable". Eligibility is determined with reference to certain qualifications. The requirement that on cessation of membership the person is to function as Chairman, does not relate to the qualification or virtue of the person; the qualification is otherwise determined. The restriction that he should cease to be a member, in other words that he cannot function both as member and Chairman, relates only to the point of time and not to the intrinsic merit or qualification of the person. On the date of issue of the notification, Sri Samal was fit or worthy to be chosen as Chairman of the Commission. He was legally qualified for such appointment. The notification is therefore valid and no exception can be taken to it. It would come into force only when the incumbent joins his new office. The moment the incumbent joins the new office he ceases to hold the former office.

On the aforesaid analysis, the contention of Mr. Misra that opposite party No. 2 could not have been appointed as Chairman while he was member of the Commission, must be rejected.

16. In *Dhirendra Krishna v. Corporation of Calcutta*, AIR 1966 Cal 290 (FB) this question came up for consideration though on a different point. Mr. Justice Mitter in paragraph 12 of his dissenting judgment observed thus:—

"As a person cannot hold two posts at the same time, it must be held that on appointment as a Chairman a person ceases to hold office as an ordinary member of the Commission. It cannot be gainsaid that there is difference in status between that of a Chairman and an ordinary member besides the difference in salary. As a person cannot function as a Chairman unless he is appointed expressly for the purpose, it follows that on being appointed the Chairman of a Public Service Commission, a person who was a member ceases to hold the office of an ordinary member though for many purposes he may be considered to be a member of the said Commission. We must read Article 316 along with the other Articles including Article 319, so that they harmonise with one another. I do not see why Article 316 (2) should control Article 319. If it is possible to arrive at an interpretation which gives effect to both, we should adopt that construction. In my view, the expression "ceasing to hold office" in Article 319 is referable to any situation whereby a person who held an office before discontinuing

to hold it, may be by effluxion of the period of office or resignation, or by appointment to another office. The Constitution does not seem to require that a member of the State Public Service Commission should resign his office before he could be appointed a member of the Union Public Service Commission."

This passage has our respectful concurrence.

17. If it was necessary that a member should resign before he is appointed as Chairman of the Commission, the Constitution would have said so.

We accordingly find no merit in the second contention.

18. In the result, the application fails and is dismissed, but in the circumstances without costs.

S. K. RAY, J.: 19. I agree.

Application dismissed.

AIR 1970 ORISSA 209 (V 57 C 69)

G. K. MISRA, C. J. AND S. K. RAY, J.

Krishna Chandra Naik and others, Petitioners v. Sk. Makbul and others, Opposite Parties.

Criminal Reference No. 30 of 1967 and Criminal Revn. No. 241 of 1967, D/- 9-1-1970.

(A) Criminal P. C. (1898), Section 145 — Affidavit evidence in proceeding under — Magistrate having seisin over the proceeding has no power to authorise another Magistrate to take affidavits intended to be used before him, because the Magistrate so authorised would not be a person who can be deemed to have been validly authorised to administer oaths and affirmations which are quite unrelated to any matter pending before him.

(Para 3)

(B) Oaths Act (1873), Section 4 — Authority to administer oaths and affirmations — Magistrate's power of delegation of — Power can only be exercised in favour of an officer subordinate to him as distinguished from another Magistrate which is a Court. (Para 3)

(C) Oaths Act (1873), Section 4 — Authority to administer oaths and affirmations — Courts and persons referred in the section — They must have connection with the matter to which the affidavits relate and must be discharging their duties or exercising their powers in connection therewith. (Para 7)

(D) Criminal P. C. (1898), Section 145 — Affidavit evidence in proceeding under Section 145 — Affidavits must be sworn to before the Magistrate before whom such proceeding is pending — Only if evidence of person is of formal character affidavit may be sworn to before any other Magistrate. (Criminal P. C. (1898), Ss. 510-A, 539-AA).

DN/EN/BS49/70/MLD/D

AIR 1963 All 256 & AIR 1966 Raj 5 & AIR 1969 All 405, Rel. on; AIR 1966 Punj 528 & AIR 1969 Manipur 3, Dissented from.

(Paras 5, 9)

Cases Referred: Chronological Paras
(1969) AIR 1969 All 405 (V 56) =
1969 Cri LJ 963, Govind v. State 4, 9
(1969) AIR 1969 Manipur 3 (V 56) =
1969 Cri LJ 124, Leitanthem Bidhu
Singh v. Khangirakpam Ibobi Singh 4, 9
(1966) AIR 1966 Punj 528 (V 53) =
1966 Cri LJ 1479, Ahmad Din v.
Abdul Salem 4, 9
(1966) AIR 1966 Raj 5 (V 53) =
1966 Cri LJ 60, Hemdan v. State
of Rajasthan 4, 9
(1963) AIR 1963 All 256 (V 50) =
1963 (1) Cri LJ 722, Wahid v. State 4, 9
(1944) AIR 1944 Cal 283 (V 31) =
45 Cri LJ 748, Nandlal Ghosh v.
Emperor 4

R. Mohanty and R. C. Ram, for
Petitioners; R. K. Mohapatra and S. P.
Mohapatra, for Opposite Parties.

RAY, J.— The Criminal Reference has been referred to a Division Bench by our learned brother R. N. Misra, J., for an authoritative decision on the question as to whether affidavits for utilisation in a proceeding under Section 145, Criminal Procedure Code should be sworn before the Magistrate before whom the proceeding is pending, or another Magistrate as authorised by the trying Magistrate, and affidavits which are not sworn to before these authorities are not available to be looked into in such proceeding.

In the proceeding under Section 145, out of which this reference arose, the parties swore some of their affidavits before the officer-in-charge of the current duties of the S D O in whose Court the Section 145 proceeding was pending during the latter's absence and before another first class Magistrate who had no seisin over the proceeding. The S D O relied upon these affidavits along with others in disposing of the case under Section 115, Criminal Procedure Code before him. The Additional Sessions Judge, Balasore, thereupon made a reference to the High Court for setting aside the order of the S. D. O. on the ground that the affidavits which were not sworn to before the S. D. O. who had actual seisin of the matter to which the affidavits related, should have been discarded from consideration.

2. The Criminal Revision was also referred to the Division Bench by our learned brother, Patra, J., for an authoritative pronouncement on the point whether an affidavit sworn before a Magistrate other than the Magistrate before whom a proceeding under Section 145, Criminal Procedure Code was pending can be utilised for deciding the dispute in the said proceeding.

3. The amplitude of the questions posed by Misra, J., is larger than the question posed by Patra, J. Misra, J., posed two questions,

viz., (i) whether the affidavit sworn to before a Magistrate other than the trying Magistrate can be utilised in the Section 145 proceeding as evidence, and (ii) whether affidavits filed before another Magistrate who is authorised by the trying Magistrate to take such affidavits can be utilised in the Section 145, proceeding. The first question is common both to the Reference and the Revision. The second question posed by Misra, J., does not strictly arise out of the reference before him, because, in that case the S. D. O. before whom the Section 145 proceeding was pending never authorised any other Magistrate to take affidavits and that the impugned affidavits were not sworn to before any Magistrate so authorised. This part of the question may be disposed of at once.

There does not appear to be any provision in the Criminal Procedure Code which empowers a Magistrate having seisin over a proceeding under Section 145, Criminal Procedure Code to authorise any other Magistrate to take affidavits which may be utilised in the proceeding. Section 539, Criminal Procedure Code deals with the subject-matter of user of affidavits before a High Court and permit swearing of such affidavits and affirmations before such Court and other persons and authorities enumerated therein including any person appointed by the High Court. The power to authorise another person to take affidavits is conferred expressly on the High Court by this section. Apart from this provision, there are no other sections in the Code which vest a Magistrate with the power to authorise another Magistrate to take affidavits in relation to a matter pending before him.

Section 4 of the Indian Oaths Act authorises all Courts having by law authority to receive evidence either to administer oaths themselves or empower any officer to administer such oaths. In pursuance of this section the Magistrate can empower an officer obviously of his Court and subordinate to him, to administer oath. This cannot be construed as authorising a Magistrate to empower another Magistrate, which is also a Court, to administer oaths and affirmations, which is his primary functions in relation to a matter pending before it. The power of delegation of the authority to administer oaths and affirmations conferred under this section must be strictly observed and can only be exercised in favour of an officer as distinguished from a Magistrate which is a Criminal Court as defined in Section 6 of the Code of Criminal Procedure. Thus, the second question posed by Misra, J., must be answered in the negative, viz., that since the Magistrate trying a proceeding under Section 145, Criminal Procedure Code has no power to authorise another Magistrate to take affidavits intended to be used before him, such affidavits cannot obviously be treated as evidence in this case, because, the Magistrate so authorised would not be

a person who can be deemed to have been validly authorised to administer oaths and affirmations which are quite unrelated to any matter pending before him.

4. The only common question now left for determination is whether affidavits sworn before Magistrates other than the concerned Magistrate before whom a proceeding under Section 145 is pending, can or cannot be entertained as evidence and perused by the trying Magistrate under Section 145 (4), Criminal Procedure Code. Judicial opinion is divided on this issue. According to the decisions reported in AIR 1963 All 256, *Wahid v. State*; AIR 1966 Raj 5, *Hemdan v. State of Rajasthan*, and AIR 1969 All 405, *Govind v. State*, affidavits to be used in a proceeding under Section 145, Criminal Procedure Code which are of substantive nature, must be sworn to before the Magistrate holding an enquiry into the question of possession in a proceeding under Section 145, Criminal Procedure Code or by an officer empowered by him in this behalf and not by any other Magistrate. Indirect support has been derived from a decision of the Calcutta High Court reported in AIR 1944 Cal 283, *Nandlal Ghosh v. Emperor* even though question of the present nature did not directly arise there.

Contrary view has been laid down in two cases, one reported in AIR 1966 Punj 528, *Ahmad Din v. Abdul Salem* and the second reported in AIR 1969 Manipur 3, *Leitanthem Bidhu Singh v. Khangirakpam Ibobi Singh*. This Manipur case has adopted the Punjab High Court view.

5. There are some provisions in the Code of Criminal Procedure which provide for filing of affidavits in certain cases. They are contained in Sections 74, 145 (1), 499 (3), 510-A, 526 (4) and 539-A. Under Section 74, an affidavit in proof of service of summons is required to be made where a summons issued by a Court is served outside the local limits of its jurisdiction and the serving officer is not present in the Court at the hearing of the case. Such an affidavit may be made before "a Magistrate". This section, therefore, authorises every Magistrate to take affidavits of the kind specified therein and to administer oath. Section 145 (1), Criminal Procedure Code requires the parties concerned in the dispute likely to cause breach of peace to adduce evidence of such persons on whom they rely in support of their claims by putting in their affidavits but it does not expressly indicate as to before which Court or person such affidavits are to be sworn. Section 499 (3) permits a Court to accept affidavits in proof of facts contained therein relating to the sufficiency of sureties but is silent as to before whom the affidavit is to be made. Section 510-A provides that the evidence of any person whose evidence is of a formal character may be given by affidavit and that such affidavit may be read in evidence in any inquiry, trial, or other pro-

ceeding under the Criminal Procedure Code. Under Section 526 (4) every application for exercise of power conferred by this section may be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation. Section 539-A allows affidavit evidence of the allegations respecting any public servant to be given in any inquiry, trial or other proceeding under the Criminal Procedure Code. Sections 539 and 539-AA, Criminal Procedure Code are the two provisions which lay down the authorities before whom certain classes of affidavits may be sworn. Section 539 provides that the affidavits of all kinds to be used before any High Court or any officer of such Court may be sworn before the authorities or Courts specified therein. Section 539-AA lays down that affidavits to be used before any Court other than a High Court under Section 510-A or Section 539-A may be sworn or affirmed in the manner prescribed in Section 539 or before any Magistrate. It is significant to note that this Sec. 539-AA does not refer to affidavits under Section 145 while it refers to affidavits under Sec. 510-A or Section 539. It thus transpires that the Criminal Procedure Code has enacted specific provisions as to the Courts or authorities before whom affidavits under Sections 74, 510-A, 539-A are to be sworn and does not specifically provide for the mode of swearing of an affidavit under Section 145, Criminal Procedure Code.

When evidence of a person is of a formal character and is not of a substantive nature, it may be given by affidavit sworn to before any Magistrate other than the Magistrate before whom Section 145 proceeding is pending. That is so because of the specific provisions contained in Section 510-A and Section 539-AA, Criminal Procedure Code. But where the evidence is of substantive character, the question for determination cannot be solved with reference to anything in the Code. Reliance in this connection has to be placed on the provisions of the Indian Oaths Act.

6. Section 4 of the Indian Oaths Act enumerates the Courts and persons who are authorised thereunder to administer oath. It runs as follows:

"The following Courts and persons are authorised to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of powers imposed or conferred upon them respectively by law:

(a) all Courts and persons having by law or consent of the parties authority to receive evidence;

(b) the Commanding Officer of any military, naval or air force station or ship occupied by troops in the service of Government;

Provided:—

(1) that the oath or affirmation be administered within the limit of the station, and

(2) that the oath or affirmation be such as a justice of the Peace is competent to administer."

Section 5 (a) of the Indian Oaths Act runs as follows:—

"5 — Oaths or affirmations shall be made by the following persons;

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence."

7. Section 4 speaks of the authority who can administer oath whereas Section 5 speaks of persons who shall make such oath. Both are interrelated and must be conjunctively read and construed. Reading these two sections together, it is quite clear that certain preconditions must be fulfilled before a Court or a person can administer oath. Those conditions, so far as are relevant for the present purpose, are that the Court must have authority to receive evidence and the witnesses who are to swear affidavits before him, must be those who may be lawfully examined by that Court or may give or be required to give evidence before such Court and that such Court must be discharging his duties or exercising his powers conferred upon him by law, in course of which the oath is to be administered. In other words, there must be a nexus between the administration of oath and discharge of duties or exercise of powers imposed or conferred upon the Court by law and that such Court must have authority to receive the evidence of the person who is being administered oath, may lawfully examine him or require him to give evidence before him.

A Court which has no connection with the matter to which the affidavits relate and is not discharging its duty or exercising its power in connection therewith, cannot administer any oath. If it were not so, then the expression "in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law" in Section 4 of the Oaths Act would appear to be redundant and a meaningless surplusage. That expression would have relevancy and meaning if Section 4 is interpreted to mean that it refers to "Courts and persons" who, while administering oaths or affirmations must be discharging their duties or exercising their powers in connection with the matter to which the affidavit relates and would be acting in that connection.

This view is further fortified by S. 539-AA, Criminal Procedure Code. This section, as already stated, provides for swearing or affirmation of affidavits before any Magistrate when it is intended to be used in any Court other than the High Court under Section 510-A or 539-A. This is a special provision which specially empowers swearing of affidavit before a Magistrate who has no connection with the

matter to which the affidavit relates. This provision would be needless, if Sections 4 and 5 of the Oaths Act could be so interpreted as to permit affidavits before any Magistrate to be used before any other Magistrate in all circumstances whatsoever.

A scrutiny already made, of the various sections of the Code of Criminal Procedure where affidavits are permitted to be used, shows that where the legislature intended that an affidavit sworn before any Magistrate could be used before any other Magistrate, the Code had expressly stated so. Where such express indication is wanting, the Section 4 of the Oaths Act would operate, in which case the Court where the affidavit is to be used is the Court before whom it is to be sworn. Section 74, Criminal Procedure Code permits affidavits referred to therein, to be made before 'a Magistrate'. But none of Sections 499 (3), 510-A, 526 (4), 539-A indicates that the affidavits referred to therein can be sworn before any Magistrate other than the Court where such affidavits have to be used. There are two sections in the Code of Criminal Procedure, namely, Sections 539 and 539-AA which permit swearing of affidavits before Courts and authorities other than the Court where the affidavits are to be used. The obvious inference is that but for those two special provisions affidavits intended to be used in any court must be sworn to before that authority or Court. As already seen Section 539-AA, Criminal Procedure Code does not cover affidavits in Section 145, Criminal Procedure Code. This provision therefore proves the rule that affidavits in proof of possession shall be sworn to before the Magistrate who is holding the inquiry under Section 145, Criminal Procedure Code since Section 539-AA does not authorise swearing of such affidavits before any Magistrate as it does in respect of affidavits under Section 510-A, Criminal Procedure Code. Section 539-AA being an exception to the Rule proves it.

8. Sub-section (1) of Section 145, enacts that the Magistrates as enumerated therein may, after initiating the proceeding, require the parties concerned "to put in such documents or to adduce, by putting in affidavits, the evidence of such persons as they rely upon in support of such claim." This clearly shows that evidence by way of affidavits has to be adduced before the Magistrate who has seisin of the proceeding. "Evidence" has been defined in Section 3 of the Indian Evidence Act. It means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry which is called 'oral evidence' and all documents produced for inspection of the Court, are called 'documentary evidence'. The affidavits contemplated under Section 145, Criminal Procedure Code must be evidence as defined in the Evidence Act, and it can only be such if the witness makes a statement by way of

affidavit before the very Court who is sitting upon the inquiry and if it is in relation to the subject-matter of inquiry. Affidavit is a declaration of facts made in writing and sworn before a person having an authority to administer oath. Such affidavits would be evidence if the statement is made before the Magistrate holding the inquiry and relates to the subject-matter of that inquiry. From this the indication is quite clear that the affidavits which are to be filed before a Magistrate initiating the proceedings under Section 145, or a Magistrate to whom such a proceeding is transferred and who is to hold the inquiry, must be sworn before him in order to be evidence.

9. For all these reasons, we are clearly of the opinion that the affidavits which are to be used in a proceeding under Section 145, Criminal Procedure Code must be sworn to before the Magistrate before whom such proceeding is pending, unless the evidence of a person is of a formal character in which case that evidence may be given by affidavits sworn to before any other Magistrate. We are, therefore, in respectful agreement with the view expressed in AIR 1963 All 256; AIR 1966 Raj 5 and AIR 1969 All 405, and dissent from that expressed in AIR 1966 Punj 528, and AIR 1969 Manipur 3.

10. The affidavits in the two 145 proceeding sworn to before another Magistrate who had no concern with the proceedings are not proper affidavits and must be rejected. The parties must not be allowed to suffer on account of this decision, as the point decided was not free from doubt, and the parties were likely to be misled as they have been misled.

The reference, therefore, is accepted and the revision is also allowed. The order dated 16-3-1967 passed by Sri N. M. Mohanty, S. D. O., and the Magistrate, 1st Class Bhadrak in Misc. Case No. 10/1/66 and the order dated 13-3-1967 passed by Sri K. M. Ram, Magistrate, 1st Class, Athgarh, in Cri. Misc. Case No. 62/65 are set aside. The cases are sent back to the respective Magistrates who shall give the parties concerned opportunity to file proper affidavits afresh, rehear the cases and then to dispose of them in accordance with law.

G. K. MISRA, C. J.:— 11. I agree.
Order accordingly.

AIR 1970 ORISSA 213 (V 57 C 70)

G. K. MISRA, C. J. AND S. K. RAY, J.

Bauribandhu Misra, Petitioner v. I. G. of Police and others, Opposite Parties.

O. J. C. No. 373 of 1969, D/- 17-11-1969.

(A) Constitution of India, Article 226 — Writ Petition — New point at hearing involving certain facts not mentioned in peti-

tion — Though ordinarily such contention not to be permitted, accuracy of factual basis of statement not being disputed it was allowed to be urged. (Para 2)

(B) Constitution of India, Article 311 — Disciplinary proceedings — Natural justice — In the absence of a rule successor Enquiring Officer can submit report on evidence recorded by his predecessors — No violation of principles of natural justice — AIR 1961 Guj 63, Dissented from. Case law discussed. (Paras 7, 8, 9)

Cases	Referred:	Chronological	Paras
(1969) AIR 1969 SC 966 (V 56) =	1969 Lab IC 1368, Railway Board,		
Delhi v. N. Singh			8
(1966) AIR 1966 Mad 203 (V 53) =	ILR (1965) 1 Mad 185 (FB), D. I. G.		
of Police v. Amalanathan			8
(1964) AIR 1964 SC 364 (V 51) =	1964-4 SCR 718, Union of India v.		
H. C. Goel			8
(1961) AIR 1961 Guj 63 (V 48), Hemraj	Singhji v. I. G. of Police		5
(1958) AIR 1958 Cal 470 (V 45) =	62 Cal WN 690, Amulya Kumar v.		
L. M. Bakshi			5

R. C. Patnaik and A. K. Misra, for Petitioner; Advocate-General, for Opposite Parties.

G. K. MISRA, C. J.:— The petitioner is a police constable. In February, 1960, he was attached to Jaleswar Police Station in the district of Balasore. On 7-2-1960 a farewell party was given at Jaleswar Police Station on the occasion of the transfer of the Officer-in-Charge. When the Police Officers, other constables and outsiders assembled at the barracks to attend the feast, the petitioner entered into the barracks with a short lathi in a drunken state and inflicted blows on constable No. 29. Thereafter, the petitioner remained confined in his own room, bolting the door from inside and did not listen to repeated calls by the Assistant Sub-Inspector to come out. A proceeding was drawn up against the petitioner. On 22-9-1961, the Superintendent of Police, Balasore (Opposite Party No. 31) ordered that the petitioner would forfeit his best increment as also his next increment for a period of two years from 1-9-1961, involving a pecuniary loss of Rs. 41/-. He also imposed three black marks. An appeal to the Inspector-General of Police produced no result. The writ application has been filed under Articles 226 and 227 of the Constitution challenging the order of the Superintendent of Police imposing the aforesaid punishment.

2. In the writ application, the impugned order was challenged on several grounds such as that the procedure laid down for holding enquiries was not followed, the evidence of the prosecution witnesses was taken at the back of the petitioner, copies of documents were not supplied though they were utilised by the prosecution, the proceeding was con-

ducted in English which was not known to the petitioner, and no opportunity was given to defend petitioner through counsel. At the time of hearing, all these grounds were not pressed. The only contention urged by Mr. Patnaik was on the basis of certain facts not mentioned in the writ application. Ordinarily, such a contention would not have been permitted to be urged as it would involve a question of fact. But as the learned Advocate-General did not dispute the accuracy of the factual basis of the statement, the contention was permitted to be urged.

3. The undisputed facts on which the contention is based are that initially, one Mr. Bhowmick was appointed as the enquiring officer. On the application of the petitioner to transfer the proceeding from Mr. Bhowmick, the disciplinary authority appointed one Mr. Hazari as the enquiring officer. Mr. Hazari was subsequently transferred and so the disciplinary authority appointed one Mr. Paramananda Misra as the enquiring officer. Each of these enquiring officers recorded some evidence and the enquiry report was submitted by Mr. Paramananda Misra.

4. On the aforesaid facts Mr. Patnaik contended that as the enquiry report was based on evidence recorded by some of the predecessor enquiring officers and as the last enquiring officer who submitted the report had no opportunity to observe the demeanour of all the witnesses, the enquiry report was bad in law, and the disciplinary authority cannot rest his conclusion on such enquiry report.

5. The contention, on the face of it, appears fantastic and illogical. Mr. Patnaik however placed reliance on a few decisions some of which may be noticed.

In AIR 1958 Cal 470, Amulyakumar v. L. M. Bakshi, the learned Judge made the following observations:—

"If the enquiring authority has the duty to come to a conclusion as to the guilt of the delinquent, upon an evaluation or assessment of the evidence, then it is entirely necessary that he should be the person who should hear the evidence of witnesses. It is impossible to evaluate the evidence of a witness taken on proxy, because one of the salient features in such a proceeding is to observe the demeanour of the witnesses. As it has been said, even the Devil doth not know the mind of man and therefore to arrive at the truth it is necessary not only to read the evidence but to see the demeanour of the person giving evidence and where necessary to elicit answers to doubtful points. To anyone conversant with such trial it is but an elementary proposition that the demeanour of a witness is the most important element in assessing the value of his evidence."

These observations apparently support the contention of Mr. Patnaik. But on a closer scrutiny of the facts it would appear that they were made in relation to the facts and

circumstances of that case. Therein the enquiring officer was appointed by the disciplinary authority. On two dates the evidence of some important witnesses was taken by one Nirmal Kumar Bhattacharjee who was not appointed as the enquiring officer and on that evidence the ultimate finding rested. This is clearly against the principles of natural justice. The evidence was recorded by a person having no jurisdiction or authority to record evidence and was wholly inadmissible. The disciplinary authority certainly cannot rest his conclusion on such evidence. The aforesaid observations must therefore be confined to the facts of that case.

Similarly, in AIR 1961 Guj 63, Hemraj-singhji v. I. G. of Police, there are some observations supporting the petitioner's contention. In that case, the proceedings against the petitioner were dealt with by more than one officer and the same officer did not deal with them throughout. Their Lordships held:—

"The officer who had occasion to see the witnesses and observe their demeanour had not written any summing up. The summing up was written by his successor and in the proceedings which followed after they were set aside, no witnesses were examined by the successor in office whose summing up was based on the evidence of witnesses recorded by his predecessor."

On these facts, their Lordships held that the principle of natural justice was violated.

For reasons to be presently given, we are clearly of opinion that this decision is contrary to law.

6. It is well known that even in civil suits, a successor judicial officer can deliver judgment on the evidence recorded by his predecessor. Doubtless, observation of the demeanour of witnesses is an essential part of the trial but in a case where the judicial officer is transferred while in the midst of the trial, or at the close of the same but before judgment is delivered, the successor delivers judgment, without recording fresh evidence himself, and such judgment is not without jurisdiction or contrary to law.

After the amendment of the Criminal Procedure Code in 1955, the same principle applies to trial of criminal cases by Magistrates; unless the successor Magistrate chooses otherwise, he can proceed on the basis of evidence recorded by his predecessor. The accused is not entitled to claim de novo trial as a matter of right which he had prior to the amendment.

7. There is no rule that in a disciplinary proceeding the successor enquiring officer cannot rely upon the evidence recorded by the predecessor enquiring officer. In the absence of such a rule, there is no violation of the principle of natural justice merely because the successor was not in a position to observe the demeanour of witnesses. The enquiry-

ing officer is not the ultimate punishing authority. It is the disciplinary authority which is entitled to impose the final punishment after reaching the necessary conclusion. In any event, where the evidence is recorded by the enquiring officer, the disciplinary authority has no opportunity of marking the demeanour of the witnesses. If the view taken in the aforesaid two cases is held to be of general application, then, as a necessary and logical conclusion, the finding of the disciplinary authority in every case must be held to be without jurisdiction merely because he had no opportunity of observing the demeanour of witnesses himself. Such a conclusion is not borne out by the rules and is wholly illogical.

8. After the pronouncement of their Lordships in AIR 1964 SC 364, *Union of India v. H. C. Goel*, such a contention is wholly untenable. One of the questions that arose in that case was whether Government was competent to differ from the findings of fact recorded by the enquiring officer who had been entrusted with the work of holding a departmental enquiry. The matter was critically examined and their Lordships observed thus:—

“The interposition of the enquiry which is held by a duly appointed enquiry officer does not alter the true legal position that the charges are framed by Government and it is the Government which is empowered to impose the punishment on the delinquent public servant. Therefore, on principle it is difficult to see how the respondent is justified in contending that the findings recorded by the enquiry officer, bind the appellant (Government) in the present case.”

The ratio of the decision clearly implies that the disciplinary authority imposes the punishment without recording evidence and without having any opportunity of marking the demeanour of the witnesses. If the ultimate punishing authority can take the decision without marking the demeanour of witnesses, it would be fantastic to say that a successor enquiring officer cannot give the report unless he himself has recorded the entire evidence. The aforesaid view runs counter to the argument that an enquiry report submitted by the last enquiring officer cannot be based on the evidence of his predecessors. The Supreme Court decision was followed in AIR 1969 SC 966, *Railway Board, Delhi v. N. Singh*.

Our view is also fully supported by the decision in AIR 1966 Mad 203 (FB), *D. I. G. of Police v. Amalanathan*.

9. On the aforesaid analysis, we are of opinion that the successor enquiring officer can submit the enquiry report on the basis of materials collected by his predecessors. The Calcutta case is distinguishable on facts and the observations in the Gujarat decision are contrary to law. If any of these decisions purported to lay down any general propositions to the contrary, we are unable, with

respect, to accept them as laying down good law.

10. In the result, the writ application fails and is dismissed, but in the circumstances, without costs.

S. K. RAY, J.:— 11. I agree.

Application dismissed.

AIR 1970 ORISSA 215 (V 57 C 71)

R. N. MISRA, J.

Kandha Das, Appellant v. Indumati Devi, Respondent.

Second Appeal No. 432 of 1965, D/- 23-12-1969 from decision of Sub-J., Berhampur, D/- 6-7-1965.

(A) Court-fees and Suits Valuations — Court-fees Act (1870), Sec. 7 (iv-A) (Orissa) — Suit for declaration that plaintiff was not bound by sale deed executed by her father in favour of defendant — Plaintiff not party to sale deed — Suit is not one for cancellation falling within Section 7 (iv-A). (Para 10)

(B) Civil P. C. (1908), Section 100 — Plea as to pecuniary jurisdiction of trial Court — Finding that suit was properly valued and Court had jurisdiction — Appellate Court refusing permission under Order 41, Rule 2 to raise question of jurisdiction — High Court refused to allow it to be raised again in second appeal. (Para 10)

(C) Transfer of Property Act (1882), Section 11 — Restriction repugnant to interest created — Settlement deed — Conveyance of absolute interest — Restriction as to joint enjoyment with settlor and as to alienation is void and cannot be given effect to.

A deed of settlement executed by a father in favour of his daughter ran as follows:— “Since you are nursing me and also taking care of me, I out of affection, have settled this property described fully in the schedule and have created right in your favour. So long as I am alive, with the usufructs of the land, you and I will be maintained. You without my knowledge and I without your knowledge cannot execute any document touching this property. After my death you would perform my obsequies and you and your descendants shall enjoy and possess the properties from generation to generation with full rights.”

Held that the document created an absolute conveyance of title in favour of the daughter and therefore the restriction on alienation and enjoyment imposed by the subsequent clauses of deed were bad in law and could not be given effect to. AIR 1963 SC 890, Applied; AIR 1958 Orissa 254, Dist. (Paras 12, 15)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 890 (V 50) = 1963 Supp 2 SCR 417, *Ram Kishorelal v. Kamal Narayan*

12

(1958) AIR 1958 Orissa 254 (V 45) =

24 Cut LT 127, Kshetra Sahu v.

Shyama Sahu

11

Y. S. N. Murty, for Appellant; G. Rath, for Respondent.

JUDGMENT:— This second appeal is by the sole defendant in a suit for title, declaration that her interest is not bound by the alienation by her father in favour of the defendant on 7-9-1959 under Ext. B and to recover possession. The defendant has lost in the Courts below.

2. The plaintiff's case was that her father Bachha Das was the owner of the suit property and he died leaving behind the plaintiff who is his daughter as the sole heir. Bachha executed a settlement on 5-1-1959 giving all his properties to the plaintiff and the plaintiff has been in possession ever since then. The defendant Khandha happens to be a cousin of Bachha and when he disturbed her possession, proceedings under Section 144, Criminal Procedure Code were initiated which were subsequently converted to proceedings under Section 145, Criminal Procedure Code. Possession was, however, found in favour of the defendant. Therefore the plaintiff has come with the present suit.

3. The defence taken was that the property would be valued at Rs. 12,500/-. Ext. B, the sale deed in his favour is also for the said land. In the circumstances the learned trial Judge had no pecuniary jurisdiction to try the suit. It was further claimed that the suit was barred by limitation. Bachha had cancelled the settlement dated 5-1-1950 (Ex. 8) and thereafter had executed the Ext. B, the sale deed in favour of the defendant. The defendant claimed to be in possession all throughout after the same.

4. The learned trial Judge found that the suit had been properly valued and the Court had jurisdiction. He further found that the settlement deed Ext. 3 was valid and binding and therefore Bachha had no title in him to alienate the properties under the Ext. B in favour of the defendant. On these findings he decreed the suit.

5. The lower appellate court affirmed the findings of the learned trial Judge and held that the plaintiff had acquired an interest in present in the suit property under Ext. 3; Ext. C, the cancellation deed dated 20th July, 1959 was not valid and Bachha had no alienable interest to convey under Ext. B.

6. In the memorandum of appeal before the lower appellate court the question of want of pecuniary jurisdiction of the learned trial Judge had not been raised. When an attempt to raise that point was made before the lower appellate Court, the learned appellate Judge did not give the permission to agitate the question of jurisdiction. Order 41, Rule 2 of the Code of Civil Procedure provides thus:

"The appellant shall not, except by leave of the Court, urge or be heard in support of

any ground of objection not set forth in the memorandum of appeal shall not be confined to the grounds of objection set forth in memorandum of appeal or taken by leave of the Court under this rule: The learned appellate Judge looked into this aspect of the matter in a part of his judgment, but ultimately held:

"I do not find any necessity to permit the appellant to agitate the question of jurisdiction. In that view, the objection raised regarding the valuation and jurisdiction is overruled."

7. Mr. Murty, learned counsel for the appellant raises two contentions before me. Firstly he contends that the defendant had taken the plea in the written statement that the Court had no pecuniary jurisdiction to entertain the suit. An issue being issue No. 4 was specifically raised and had erroneously been determined by the trial Court. To the facts of the present case Section 7 (iv-A) of the Court-fees Act as amended in Orissa was directly applicable. One of the prayers in the suit was for a declaration that Ext. B was not binding on the plaintiff. Therefore, the learned trial Judge clearly went wrong in holding that the claim was not to be valued at Rs. 12,500/-. the consideration money under Ext. B. Even if a ground had not been included in the memorandum of appeal challenging the finding on issue No. 4, the Court was not going into the matter and as the learned appellate Judge as a matter of fact has gone into the question and has taken a wrong view of the law, in second appeal, the appellant should be permitted to canvass that aspect.

8. Mr. Rath, learned Counsel for the respondent contends that the second relief in the suit was redundant. In view of the fact that the plaintiff was not a party to the said document it was open to the plaintiff to ignore it and claim title on the basis of the settlement deed dated 5-1-1959 in her favour. To find title on the basis of the settlement deed, it necessarily would involve an enquiry about the validity of the sale deed dated 7-9-1959 and thus the second relief in the suit is redundant on the principle that the plaintiff is not "eo nomine", a party to Ext. B, she could proceed by ignoring the document and therefore this is not a case which strictly calls for cancellation of a document and does not give rise to the application of S. 7 (iv-A) of Court-fees Act.

9. There is a peculiar feature in this case. On 5-1-1959 Bachha executed the settlement deed in favour of the plaintiff, which has been marked as Ext. 3. On 20th July, 1959, the said document was cancelled by Ext. C. On 7-9-1959, a sale deed came to be executed by Bachha in favour of the defendant Kandha. Again on 8th March, 1960, Bachha executed a cancellation deed (Ex. 1) cancelling Ext. B itself.

10. On a consideration of the aforesaid materials I would accept the position that

the second relief in the suit was redundant; plaintiff being not a party to the document (Ext. B) was not bound to have it cancelled in order to succeed in her suit; the provisions of S. 7 (iv-A) of the Court-fees Act as amended in Orissa, therefore, do not apply to the facts of the present case. In any event, the lower appellate court having not permitted the defendant-appellant to batter the findings under issue No. 4, I would not also permit the defendant to question the same in the second appeal. This appeal will proceed on the basis that the learned trial judge had jurisdiction to entertain the suit.

11. This leads me to examine the only other contention as to whether Ext. 3 created an absolute conveyance in favour of the plaintiff so that Bachha had no alienable interest under Ext. B. The material portions of Ext. 3 may be translated thus:

"Since you are nursing me and also taking care of me, I out of affection, have settled this property described fully in the schedule and have created right in your favour. So long as I am alive, with the usufructs of the land, you and I will be maintained. You without my knowledge and I without your knowledge cannot execute any document touching this property. After my death you would perform my obsequies and you and your descendants shall enjoy and possess the properties from generation to generation with full rights."

Mr. Murty relies on a decision of this Court in the case of *Kshetra Sahu v. Shyama Sahu*, 24 Cut LT 127 = (AIR 1958 Orissa 254) wherein a grant came to be interpreted by Mohapatra, J. The terms of the grant were to the following effect as would appear from a part of the judgment.

"The land described in para 3 of the document is my self-acquired property and I am enjoying it with absolute rights without any dispute. None else has got any right or title or claim to this land. You are my daughter. You have no properties for your maintenance, there is great need and so for your maintenance you are depending on me. For your maintenance I am giving (Pradana) the para 3 scheduled lands worth Rs. 1,500/- and I have put you in possession of the lands and have divested myself of my rights from the lands. From today this land has become yours. You will keep this land in your possession and from out of its income, you will pay the Government revenue and with the balance usufruct you will maintain yourself and if necessary you can sell and mortgage or transfer the land to meet your maintenance and you can do whatever you like regarding the land. Regarding this land at any time in future, neither I nor my heirs and successors can make any claim against you

Ultimately it was held in this case that only a life interest for the grantee was created and on the death of the grantee, the property re-

verted to the grantor or his heirs. Relying on the principle of this case Mr. Murty's contention is that Ext. 3 must be held to have created only a limited interest in favour of the plaintiff and as such there cannot be a loss of total title in Bachha so as to justify the conclusion of the lower appellate Court that Bachha had no transferable interest by the time he came to execute the sale deed Ext. B. Ext. B does not purport to convey the residuary title of Bachha and it proceeds on the basis that Bachha was the full owner of the property in possession and purported to part with title and possession together.

12. Mr. Rath, learned Counsel for the plaintiff-respondent contends that Ext. 3 was an absolute conveyance of title in regard to the subject-matter, therefore any subsequent limitation was bad law. In support of his proposition he relies on the decision of the Supreme Court in the case of *Ramkishorelal v. Kamalnayan*, AIR 1963 SC 890. Their Lordships of the Supreme Court came to hold that if title was conveyed and in the subsequent clauses of the document, restrictions on alienations were imposed, the clauses imposing restriction should be held as bad.

"Again, even where a particular word has to a trained conveyancer a clear definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given."

As it appears, there is a clear averment in the earlier portion of Ext. 3 that the property described in the schedule is settled and a right to the property is created. Thereafter a restriction was sought to be imposed on the right to alienate during the lifetime of the grantor and there was a further averment made that the property would be jointly enjoyed. The statement that neither the grantor nor the grantee would be in a position to alienate during the lifetime of the grantor without consent runs counter to the creation of title in the grantee. I would, therefore, hold that in terms of the principle

indicated in the aforesaid decision of the Supreme Court, the subsequent clauses are not to be given effect to and title be held to have passed under Ext. 3 to the daughter.

13-14. Once it is found that Ext. 3 conveyed good title in respect of the property to the plaintiff, it must necessarily follow that Bachha had no subsisting interest in such property on the date when he came to execute Ext. B, and as such the defendant under that document did not obtain title so as to obstruct the title of the plaintiff.

15. I would, therefore, hold that the plaintiff was the absolute owner of the suit land under the settlement deed dated 5-1-1959 and is entitled to recover possession of the disputed property.

16. The claim for mesne profits seems not to have been pressed in the Courts below and no decree for such mesne profits has therefore been granted.

17. The appeal fails and is dismissed. The plaintiff would be entitled to her costs throughout.

Appeal dismissed.

AIR 1970 ORISSA 218 (V 57 C 72)

R N MISRA J.

Nrusinghanath Deb and others, Appellants
v. Banamali Panda and others, Respondents.

Second Appeal No. 604 of 1965, D/- 24-12-1969 against decision of Sub J., Puri, D/- 23-8-1965.

(A) Transfer of Property Act (1882), Section 54 — Sales of immovable property — Passing of consideration not condition precedent for transfer of title.

Where the sale deed showed unequivocal intention of making immediate conveyance of title and consideration was to be received subsequently at the time of endorsing registration ticket title passed on registration of sale deed even when consideration did not pass. AIR 1953 Orissa 23, Followed.

(B) Evidence Act (1872), Section 21 — Proof of admission — Concession of facts recorded in judgment — No challenge in grounds of appeal — Statement in judgment to be accepted as correct unless properly challenged — Mere incorporation as a ground in memo of appeal not sufficient challenge.

(Para 6)

Cases Referred: Chronological Paras

(1964) AIR 1964 Orissa 239 (V 51) =

ILR (1961) Cut 551, Ramchandra

Biharilal Firm v. Mathuramohan

(1961) AIR 1961 Orissa 19 (V 49) =

1960-2 OJD 130, Michhu Kuanr v.

Rachu Jena

(1953) AIR 1953 Orissa 23 (V 40) =

ILR (1953) Cut 531, Balabhadra

Misra v. Nirmala Sundari Devi

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M. Mohanti, for Appellants; B. Mohapatra, for Respondents.

JUDGMENT: This is an appeal by the plaintiffs against a reversing judgment of the learned Subordinate Judge, Puri in a suit for declaration of title and possession and for other reliefs.

2. The case made out by the plaintiffs was that the suit properties along with certain other properties belonged to the deity Sri Nrusinghanath Deb. Plaintiffs 2 and 3 and the predecessors of the defendants were in possession of such properties as marfatdars. For convenience of possession, the marfatdars had divided the properties of the deity among themselves and in such division the suit properties came to be allotted to the share of Ananda Panda, father of plaintiffs 2 and 3. Ananda's eldest son Agadhu died issueless. Taking advantage of a dispute between late Agadu Panda and plaintiff No. 2 (plaintiff no. 3 was a minor then) Bhagaban Panda, uncle of defendant no. 1 obtained a permanent lease in respect of the disputed properties in the names of himself and his brother Banchhanidhi, father of defendant no. 1. This lease was not acted upon and was a fraudulent one. Notwithstanding the fraudulent character of the lease deed, defendant No. 1 created trouble in respect of the disputed properties. At the instance of certain well-wishers it was settled that plaintiffs 2 and 3 would purchase the right of defendant no. 1 in respect of the suit land for a consideration of Rs. 300 and in pursuance of such arrangement defendant no. 1 executed and registered the sale deed Ext. A dated 19-5-60 and received the entire consideration of Rs. 300. But the original sale deed Ext. A was kept with him and later defendant no. 1 brought a false criminal case against plaintiffs 2 and 3 on the allegation that they had plucked cocoanuts from the suit land. Though there was an acquittal in the criminal case, the plaintiffs in order to remove the cloud from their title have filed the suit.

3. Defendants 4, 6 to 8, 10, 12, 14, 15 and 19 supported the plaintiffs' Defendant no. 1 actually contested the litigation. His case was that late Banchhanidhi Panda and Bhagaban Panda obtained a permanent lease of the suit properties from plaintiff no. 2 late Agadhu Panda and their mother Jamuna by a registered deed of lease on payment of salami for the purpose of the deity. Defendant no. 1 as the sole surviving heir of Banmali and Banchhanidhi has been in possession of the leasehold. In order to purchase other properties defendant no. 1 agreed to alienate the suit properties to plaintiffs Nos 2 and 3 for a consideration of Rs. 300 and it was further agreed that the consideration money would be paid by plaintiffs nos. 2 and 3 to defendant no. 1 at the time of endorsing the registration ticket in favour of plaintiffs nos. 2 and 3 and delivery of possession of the suit properties would be

given to plaintiffs nos. 2 and 3 then. Accordingly the sale deed Ext. A was executed and registered by defendant No. 1. As plaintiffs nos. 2 and 3 failed to pay the consideration money defendant no. 1 did not endorse the registration ticket in their favour and executed a cancellation deed Ext. C on 6-1-61. Defendant no. 1 has been in possession throughout and no title has been acquired under Ext. A by plaintiffs 2 and 3.

4. The trial court came to find that the permanent lease deed dated 2-4-1917 was genuine and for consideration; the plaintiffs were not in possession of the suit properties and the defendant no. 1 was in possession of the same; and title passed independent of passing of consideration. It was needless to discuss the evidence on the question of passing of consideration. The learned Munsif decreed the suit.

5. Before the lower appellate court it was conceded that the consideration money had not passed under the sale deed Ext. A, nor was the genuineness of the lease deed of 1917 challenged. Therefore, the only question with which the lower appellate court concerned itself was as to whether title passed under the sale deed Ext. A even if the consideration had not been paid. The material portion of the sale deed has been translated by the lower appellate court in the following manner:—

“That in order to purchase new landed properties, I sell the above mentioned 1.08 acres land to you with cocoanut, mango, jackfruit, Chakunda and other trees standing thereon at the highest prevailing price of Rs. 300/- and having agreed to receive the consideration money at the time of endorsing the registration ticket, I deliver possession of the sold land and become disentitled thereto. From today you will cultivate the said land or get it cultivated as your purchased property and appropriate the income thereof from generation to generation by paying rent, obtaining receipt and getting your name mutated in place of mine.”

The learned Appellate Judge referred to two decisions of this Court in 1960-2 OJD 136 = (AIR 1961 Orissa 19), *Michu Kuanr v. Raghu Jena* and ILR (1964) Cut 551 = (AIR 1964 Orissa 239), *Ramchandra Bihari Lal Firm v. Mathuramohan* and came to hold ultimately that no title had passed under Ext. A and, therefore, he reversed the decree of the trial court.

6. Mr. Mohanti wanted to contend that the concession said to have been made before the lower appellate court that the consideration money has not passed under the sale deed Ext. A is not a correct one. I do not find any challenge in the grounds of appeal to support the present contention of Mr. Mohanti. Normally a statement in the judgment of a court must be accepted to be true unless it is properly challenged. Even mere incorporation of a ground in the memorandum of appeal has been held not to con-

stitute a sufficient challenge to the correctness of such a statement. The concession is on a question of fact and parties or their learned counsel are entitled to make such a concession. In the circumstances, I must hold that the concession has been made and the statement made in the lower appellate court's judgment to record such a concession cannot be disputed.

7. The only point that arises for consideration is as to whether on the footing that no consideration was paid for Ext. A title can be said to have passed. ‘Sale’ has been defined in Section 54 of the T. P. Act as “a transfer of ownership in exchange for a price paid or promised or part-promised.” In the present case, the narrative portion, as extracted above, goes to show that the consideration was to be received subsequently at the time of endorsing the registration ticket. It was not indicated as to on which date or at what point of time the registration ticket would be endorsed. Without waiting for such endorsement to be made of the ticket and the consideration to be received, it was stated in the conveyance,

“I deliver possession of the sold land and become disentitled thereto. From today you will cultivate the said land or get it cultivated as your purchased property and appropriate the income thereof from generation to generation by paying rent, obtaining receipt and getting your name mutated in place of mine.”

As such the intention seems to be unequivocal of making a conveyance of the title in praesenti and not dependent upon passing of the consideration. A Division Bench of this Court in ILR (1953) Cut 531 = (AIR 1953 Orissa 23), *Balabhadra Misra v. Nirmala Sundari Devi* came to consider a similar question where the narration in the sale deed ran thus:—

“But being in need of money to make part payment of the mortgage dues of Sree Babu M. Subba Rao we of our own accord and free will sell the zamindari consisting of the undermentioned village to the above-mentioned vendee for Rs. 1205 as the consideration for the said zamindari and we have counted the said money and received it from the vendee out of her Stridhan through her father in one instalment and acknowledge that from this day the vendee will be entitled to possess all rights, including land, water, trees, stones, property, underground, idols and temples, all rights and after her sons and grandsons for all time to come and they will deposit the sadarzama of the property.”

and held that in such a case the passing of title was not dependent upon payment of consideration. I think, the reasons that appealed to the learned Judges in that case are well applicable to the facts of the present case and it must be held on the aforesaid basis that passing of title was not made dependent upon passing of the consideration

money. In the circumstances, it must be held that title passed under Ext. A being not dependent upon the passing of consideration. Once it is so found, it must also be held that the judgment of the lower appellate Court is wrong and the appellants are entitled to succeed.

8. The Second Appeal is allowed with costs throughout. The judgment of the lower appellate court is reversed and that of the trial court is restored.

Appeal allowed.

AIR 1970 ORISSA 220 (V 57 C 73)

G. K. MISRA, C. J., AND R. N. MISRA, J.

Baidhar Das, Petitioner v. The State and others, Opposite Parties.

O. J. C. No. 63 of 1968, D/- 13-8-1969.

(A) Civil Services — Orissa Civil Service (Classification, Control and Appeal) Rules (1930) Rule 15 — 'Reasonable opportunity' — Opportunity contemplated is same as contemplated in Article 311 (2) of Constitution — Compliance with each of requirement laid down in rule must normally be insisted upon. (Para 4)

(B) Civil Services — Orissa Civil Service (Classification, Control and Appeal) Rules (1930), Rule 15 — Reasonable opportunity — Right of cross-examination — Delinquent not given opportunity of knowing contents of documents which were going to be utilized against him in enquiry — Realising this infirmity delinquent called upon after enquiry was over to offer another explanation against charges — But enquiry not reopened — Held enquiry proceedings were liable to be quashed as delinquent was denied right of cross-examining witnesses in support of charges — (Constitution of India, Art. 311 (2)). (Para 5)

(C) Constitution of India, Art. 311 (2) — Reasonable opportunity — What is.

Article 311 (2) of the Constitution which guarantees a reasonable opportunity to a public servant ensures (a) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based; (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him. AIR 1958 SC 300, Rel. on. (Para 5)

(D) Constitution of India, Article 311 (2) — Reasonable opportunity — Representation by lawyer at enquiry — Delinquent not hav-

ing working knowledge of procedure relating to cross-examination of witnesses — Charges of serious nature and documents bulky and many — Witnesses examined in support of charges were also too many — Held disciplinary authority acted contrary to spirit of Article 311 (2) in denying representation by lawyer at enquiry, enquiry was thus vitiated. AIR 1962 Orissa 78 and OJC No. 1678 of 1968, D/- 30-7-1969 (Orissa), Foll.; AIR 1964 Mys 250, Rel. on; AIR 1959 Orissa 152, Disting. (Para 9)

Cases Referred: Chronological Paras

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| (1969) O. J. C. No. 1678 of 1968, | |
| D/- 30-7-1969 (Orissa), Purna | |
| Chandra Sethi v. Supdt. Proof and | |
| Experiments, Chandipur | 7 |
| (1964) AIR 1964 Mys 250 (V 51) = | |
| (1963) 2 Lab LJ 694, T. Muniswamy | |
| v. State of Mysore | 8 |
| (1962) AIR 1962 Orissa 78 (V 49) = | |
| ILR (1961) Cut 373, Nitya Ranjan | |
| v. State | 7, 8 |
| (1959) AIR 1959 Orissa 152 (V 46) = | |
| ILR (1959) Cut 95, James Bushi v. | |
| Collector of Canjam | 7 |
| (1958) AIR 1958 SC 300 (V 45) = | |
| 1958 SCR 1080, Khem Chand v. | |
| Union of India | 5 |

S. Misra (2), for Petitioner; The Standing Counsel, for Opposite Parties.

R. N. MISRA, J.: This is a writ application under Articles 226 and 311 of the Constitution at the instance of the petitioner who was an organiser of the Craft School, Cuttack. He came to be appointed to such post in 1955, and while he was serving in such capacity, on 6-5-67 he was subjected to a departmental proceeding. Twelve charges were framed against him by the appointing authority and he was called upon to submit his explanation in respect of such charges. On 11-5-57, he applied for copies of statements of facts on which the charges were based and of documents referred to in the charges in order to be in a position to offer his explanation against the charges. As the copies were not supplied, ultimately on 9-8-57 he offered his explanation mentioning therein that he had been handicapped in placing his explanation against the charges on account of the non-supply of the statements of facts and the documents which he had asked for. One Sri L. S. Panda, the Assistant Director of Industries, was appointed the enquiring officer. The enquiry continued for over three years. Two more enquiring officers in succession were appointed, and ultimately the last enquiring officer, Shri L. Dandapat submitted his report on 28-12-60. At the enquiry, 28 witnesses in support of the charges and 9 in support of the petitioners' defence were examined. 193 documents were exhibited. The disciplinary authority had nominated an Anti-corruption Inspector to present the case in support of the charges before him. The petitioner had,

therefore, raised an objection to the conduct of the case by a Prosecuting Inspector. The disciplinary authority by his order dated 17-7-58 rejected the application. Thereafter the petitioner came up with an application for permission to have legal assistance in support of his defence, but the enquiring officer refused such request by his order dated 18-8-1958.

After the enquiry was over, the petitioner was called upon to offer a second explanation against the charges, obviously on account of the fact that the documents had not been given to him and he might not have given a complete explanation on the earlier occasion. That explanation he gave on 9-2-61. On 5-5-62 the petitioner was called upon to show cause against the proposed punishment, and on 7-5-63 the Director of Industries passed the order of discharge from service. Of the twelve charges framed against the petitioner, the enquiring officer had found him guilty in respect of ten. The punishing authority found that two more charges had not been proved against the petitioner, and the punishment ultimately rested on the eight remaining charges framed against the petitioner. Aggrieved by the said order of discharge from service, the petitioner has come before this Court.

2. The opposite parties have filed a counter-affidavit wherein it has been contended that the petitioner had inspected some records and was allowed to have copies from them, and some other records were produced before the enquiring officer at the time of enquiry and the petitioner was given sufficient opportunity to examine and cross-examine witnesses on the basis of the documents. Therefore, the petitioner was not prejudiced in raising a proper defence. It was further asserted that the charges were not at all intricate or complicated, and the petitioner had not made out any special facts and circumstances for allowing the assistance of a legal practitioner.

3. Two contentions were raised by Mr. Misra appearing for the petitioner. They are—

(1) The petitioner has been substantially prejudiced on account of the omission on the part of the authorities to provide the delinquent with the statements of facts on the basis whereof the charges were framed, and on account of the non-supply of the documents material and relevant for the enquiry; and

(2) Denial of legal assistance in the facts of the present case has denied the reasonable opportunity guaranteed under Art. 311 (2) of the Constitution to the petitioner in defending himself.

4. The first contention of Mr. Misra that reasonable opportunity has been denied on account of the non-supply of material papers and documents is sought to be made on the basis of Rule 15 of the Orissa Civil Service

(Classification, Control and Appeal), Rules, 1962 (hereinafter referred to as the Rules). The petitioner lost sight of the fact that the enquiry was concluded at a time when the Rules of 1962 were not in force. The present enquiry was being undertaken under the old Civil Services (Classification, Control and Appeal) Rules. The material provisions of the aforesaid Rules are absolutely similar to those contained in the Rules of 1962. The counter-affidavit however did not question the assertion made by the petitioner that there was non-compliance of the provisions of the Rules of 1962. To examine the first contention of Mr. Misra, reference has however to be made to the Civil Services (Classification, Control and Appeal) Rules, 1930, and not to the Rules framed in 1962. The requirement for supply of a statement of the allegations, on which the charges are based, was also prescribed in such Rules. The procedure prescribed for enquiry against delinquent public servants, as contained in the aforesaid Rule provides for 'reasonable opportunity' as contemplated under Art. 311 (2) of the Constitution, and, therefore, compliance with each of the requirements laid down by the rule in question should normally be insisted upon, as otherwise reasonable opportunity, which is guaranteed to the public servant under Article 311 (2) of the Constitution, may not be ensured to the delinquent whose conduct is under enquiry. On examination of the charges in the instant case, it is clear that the statement of facts is not included therein. The allegation in the counter-affidavit that the charges included the statement cannot be accepted.

5. Annexure 8 to the writ application is an application of the petitioner dated 14-12-1959 to the Joint Registrar of Co-operative Societies, Orissa, for supply of records and documents. Therein the petitioner has referred to seven of his earlier applications between 11-5-57 and 11-11-59. The petitioner clearly indicated in the said application that no action had been taken on all his previous applications for the documents and he was handicapped in his defence. He, therefore submitted a list of records and documents which he wanted and prayed that authenticated copies of the said documents should be made available to him. The authorities seem to have taken a callous attitude and did not dispose of his representations either contemporaneously or within a reasonable time. The enquiry continued and witnesses after witnesses before different enquiring officers were being examined. Voluminous documents were being placed in support of the charges. The petitioner did not have any opportunity of knowing the contents of the documents which were going to be utilised against him. As he was not being represented by a counsel at the enquiry, it was incumbent upon the enquiring officer to ensure that the petitioner had been provided with copies of the documents or at

least inspection thereof before the documents were being exhibited by different witnesses who were being examined in support of the charges. Realising this infirmity, the authorities called upon the petitioner to offer another explanation against the charges after the enquiry was over. It may be that by that time the petitioner had acquainted himself with the materials that were used against him but the enquiry was over and the witnesses had already been examined and cross-examined and the documents had been exhibited. While the petitioner was called upon to give another explanation against the charges, the enquiry was not reopened and, therefore, the petitioner cannot be said to have had the benefit which he could otherwise have had if the documents or copies thereof had been provided to him before the witnesses were examined. It is settled law that a delinquent can establish his defence by cross-examining the witnesses in support of the charge. That right had been denied to the petitioner in the present case.

In paragraphs 4 and 5 of the counter affidavit it is stated,

"4. . . . it is submitted that some of the records were inspected by the petitioner and the petitioner was allowed to take copies therefrom and other records were produced before the enquiring officer at the time of enquiry and the petitioner was given sufficient opportunity to examine and cross-examine the witnesses on the basis of the documents.

5. That as regards the statement in paragraph 7 of the writ application it is submitted that as the petitioner could not get adequate opportunity of going through the records on which charges were based, he was given a second chance to submit the written statement basing on facts alleged in course of enquiry and the petitioner submitted this statement on 9th February, 1961."

It is interesting to find that the punishing authority noticed this aspect in his final order. He stated,

"As the delinquent officer could not get adequate opportunity of going through the records on which charges were based, he was given a second chance to submit a written statement basing on facts allowed in course of enquiry and Sri Baidhar Das gave his statement on 9-2-61."

On the accepted position that reasonable opportunity was not given to the petitioner before or at the enquiry and he was prejudiced in raising his defence properly, the proceedings are liable to be quashed. Article 311 (2) of the Constitution which guarantees a reasonable opportunity to a public servant ensures (a) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based; (b) an opportunity to defend himself by cross-exa-

mining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him. This rule laid down in AIR 1958 SC 300 (Khem Chand v. Union of India) has been accepted as laying down the real purport and scope of the guarantee under Article 311 (2) of the Constitution. In the facts of the present case, there can be no doubt that the said reasonable opportunity has been denied to the petitioner and an infirmity has crept into the proceedings. The first contention of Mr. Misra, therefore, is bound to succeed.

6. The second contention raised by Mr. Misra is equally forceful. The charges in this case were of falsification of accounts, misappropriation of Government money, acceptance of illegal gratification etc. As many as 28 witnesses in support of the charges, 9 in support of the defence were examined. As has already been indicated 193 documents were exhibited. The enquiry began in the year 1957 and ended in 1961. Three enquiring officers in succession to one another were appointed. The punishing authority noticed this aspect of the matter also and in his final order he stated,

"The case is pending with me for a few months, but as depositions of 37 witnesses had to be read and as the report of the Enquiring Officer and the explanations given by Sri Baidhar Dash, Ex-Organiser of the Crafts school on different occasions had also to be studied, I never found time enough to go through all these materials. In the meantime Sri Baidhar Dash had seen me several times. . . . At first the enquiry was taken up by the Asst. Director of Industries (General) who examined 3 prosecution witnesses and later Joint Registrar of Co-op. Societies (General) Sri A. B. Panda took up the enquiry and examined 27 prosecution witnesses including those re-examined. Sri L. Dandapat, Joint Registrar of Co-op Societies (General) completed the enquiry and examined 9 defence witnesses. In all 28 prosecution witnesses, 9 defence witnesses and 193 exhibits were examined and produced."

From the materials on record we gather that the petitioner does not have much of educational attainment and nothing is placed on record to show that he has the working knowledge of the procedures obtaining in courts relating to examination and cross-examination of witnesses. There is no doubt that the charges are of very serious nature. The documents are bulky and many. The witnesses examined in support of the charges are also too many.

7. The contention raised by Mr. Misra has to be examined from two aspects. Firstly, if the person nominated by the disciplinary authority to present the case in support of the charges is a legal practitioner, the delinquent officer is entitled, as of right, to be

represented by a legal practitioner at the enquiry. If however the officer nominated to present the case in support of the charges is not a legal practitioner, the delinquent officer is not entitled to such representation by a lawyer unless the disciplinary authority, having regard to the circumstances of the case, permits such representation. This aspect of the matter had been the subject matter of examination in this Court on several occasions. A Division Bench of this Court examined the matter in AIR 1959 Orissa 152 (James Bushi v. Collector of Ganjam) and stated thus:—

“In departmental proceedings against delinquent public servants they are not entitled, as of right, to be represented by a lawyer; and it is left to the discretion of the Officer holding the enquiry to allow, or refuse to allow, a lawyer to represent the delinquent officer. Hence, the mere denial of such legal help will not necessarily involve failure to observe the rules of natural justice in all cases. In considering the question of prejudice other factors such as the nature of the charges made against the public servant and his own educational and other attainments which have a bearing on his ability to defend himself without legal help, should also be considered.”

On the next occasion when the same point came up for examination in AIR 1962 Orissa 78 (Nitya Ranjan v. State) Chief Justice Narasimham on behalf of the Division Bench stated:—

“Though in a departmental enquiry the delinquent public servant may not be entitled as of right to legal assistance to defend himself, nevertheless, there may be special circumstances connected with the case, such as, complexity of facts, volume of evidence, the educational attainments and experience of the public servant etc. which may show that without legal assistance he will not be able to adequately cross-examine the witnesses or to establish his innocence. In such circumstances denial of legal assistance may be equivalent to denial of ‘reasonable opportunity’ within the meaning of Article 311 (2) and the entire proceeding is liable to be quashed.”

In both the cases, the principle that in proper cases legal assistance would be required to be provided as a part of “reasonable opportunity” was accepted. But in the first case the Court came to hold that the petitioner therein was used to the process prevalent in court and as a fact had been able to cross-examine the witnesses sufficiently. Therefore they did not entertain the contention that denial of legal assistance had vitiated the ultimate order of punishment. In the second case, however, their Lordships stated as follows:—

“Judged in the light of the aforesaid principle the petitioner’s contention must succeed. This case is of unusual comple-

xity. The total number of witnesses examined on the side of the prosecution and defence and Court was 91. The total number of documents exhibited was 166. The deposition of witnesses alone runs into 437 pages. The charges deal with criminal breach of trust, falsification of accounts and forgery which, as is well known, are some of the most difficult offences in the Penal Code.

The petitioner is comparatively a junior officer of the Forest Department who entered service in 1951 and has absolutely no knowledge of law. It is true that as an Assistant Conservator of Forests he might have detected and tried a few minor forest offences, but his intellectual attainments and experience cannot be said to be of that standard as to enable him adequately to cross-examine witnesses in a case of this type. In the peculiar circumstances of this case, therefore, the petitioner should have been permitted to be represented by a lawyer as prayed for by him.”

The punishment in the second case was vacated on the aforesaid finding. The facts of the present case are almost comparable to the facts of AIR 1962 Orissa 78 referred to above. The gravity of the charges, the nature of evidence led, and the extent of documents exhibited clearly go to show that the petitioner could not have cross-examined the witnesses and supported his defence without representation by a lawyer. This aspect of the matter came up for examination by a Division Bench of this Court consisting of my Lord the Chief Justice and myself very recently in O. J. C. No. 1678 of 1968 (Orissa) (Purna Chandra Sethi v. Supdt., Proof and Experiments, Chandipur) disposed of on 30-7-1969, wherein my Lord the Chief Justice examined the legal aspects at length and laid down the law applicable to such cases.

8. The person nominated to present the case in support of the charges in this case was an Anti-corruption Inspector. The petitioner raised an objection to the engagement of such a person at the enquiry. On 14-7-1958 the disciplinary authority informed the petitioner the decision on his objection. Annexure 6 is the said decision which is extracted below:—

“With reference to your letter No. 15 dated 18-2-1958 raising an objection to the presence of Sri G. N. Brahma, Inspector, Anti-corruption in course of the hearing, I am to inform you that there is no harm in having an investigating officer to assist the enquiring Officer. The enquiring officer can take any reasonable assistance in the matter, as such. Your objection to Shri G. N. Brahma assisting the investigating officer in course of the enquiry is not acceptable.”

It may be true that the Anti-corruption Inspector was not a legal practitioner. But we cannot shut our eyes to the fact that

the said Inspector is an experienced prosecutor and for the petitioner to be pitted against such a person at the enquiry definitely puts the delinquent petitioner at a disadvantage. Such a contention was raised before this Court in AIR 1962 Orissa 78 referred to above. His Lordship the Chief Justice in disposing of this matter in that case stated:—

"The petitioner and the Prosecuting Inspector were not placed on the same footing as far as the applicability of Rule 6 (2) of the Disciplinary Proceeding (Administrative Tribunal) Rules were concerned. He further contended that the word 'counsel' occurring in Rule 6 (2) should not be given a narrow meaning so as to restrict it to legal practitioners practising in law courts but that it should be construed in a liberal sense to include all those persons who by virtue of their experience and attainments are in no way inferior to legal practitioners." The Court however did not dispose of the said aspect.

9. This point came up for examination before a Division Bench of Mysore High Court in AIR 1964 Mys 250 (T. Muniswamy v. State of Mysore). Iyer, J., delivering the judgment of the Division Bench said,—

"But the two rules made by the Governor assist the impeachment in every possible way and cripple the defence in an equal measure. If one of these rules permits the impeachment to be entrusted to any agency selected by the disciplinary authority, and empowers him to do so in any case, there can be small reason for the refusal of that right to the government servant or for the prescription of the permission of the disciplinary authority to engage counsel. The bestowal of power on the disciplinary authority to decide whether the case is one for the grant or refusal of such permission without placing any such restriction on the power of the disciplinary authority to arrange for the conduct of the impeachment, is as unreasonable and discriminatory as the prohibition against the engagement of any one other than an approved government servant for the conduct of the defence without any corresponding restraint on the selection by the disciplinary authority. Further, although a disciplinary authority is a tribunal to whom the power to pronounce on the guilt or innocence of the government servant is confided, Rule 11 (5) very strangely makes it his duty to arrange for the presentation of the case in support of the charge, which is not known to be the concern of a quasi-judicial tribunal which the disciplinary authority is. If the exercise of the power to nominate a person to conduct the impeachment involves the application of the mind of the disciplinary authority to the selection of a suitable person for that purpose, the disciplinary authority does not when making such selection function as a tribunal but as a statutory authority entrusted with the duty to arrange for

the establishment of the accusation, and in that role, it occupies a position similar to that of the government servant both of whom should therefore be treated alike and afforded equal opportunities in their respective pursuits which Rule 11 (5) does not, and is therefore susceptible to the criticism that its provisions are not in consonance with the spirit of clause (2) of Art. 311." There is much force in what has been stated and it is indeed a matter for serious consideration of the authorities framing rules under Article 311 (2) of the Constitution connected with disciplinary proceedings to examine this aspect of the matter and provide sufficient protection for the guarantee of reasonable opportunity to the delinquent public servant. In this view of the matter, the second contention of Mr. Misra also succeeds. In the facts and circumstances of this case, the disciplinary authority acted contrary to the spirit of Article 311 (2) of the Constitution in denying the representation of the petitioner by a lawyer at the enquiry, and thus deprived him of the reasonable opportunity guaranteed to the petitioner as a public servant under the said provisions of the Constitution. The enquiry is thus vitiated.

10. We, therefore, issue a writ of certiorari and quash the order of discharge from service of the petitioner dated 7-5-1963 and direct that the petitioner be taken as continuing in service. We however make it clear that it is open to the disciplinary authority to continue the proceedings on the basis of the charges framed in accordance with law. This writ application is allowed with costs. Hearing fee of Rs. 100/- (Rupees one hundred).

G. K. MISRA, C. J.— 11. I agree.

Petition allowed.

AIR 1970 ORISSA 224 (V 57 C 74)

G. K. MISRA, C. J. AND S. K. RAY, J.
Sudhakar Ghadei, Petitioner v. The State of Orissa, Opposite Party.

O. J. C. No. 283 of 1965, D/- 17-11-1969.

(A) Civil Services — Orissa Administrative Services Class II (Recruitment) Rules (1959), Rule 6 and Regulations framed under R. 6 — Reg. 10 — Reservation for Scheduled Castes — Competitive examination by State Public Service Commission — Public Service Commission recommending 33 candidates for 'A' Class posts and 53 for B class posts — Scheduled Caste candidate standing 105th in order of merit recommended for 'B' class post — Candidate appointed to 'B' class post cannot claim appointment to 'A' class post on the basis of reservation in 'A' class posts.

(Para 5)

CN/DN/B550/70/BDB/M

(B) Constitution of India, Article 335 — Reservation in services for Scheduled Castes and Scheduled Tribes — Candidates found unfit cannot claim appointment despite reservation.

Constitutional guarantee given to members of Scheduled Castes and Scheduled Tribes that a certain proportion of posts in the Public Services should be reserved for them is subject to the paramount consideration that they must be declared fit by the Public Service Commission having regard to the maintenance of administrative efficiency; if the members of the Scheduled Castes and Scheduled Tribes, are unfit, they cannot claim to be appointed to the service despite reservation. (Para 6)

S. P. Mohapatra, for Petitioner; Advocate-General, for Opposite Party.

G. K. MISRA, C. J.: Facts more or less are not in dispute. The petitioner belongs to the 'Tiar' community which is a Scheduled Caste. He graduated from the Utkal University in 1962. In the competitive examination held by the Orissa Public Service Commission for the year, the petitioner secured the 105th position in the list of 133 successful candidates. He was the only successful scheduled caste candidate. The Public Service Commission placed him under Group 'B' with the following observation :

"There were fifteen candidates and seven candidates belonging to the Scheduled Castes and Scheduled Tribes respectively. Five scheduled caste candidates and four scheduled tribe candidates did not take the examination. Out of the remaining candidates who appeared at the examination only one scheduled caste candidate qualified himself at the examination. He is Sri Sudhakar Ghadei who occupies the 105th position in the enclosed list. The commission, having regard to the maintenance of efficiency of administration consider him suitable for appointment to the services under Group B. He was appointed to the Junior Branch of O. F. S." (Orissa Finance Service).

The Service Commission recommended the first 33 candidates in the list of 133 as being suitable for appointment to the services under Group 'A', under the Orissa Administrative Service, Class II (Appointment by Competitive Examination) Regulations, 1959, (hereinafter referred to as the Regulations). Government appointed 27 candidates to the services under Group 'A'. In the ordinary course, the petitioner could not have been appointed to any of the Services under Group 'B' as, in all Government appointed 86 candidates to the Services in both the groups and the position of the petitioner was 105th. The Service Commission, however, having regard to the maintenance of efficiency of administration considered him suitable for appointment to any service under Group 'B', in consideration of the special provision relating to reservation of vacancies for members

of the Scheduled Castes and Scheduled Tribes. The petitioner's case is that as there is reservation of 18 per cent for each category of Service and as he was the only successful scheduled caste candidate he should have been appointed to any of the services under Group 'A' even though his position was 105th in the list of successful candidates.

This contention requires a careful examination of the various provisions of the Orissa Administrative Services Class II (Recruitment) Rules, 1959 (hereinafter referred to as the Rules) and of the Regulations.

3. Rule 4 relates to method of recruitment. Clause (a) thereof prescribes direct recruitment by competitive examination. Rule 6 provides that recruitment to the Service shall, subject to the provisions of the Rules, be in accordance with such regulations as the State Government may, after consultation with the Service Commission, make in this behalf. Such regulations, in the case of direct recruitment, shall inter alia provide for reservation of seats for scheduled castes and scheduled tribes in accordance with orders issued by the State Government from time to time. Regulation 3 deals with holding of examinations. It runs thus:—

"3. Holding of examination. — (1) A combined competitive examination shall be conducted by the Commission having regard to the likely number of vacancies each year, in the manner prescribed in Schedule I for direct recruitment to the Services mentioned in Groups A and B below:—

Group A.

(i) The Orissa Administrative Service, Class II

(ii) The Orissa Finance Service (Senior Branch)

(iii) The Orissa Police Service

Group B.

(i) The Orissa Subordinate Administrative Service

(ii) The Orissa Finance Service (Junior Branch)

(2). The dates on which and the places at which the examination shall be held, shall be fixed by the Commission."

It will thus be seen that by virtue of Regulation 3, a combined competitive examination shall be conducted by the Public Service Commission, after taking into account the total number of anticipated vacancies, both in Groups A and B. Though the status and scales of pay of the Services in Groups A and B essentially differ, still one combined examination is held for both the classes of services. As would be explained hereafter this is based on the simple reason that persons higher in the list would be selected for Group A and the remaining persons lower in the list would be appointed to the Services under Group B according to the vacancies.

4. The other relevant regulations are 7 to 10. They may be extracted in full:

7. Forwarding of the list by the Commission (1). The Commission shall forward to the Government in the Administrative Department a list, arranged in order of merit, of the candidates who have qualified by such standards as the Commission may determine and of the candidates belonging to Scheduled Castes and Scheduled Tribes who, though not qualified by that standard, are having regard to the maintenance of efficiency of administration, declared by the Commission to be suitable for appointment to the service. The list shall also be published for general information.

(2) The said list shall ordinarily be in force for one year from the date of its preparation by the Commission:

Provided that the State Government may at any time, in consultation with the Commission, for a grave lapse in the conduct on the part of any person included in the list, remove the name of such person from the list.

8. Filling of vacancies — Subject to the provisions of Regulations 10, 12 and 13 candidates will be considered for appointment to the available vacancies in the order in which their names appear in the list.

9. Allotment — (1) Candidates securing the highest places on the results of the examination and eligible for appointment to the services included in group A under regulation 3 (1) will subject to any preference that (may) have been expressed by them in their applications, be appointed to these, upto the number of vacancies that are decided by Government to be filled on the result of the examination. Due consideration will be given to the preference expressed by a candidate at the time of his application, but the Government reserve the power to assign him to any service for which he is a candidate and for which he is considered most suitable.

(2) If two or more candidates obtain equal marks in the aggregate, the order of merit shall be determined in accordance with the highest marks secured by such candidates in the aggregate in the compulsory subject; should the marks in the aggregate in the compulsory subject be also equal, then the order of merit shall be decided in accordance with the highest marks secured in the viva voce test.

10 Reservation for Castes and Tribes candidates:— (1) Eighteen per cent and twenty per cent of the available vacancies shall be reserved for candidates who are members of Scheduled Castes and Scheduled Tribes, respectively.

(2) In filling the vacancies so reserved, candidates who are members of the Scheduled Castes or Scheduled Tribes shall be considered for appointment in the order in which their names appear in the list, irrespective of their relative ranks as compared with other candidates.

(3) If a sufficient number of candidates who are members of the Scheduled Castes

or Scheduled Tribes are not available for filling all the vacancies reserved, the remaining vacancies shall be filled by the appointment of other candidates in the list and an equivalent number of additional vacancies shall be reserved for candidates belonging to the Scheduled Castes and Scheduled Tribes to be filled on the results of the next examination:

Provided that if a sufficient number of suitable candidates belonging to the Scheduled Castes and Scheduled Tribes is not available as a result of the said next examination to fill all the reserved vacancies including the additional vacancies, the additional vacancies, or such of them as are not filled, shall lapse."

5. On an analysis of the Regulations, it will be clear that the Service Commission shall forward to Government one list, arranged in the order of merit, of all the candidates who have qualified by such standards as the Commission may determine. Such a list would be based purely on merit, on the basis of the results of the competitive examination. It would not fit in with the reservation of seats for scheduled caste and scheduled tribe candidates, for whom, according to Regulation 10 (1) eighteen and twenty per cent respectively of the available vacancies would be reserved. To harmonise the inconsistency arising out of taking in general candidates on the basis of results of the competitive examination and Scheduled caste and scheduled tribe candidates on the basis of reservation, the Regulations have devised a method by prescribing that even if a candidate belonging to the scheduled caste or scheduled tribe may not be qualified by the standard prescribed by the Service Commission on the basis of the competitive examination, his name should be included in the list to fulfil the ratio of reservation, if the Commission declares that such a candidate, having due regard to the maintenance of efficiency of administration, is suitable for appointment to the Service. Once the Commission gives such a declaration under Regulation 7, then by virtue of Regulation 10 (2) the vacancy would be filled up taking in the scheduled caste or scheduled tribe candidate if his name appears in the list, even though his relative rank, as compared with the other general candidates may be much lower.

In this particular case, the Public Service Commission recommended the first 33 candidates as being suitable for appointment to the Services under Group A. Indisputably, the petitioner does not come within this list of 33 candidates. Yet, he could be selected for Group A if the Public Service Commission declares that though by the standard of the competitive examination he could not come within these 33 places, yet he was suitable for appointment under Group A having regard to maintenance of efficiency of administration. The Commission not having made any such declaration,

the petitioner cannot claim to be appointed to any of the services under Group A.

6. On merits, the petitioner could not have been appointed to any of the services under Group B also, because, in all, only 86 candidates were appointed under both the groups and the petitioner secured the 105th place. The Public Service Commission, however declared that though the petitioner is not entitled to be selected for Group B on the basis of the competitive examination, yet, having regard to the maintenance of efficiency of administration, he was suitable for appointment to the services under Group B. This principle has been evolved in order to preserve the constitutional guarantee given to members of Scheduled Castes and Scheduled Tribes that a certain proportion of posts in the Public Services should be reserved for them. This however is subject to the paramount consideration that they must be fit; if the members of the Scheduled Castes and Scheduled Tribes, are unfit, they cannot claim to be appointed to the service despite reservation.

7. The writ application fails and is dismissed but in the circumstances without costs.

RAY, J.: 8. I agree.

Application dismissed.

AIR 1970 ORISSA 227 (V 57 C 75)

SPECIAL BENCH

G. K. MISRA, C. J., S. K. RAY AND
R. N. MISRA, JJ.

Netrananda Barik, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 231 of 1966, D/- 13-2-1970.
Co-operative Societies — Orissa Co-operative Societies Act, 1951 (11 of 1952). Sections 8, 71 — Government is empowered to confer all powers of Registrar on persons appointed to assist him under sub-section (1) of Section 8 — Powers exercisable under Section 71 by Registrar can also be exercised by officers appointed to assist him, when such power is conferred on them by Notification under Section 8 (2) — O. J. C. No. 104 of 1967 (Orissa), Overruled.

Although the Act maintains a distinction between a "Registrar" and "persons authorised to exercise the powers of a registrar", yet Section 8 authorises the State Government to entrust the powers of the Registrar on persons appointed to assist him. Normally under Section 71 power to receive references is vested with the Registrar but when that power is conferred by the Notification D/- 28-2-1956 on persons appointed to assist him, it cannot be challenged on the ground that the Act makes a distinction between the two classes of officers. Though a broad distinction has been maintained in the conferment of powers, there is still some

scope for ambiguity as to who should exercise the powers from amongst various classes of officers who can entertain those powers; that by itself is not enough to invalidate the Notification. (A provision similar to Section 15 Civil P. C. (1908), is recommended by the Court). O. J. C. No. 104 of 1967, (Orissa), Overruled; AIR 1958 Orissa 217, Disting; AIR 1956 SC 35, Ref.

(Paras 13, 14, 15)
Cases Referred: Chronological Paras
(1967) O. J. C. No. 104 of 1967, (Orissa) 2

(1958) AIR 1958 Orissa 217 (V 45) =
ILR (1958) Cut 286, Bharat Naik
v. Asst. Registrar Co-operative Societies, Cuttack 11

(1956) AIR 1956 SC 35 (V 43) =
1955-2 SCR 842, Member, Board
of Revenue v. A. P. Benthall 10

R. Mohanty and S. C. Ghosh, for Petitioner; Govt. Advocate and K. C. J. Ray, for Opposite Parties.

R. N. MISRA, J.:— This application under Articles 226 and 227 of the Constitution of India seeks to challenge the jurisdiction of the Assistant Registrar under the Orissa Co-operative Societies Act, 1951 (Act 11 of 1952) (hereinafter referred to as the Act) to make the impugned award on 27-3-62 in a dispute raised by Opposite Party No. 2. That award of the Assistant Registrar was challenged in an appeal before the Deputy Registrar under Section 128 (1) of the Act and was also subjected to two revisions in succession — one under Section 131 before the Registrar and the other under Section 132 (1) before the State Government. The decision of the Assistant Registrar having been upheld by all the forums the petitioner has come up before this Court.

2. One of the grounds raised in the petition is that the Assistant Registrar had no jurisdiction to entertain the dispute directly and his taking cognizance of the dispute without a reference of the dispute being made by the Registrar has vitiated the exercise of a jurisdiction by the Assistant Registrar. When this writ application came up for hearing before a Division Bench consisting of their Lordships the Chief Justice and Ray, J., a decision of this Court passed in O. J. C. No. 104 of 1967 (Orissa) was cited wherein my Lord the Chief Justice and myself took the view that it was not open to the Assistant Registrar to entertain a dispute raised under Section 71 (1) of the Act unless such a dispute was referred to him by the Registrar. The correctness of this decision was challenged before the Division Bench which was hearing this writ application and, therefore, in pursuance of the order dated 10-12-1969 this larger Bench has been constituted to examine the correctness of the decision in O. J. C. No. 104 of 1967 (Orissa) (hereinafter referred to as the "earlier case").

3. The reasoning which was given in the earlier case to uphold the conclusion that no

other authority except the Registrar was entitled to entertain a dispute under the Act was as follows:—

"It is not disputed by the parties that the Assistant Registrar and the Deputy Registrar are persons on whom jurisdiction has been conferred under Section 8 (2) of the Act to discharge the specified powers entrusted to the Registrar by or under the Act. But the scheme of Section 73 makes it clear that all references of disputes under Section 71 are to be made to the Registrar, and after the disputes are received he may dispose of the disputes himself or transfer such disputes for disposal to persons authorised under Section 8 (2) of the Act. The necessary consequence of this provision is that no other authority than the Registrar has jurisdiction to receive reference of disputes which are to be made under Section 71 of the Act, and after taking cognizance of the disputes under Section 73 it is open to the Registrar to keep the disputes for disposal by himself or transfer the same to the persons authorised in the manner indicated above. Therefore it follows that unless a dispute is transferred either to the Assistant Registrar or to the Deputy Registrar by the Registrar, the former has no jurisdiction to be in seisin of it. On the aforesaid analysis, the award of the Deputy Registrar is wholly without jurisdiction inasmuch as neither the Assistant Registrar before whom the dispute was originally placed nor the Deputy Registrar to whom it was transferred as indicated above could entertain the dispute unless it was one which had been received by the Registrar and had been made over to either of them for disposal in accordance with the Statute."

4. The learned Counsel appearing before us now did not dispute the correctness of the aforesaid conclusion if it was to be drawn only from the statutory provisions contained in Chapter IX of the Act. The clear effect of the provisions in Sections 71(1) and 73 of the Act would lead to the said conclusion. The correctness of the decision is, however, disputed on the basis that by notification as authorised under the Statute the powers vested in the Registrar under Sections 71 and 73 of the Act have been delegated to the other authorities under the Act appointed to assist the Registrar, and in view of the delegation of the authority of the Registrar to those subordinate authorities of the Registrar, it is now contended, the conclusion could not be correct. Before us in the earlier case reference to the notification by which such powers have been so delegated had not been placed (made—Ed.) and the conclusions were reached on a bare analysis of the statutory provisions in Chap. IX of the Act.

5. In view of the additional feature now placed at length, namely, that certain powers of the Registrar have been delegated to those appointed to assist him, the matter has to be reconsidered and the correctness of the

earlier decision in the present background has to be decided.

6. It would be useful to refer at length for convenience to all the material provisions of the Act in due course. That there is a clear distinction throughout the Statute between the "Registrar" and "persons appointed to assist the Registrar" cannot be and is not disputed.

Section 2 (n) of the Act defines "Registrar" means "a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act". Section 8 of the Act makes the following provisions:

"8 (1) The State Government may appoint a person to be Registrar of Co-operative Societies for the State of Orissa and may appoint persons to assist him.

(2) Subject to restrictions imposed by the rules, the State Government may, by general or special order in this behalf published in the Gazette, confer all or any of the powers entrusted to the Registrar, by or under this Act, on any person appointed under sub-section (1) to assist the Registrar."

7. It is not disputed that appointments have been made under sub-section (1) of Section 8 of categories of authorities as persons meant to assist the Registrar. Such categories are the Additional Registrar, the Joint Registrar, Deputy Registrars and Assistant Registrars. It is also not disputed that by notifications duly published in the gazette the State Government have conferred many of the enumerated powers entrusted to the Registrar by or under the Act on those authorities.

8. The powers under Sections 71 and 73 appear to have been clearly conferred by that notification on all those authorities enumerated above who have been appointed to assist the Registrar. The notification relevant for the present purpose is dated 28-2-1950 and as far as relevant it reads as follows:—

"Notification.

Dated, Bhubaneswar, the 28th Feb., 1950.

No. 3215/C.F. In pursuance of sub-section (2) of Section 8 of the Orissa Co-operative Societies Act 1951 (Orissa Act XI of 1952) the Government of Orissa are pleased to confer on the Assistant Registrars of Co-operative Societies in charge of Co-operative Circles constituted in the Notification of the Government of Orissa in the Development (L. S. G.) Department No. 5153 L. S. G. dated the 29th June, 1954 the powers of Registrar of Co-operative Societies, Orissa under the following Sections under the said Act and Rules made thereunder and to the extent, if any, specified therein, namely:—

(iii) Sections 71, 73, sub-sections (1), (2) (3) and (4) of Section 103, Section 104, sub-section (3) and clause (a) of sub-section (1) of Section 105 and Section 121. It is not contended before us that Rules have been made imposing restrictions on conferment of the powers of the Registrar on the

persons appointed to assist him as envisaged under sub-section (2) of Section 8 of the Act.

9. On the basis of the aforesaid notification which admittedly was in force on the date when the dispute was filed before the Assistant Registrar in the present case it is contended that the power of the Registrar to receive disputes under Section 71 (1) of the Act was open to be exercised by the Assistant Registrar who as a fact took cognizance of the dispute directly. The jurisdiction inhering in the Registrar for exercise of powers under Sections 71 and 73 has been vested, it is contended, in the Assistant Registrar on the authority of the aforesaid notification and, therefore, the Assistant Registrar had jurisdiction to entertain the dispute filed before him by opposite Party No. 2 and no objection can be taken to his entertaining the dispute without a reference being made by the Registrar.

10. This contention raised on behalf of Opposite Party No. 2 who initiated the dispute before the Assistant Registrar is challenged by the petitioner with reference to the specific provisions made in Section 73 of the Act. The provisions of Section 73 are to the following effect:—

“(1) On receipt of a reference under Section 71, the Registrar may—

- (a) decide the dispute himself; or
- (b) transfer it for disposal to any person authorised by the State Government to exercise the powers of a Registrar in this behalf; or
- (c) subject to any rules, refer it for disposal to an arbitrator or arbitrators appointed in this behalf by the State Government.

(2) Subject to any rules, the Registrar may withdraw any reference transferred or referred under clauses (b) and (c) of sub-section (1) and decide it himself under clause (a) of that sub-section or transfer or refer it again under clause (b) or (c) of that sub-section to another person exercising the powers of Registrar, or to an arbitrator or arbitrators other than those to whom the reference was originally transferred or referred.

(3) The Registrar, a person exercising the powers of the Registrar under this section, or an arbitrator or arbitrators deciding a dispute under this section, shall have power to order the expenses incurred in determining such dispute to be paid out of the funds of the society or by such party or parties to the dispute as he or they may think fit.”

Mr. Mohanty, learned Counsel for the petitioner contends that throughout the Act a distinction has been made between the Registrar and the persons authorised by the State Government to exercise the powers of a Registrar. In view of the fact that these two authorities, namely, the “Registrar” and “persons authorised to exercise the powers of a Registrar” appear in the same Chapter of the Statute, one authority cannot be equated to the other and a distinction must necessa-

riety be maintained between the two. He seeks to place reliance for this argument of his on a decision of their Lordships of the Supreme Court in AIR 1956 SC 35, (Member, Board of Revenue v. A. P. Benthall). It has been stated therein by their Lordships:

“When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression ‘distinct matters’ in Section 5 and ‘descriptions’ in Section 6 have different connotations.”

Mr. Mohanty contends that though Rules have not been framed imposing restrictions upon delegation as we are required to put a harmonious construction on the provisions contained in the different Sections of the Statute by necessary implication it would follow that the State Government had no jurisdiction to confer powers on persons appointed to assist the Registrar in such manner that the two terms would in fact stand equated.

11. Historically it is an undisputed position that until the notification of 28-2-1956 there had been no conferment of the Registrar's powers under Chapter IX on any person appointed to assist him. Therefore when it was challenged before this Court that the provisions of Section 133 of the Act by which restriction has been imposed on appearance of parties through counsel were unconstitutional in AIR 1958 Orissa 217, (Bharat Naik v. Co-op. Societies, Cuttack), Narasimham, J. has stated:

“Moreover, it seems a reasonable classification to divide into two groups the authorities who may exercise powers under the Act, the higher group consisting of the Registrar, the State Government, the Collector and the Board of Revenue, and the lower group consisting of other officers exercising the powers of Registrar, liquidator, arbitrator or body of arbitrators, etc. Before the former authorities there is no deprivation of the right of a party to be represented by a legal practitioner. It is only before the latter authorities that a party is deprived of the right of appearing through a legal practitioner.

If the Legislature thought that before the lower authorities the main questions to be decided may not generally involve difficult questions of law, but only ascertainment of facts and that for that purpose there would be no need for any legal practitioners to assist the party, it will be difficult to hold that the distinction made between these groups of authorities is unreasonable. Moreover, every order passed by any of the lower authorities is subject to appeal to the Registrar before whom a legal practitioner may appear as of right. The absence of any rule for the guidance of the Registrar while making an order of transfer under Section 73 of the Act will not affect the constitutionality of that provision. It is expected that while making orders

of transfer the Registrar would first of all consider the questions involved in the case the competence of the transferee officer to decide those questions and then transfer only those cases where, in his opinion, the aid of a legal practitioner will not be required, before those lower authorities."

The reasoning given by the Division Bench in the aforesaid decision is not relevant to resolve the dispute before us. It is quite possible that in view of the present delegations by which the powers entrusted to the Registrar under the Act have now been conferred on his subordinates, the reasoning given to negative the contentions raised before the Division Bench may not be justified. We, however, do not propose to express any final opinion on that point. Suffice it to say that the aforesaid authority is not relevant for our purpose except to the extent that it notices the fact that until then it was only the Registrar who was receiving the disputes.

12. The scheme contained in Chapter IX of the Act in regard to receipt of disputes as also for settlement of disputes seems to have been similar in the corresponding Statutes in the States of Bihar, Delhi, Madras, Punjab and Kerala. In the material Sections in the Statutes in vogue in those States the specified disputes are required to be referred to the Registrar and the Registrar is also authorised either to dispose of the disputes himself or refer the same for disposal to persons exercising the powers of a Registrar in that behalf. Provisions similar to the ones contained in Section 8 of the Act are also contained in those States.

13. Mr. Mohanty contends that the provisions in the Statute are so drafted that there is enough room for the view that had been taken by us in the earlier decision. Possibly there is some force in that contention. But once the Statute authorises the State Government by notification in the gazette to confer those powers which have been entrusted to the Registrar under the Statute on the persons appointed to assist him and such notifications have been duly made, we cannot take the view that the powers which were entrusted to the Registrar under Sections 71 and 73 of the Act cannot be exercised by the Assistant Registrar or any other persons so authorised. It was open to Government not to confer the powers of the Registrar under Section 71 of the Act on the Assistant Registrar and authorise the persons appointed to assist the Registrar only for the purposes of settlement of disputes under Section 73 of the Act. In that eventuality all disputes were bound to be referred only to the Registrar and the Registrar could decide the dispute himself or transfer them for disposal under clause (b) or (c) of sub-section (1) of Section 73 of the Act. There is, however, no restriction on the conferment of the power exercisable by the Registrar under Section 71 (1) on the per-

sons appointed to assist him, and once such conferment is made in the manner indicated by the Statute objection cannot be taken to such conferment. In view of the clear provisions made in the Statute and in the face of the notification in question the only conclusion that can reasonably flow would be to hold that a dispute can also be referred to a person who has been authorised by notification to exercise the powers of the Registrar under Section 71 (1) of the Act.

14. A challenge to the notification was also attempted to be thrown on the ground that care has not been taken by the State Government to delegate the powers of the Registrar to his subordinates in a manner which would keep the spirit of the Statute intact. It was also canvassed that if full effect is given to the notification it would lead to uncertainty of jurisdiction and the self same dispute may be referred to either the Registrar or an authority subordinate to him. The learned Government Advocate brought to our notice the conditions indicated in the conferment of powers in the notification. A broad distinction has been maintained in making the conferment of powers; disputes which arise between institutions whose area of operation is State-wide have been reserved for authorities having State-wide jurisdiction namely, the Additional Registrar and the joint Registrar; disputes arising in relation to societies having limited area of operation but beyond the local limits of circles have been reserved for the Deputy Registrars whose jurisdiction is in relation to ranges and the other disputes which are limited within the circles have been assigned to the Assistant Registrars. A dispute which is, however, entertainable by the Assistant Registrar being a dispute covered within the circle would also be maintainable before the Registrar direct unless a provision similar to the one made under Section 15, Civil Procedure Code which prescribes,

"Every suit shall be instituted in the Court of the lowest grade competent to try it" is also made either in the Rules or in the notification or is indicated in the notification as a condition. Unless such a provision is made there may be some scope for ambiguity, but that by itself would not be a ground to resolve the dispute in favour of the petitioner.

15. On the aforesaid analysis we would hold that by virtue of the notification under Section 8 (2) of the Act the State Government have jurisdiction to confer all the powers which have been entrusted by the Statute to the Registrar upon persons appointed under sub-section (1) of Section 8 of the Act to assist the Registrar. In view of such notification and authorisation the Deputy Registrar in the earlier case had jurisdiction to entertain the dispute directly though the dispute had not been referred by the Registrar. On the aforesaid conclusion of ours, the answer would necessarily be that

the said point had not been correctly decided in the earlier case.

16. This matter will now go back for disposal on merits by the Division Bench. We do not propose to make any order as to costs of this reference.

G. K. MISRA, C. J.:— 17. I agree.

RAY, J.:— 18. I agree.

Reference answered.

AIR 1970 ORISSA 231 (V 57 C 76)

R. N. MISRA, J.

Debarchan Pradhan and others, Appellants v. Bhagirathi Pradhan and others, Respondents.

Second Appeal No. 537 of 1965, D/- 16-12-1969, from order of Sub-J., Dhenkanal, D/- 7-8-1965.

Civil P C. (1908), Order 2, Rule 2 — Suit for partition by co-sharer — No objection taken by defendant for partial partition — Subsequent suit for partition of certain property left out in earlier suit on ground that existence of this property was not known to plaintiff was not barred by Order 2, Rule 2. AIR 1964 Andh Pra 124 & AIR 1960 Pat 76, Rel. on. (Para 13)

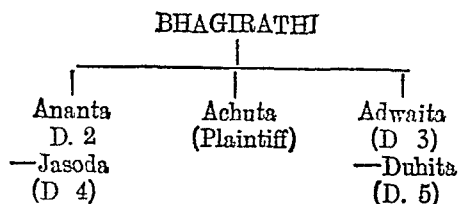
Cases	Referred:	Chronological	Paras
(1966) 8 Orissa J D 26, Union of India v. Iswar Sahu Hadibandhu Sahu			9
(1964) AIR 1964 Andh Pra 124 (V 51) = (1963) 2 Andh LT 418, Venkatasubamma v. Venkata Subbamma			13
(1960) AIR 1960 Pat 76 (V 47) = Sm. Jasoda Kumari Sewani v. Sm. Satyabhama Sewani			12
(1954) AIR 1954 SC 352 (V 41) = 1955 SCR 99, Shankar Sitaram v. Balkrishna Sitaram			9
(1954) AIR 1954 Raj 269 (V 41) = ILR (1954) 4 Raj 423, Sambhudutt v. Srinarain			10
(1949) AIR 1949 PC 78 (V 36) = 75 Ind App 121, Mohammad Khalil Khan v. Mahbub Ali Mian			8

S. Mohanty, for Appellants; S. C. Mahapatra, for Respondents.

R. N. MISRA, J.:— This is an appeal by the plaintiffs (the original plaintiff having died, his legal representatives) in a suit for declaration that the sale deed dated 27-9-1958 executed by defendant No. 1 in favour of defendants 4 and 5 is fraudulent and does not confer title on the transferees. Their claim was accepted by the trial Court, but has been negatived by the lower appellate court. Hence the plaintiffs are in second appeal against the reversing judgment.

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2. A short genealogy would be useful to indicate the mutual relationship of the parties.



The suit property is claimed to be the joint family property of the plaintiffs and defendants 1 to 3. In 1948, the defendant No. 1 executed a will with the ill motive of bequeathing all the properties to defendants 2 and 3. The plaintiff instituted T.S.2/49 for partition of the ancestral lands located at Angapada. That suit was decreed and the decree was affirmed even by this Court. On the plea that the properties now in the suit which are located at village Turada are also the joint family properties and have been left out of partition on the earlier occasion, the present suit has been filed. It is claimed that on 27-9-1958 the defendant No. 1 executed the sale deed for the suit land in favour of defendants 4 and 5 which is a void transaction. The plaintiffs claim that they have their 1/4th interest in the suit lands.

3. The defence of defendants 1, 2 and 3 jointly is that the suit is barred both under Section 11 and under Order 2, Rule 2, Civil Procedure Code. The suit property is not the joint family property, but it is the self-acquired property of defendant No. 1. The plaintiff is not in possession of this property for more than 12 years and as such his present suit is barred by limitation.

4. The learned trial Judge came to hold that the suit lands were ancestral joint family property; the suit was not barred under Section 11 nor under Order 2, Rule 2, Civil Procedure Code; the suit was also not bad on the theory of partial partition. He further found that the sale deed dated 27-9-1958 in favour of defendants 4 and 5 was not binding on the plaintiffs and he accordingly decreed the suit.

5. On appeal by the defendants, the learned appellate Judge affirmed the findings of the trial Court that the suit land was the joint family property. He further found that the property under Ext. 8 was the self-acquisition of Achuta and was not liable for partition. He, however, came to find that the suit was barred under Order 2, Rule 2, Civil Procedure Code and was also barred by limitation.

6. In view of the concurrent finding in the courts below that the property is the joint property and in view of the admitted status of the plaintiff as a co-sharer, normally relief of partition could be granted.

7. The only stumbling block in the way in the opinion of the lower appellate Court is that the present claim is barred under

Order 2, Rule 2, Civil Procedure Code. The single point for determination in the second appeal, therefore, is as to whether the present claim for partition is barred under Order 2, Rule 2, Civil Procedure Code. Order 2, Rule 2, Civil Procedure Code reads thus:

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation:

8. In a suit for partition in respect of a co-sharer and in respect of a coparcener a distinction in law has always been maintained. For a coparcener who seeks to separate himself from the hitherto joint corpus the cause of action arises in respect of the entire joint property at a single point of time while in respect of a co-sharer joint tenant it may arise at different points of time in respect of different items of property. Their Lordships of the Judicial Committee examined the scope of Order 2, Rule 2, Civil Procedure Code at considerable length in the case of *Mohammad Khalil Khan v. Mahbub Ali Mian*, AIR 1949 PC 78. Sir Madhavan Nair, J., speaking on behalf of the Board summarised the principle thus:

"The principles laid down in the cases thus far discussed may be thus summarised:

(1) The correct test in cases falling under Order 2, Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit."

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

9. Their Lordships of the Supreme Court examined the scope of sub-rule (3) of

Order 2, Civil Procedure Code in the case of *Shankar Sitaram v. Balkrishna Sitaram*, AIR 1954 SC 352. They dismissed the action in the said case holding that it was barred under the said sub-rule as the plaintiff had omitted to sue for a relief which was available to him when the suit in respect of the other items of claim had been filed on an earlier occasion. My Lord, the present Chief Justice had also occasion to consider the applicability of Order 2, Rule 2, C. P. C. in the case of *Union of India represented by the General Manager, South Eastern Rly. v. Iswar Sahu Hadibandhu Sahu*, (1966) 8 O J D 26 and referring to the position indicated in the aforesaid decision of the Privy Council, held on the facts of that case that the subsequent claim was barred under Order 2, Rule 2, C. P. C.

10. A claim in respect of certain joint family property for partition directly came up for decision in some cases. Examining the applicability of Order 2, Rule 2, C. P. C. as a bar for a subsequent claim for partition in respect of certain property left out in the earlier suit, Chief Justice Wanchoo in a Division Bench case reported in A. I. R. 1954 Raj 269 indicated the law to be thus:—

"The reason why in the case of partition between coparceners all the property must be thrown in the hotchpot except for certain well-recognised exceptions is that where a member of a joint Hindu family who broke up the joint status, wants the joint family property to be divided, the cause of action arises at one time, and he must therefore include every item of property in the suit. But in the case of tenants-in-common, it is not necessary that the cause of action for partition of every item of the property which is held in common must arise at the same time. Therefore, it may be possible in cases of co-tenants that a suit may lie for one item of property at one time and for another item at another time.

It is clear, therefore, that in the case of tenants-in-common it is not essential that all the property held in common should be brought into hotchpot though it is desirable that as far as possible, in order to avoid multiplicity of suits, all the property should be included in one suit. It is, however, for the Court in each case to decide whether the case is of such a nature that the plaintiff should be ordered to include the remaining property also in the suit for division, provided of course the property is within the jurisdiction of the Court in case it is immovable property. But the suit, in our opinion, cannot be thrown out on the mere ground that all the property which is capable of partition was not included."

11. Admittedly in the present case the question of partial partition was not raised in the earlier litigation, Title Suit No. 2/49 and that suit was entertained for disposal on

merit. If it had been contended that some other properties were left out, it was quite possible that action would have been taken by the present plaintiff who was also plaintiff in the said suit to have the disputed property included in the hotchpot.

12. A similar question in a suit for partition arose for determination in a Patna case. *Raj Kishore Prasad, J., in the case of Sm. Jasoda Kumari Sewani v. Sm. Satyabhama Sewani*, AIR 1960 Pat 76, after examining the law applicable to a case of this type held:

"..... it is manifest that, after a decree has been passed in a suit for partition of the joint family property, a subsequent suit for partition may be brought in respect of any portion of that property which, by mistake, or inadvertence, or due to ignorance or to oversight, or by consent of the co-owners, was omitted in the former suit, and if no objection is taken by the party concerned to a partial partition, the subsequent suit for partition of the portion of the property so left out and still held in joint possession, would be maintainable. If by mistake, or the like, acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise there is no reason why the Court should not grant a division of the remainder at the instance of one or more of the co-owners. In such a case, there could be no omission to sue within the meaning of Rule 2 of Order 2 of the Code."

13. In a more recent case dealing with this aspect of the matter, in the case of *Venkatasubamma v. Venkata Subbamma*, AIR 1964 Andh Pra 124, *Jaganmohan Reddy, J.*, (as he then was) considered many authorities and ultimately held that a suit would lie in almost similar circumstances as in the present case. Keeping in view the legal position as indicated above I would hold that the present claim was not hit by Order 2, Rule 2, Civil Procedure Code. The learned appellate Judge has indicated no material to support his finding that the plaintiff intentionally did not include the suit land in his previous partition suit. On the other hand, the learned appellate Judge has stated:

"It shall be deemed that the plaintiff intentionally did not include."

There could be no scope to arrive at a finding by speculation or by drawing an inference from mere fact that on the earlier occasion, this item had been left out in the hotchpot in the partition. The learned appellate Judge came to his conclusions on a wrong basis of the legal position and as such his conclusions were also vitiated. I would hold in view of the concurrent finding that the property had been acquired from the joint family funds, and the plaintiffs' present claim is entitled to succeed. The fact that the defendant on the earlier occasion had not raised the plea that the present suit property had been left out from the hotchpot, the as-

sertion of the plaintiffs in the present case that the existence of this property as a joint family asset was not known to him and the legal position that such a suit in certain circumstances is maintainable lead me to accept the claim of the plaintiffs in this case. Mere failure of existence of this property would not bring the case within the bar provided under Order 2, Rule 2, Civil Procedure Code. It is quite possible that the plaintiff on the earlier occasion did not have materials to find that this was a property which had been acquired out of joint family nucleus. Subsequently he came to find that this was acquired out of joint family nucleus and was, therefore, partible. More or less that is his case now. I would therefore vacate the judgment of the lower appellate Court and restore that of the trial Court and hold that the plaintiffs are entitled to their claim of 1/4th share in the suit property.

14. The appeal succeeds and is allowed. Since this is a suit for partition, I would direct both the parties to bear their own costs up to this stage.

Appeal allowed.

AIR 1970 ORISSA 233 (V 57 C 77)

G. K. MISRA, C. J. AND R. N. MISRA, J.

Ram Kumar Jhunjhunwala, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 357 of 1966, D/- 25-9-1969.

Land Acquisition Act (1894), Section 6 — Notification by State Government under — Notification issued in pursuance of request made by municipal authorities — Municipal authorities requiring the land for the purpose of constructing road to link up some plots with nearby municipal road — Acquisition is for public purpose.

Where, the municipal authorities, in exercise of their powers under Section 235 of Orissa Municipal Act, requested the State Government to make acquisition of certain land for the purpose of constructing a road to link up some plots with the nearby municipal road and thereby provide a convenient outlet to the inhabitants of that area, then, a notification by State Government under Section 6, in pursuance of that request, declaring the acquisition to be for a public purpose is justified. AIR 1960 J and K 78 & AIR 1965 SC 646, Disting. (Para 10)

The construction of the road does not bring in a benefit limited to any particular individual. As the ownership of the road when laid is to vest in municipality, the road will be the property of the municipality and will be available to be used by all the members of the public as of right and without any restriction. The persons living in the area are not a few individuals, but they are a section of the public at large and it is not only they but all persons who in-

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Order 2, Rule 2, Civil Procedure Code. The single point for determination in the second appeal, therefore, is as to whether the present claim for partition is barred under Order 2, Rule 2, Civil Procedure Code. Order 2, Rule 2, Civil Procedure Code reads thus:

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13. In a more recent case dealing with this aspect of the matter, in the case of Venkatasubamma v. Venkata Subbamma, AIR 1964 Andh Pra 124, Jaganmohan Reddy, J., (as he then was) considered many authorities and ultimately held that a suit would lie in almost similar circumstances as in the present case. Keeping in view the legal position as indicated above I would hold that the present claim was not hit by Order 2, Rule 2, Civil Procedure Code. The learned appellate Judge has indicated no material to support his finding that the plaintiff intentionally did not include the suit land in his previous partition suit. On the other hand, the learned appellate Judge has stated:

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section of the plaintiffs in the present case that the existence of this property as a joint family asset was not known to him and the legal position that such a suit in certain circumstances is maintainable lead me to accept the claim of the plaintiffs in this case. Mere failure of existence of this property would not bring the case within the bar provided under Order 2, Rule 2, Civil Procedure Code. It is quite possible that the plaintiff on the earlier occasion did not have materials to find that this was a property which had been acquired out of joint family nucleus. Subsequently he came to find that this was acquired out of joint family nucleus and was, therefore, partible. More or less that is his case now. I would therefore vacate the judgment of the lower appellate Court and restore that of the trial Court and hold that the plaintiffs are entitled to their claim of 1/4th share in the suit property.

14. The appeal succeeds and is allowed. *Since this is a suit for partition, I would direct both the parties to bear their own costs up to this stage.*

Appeal allowed.

AIR 1970 ORISSA 233 (V 57 C 77)

G. K. MISRA, C. J. AND R. N. MISRA, J.

Ram Kumar Jhunjhunwala, Petitioner v. State of Orissa and another, Opposite Parties.

O. J. C. No. 357 of 1966, D/- 25-9-1969.

Land Acquisition Act (1894), Section 6 — Notification by State Government under — Notification issued in pursuance of request made by municipal authorities — Municipal authorities requiring the land for the purpose of constructing road to link up some plots with nearby municipal road — Acquisition is for public purpose.

Where, the municipal authorities, in exercise of their powers under Section 235 of Orissa Municipal Act, requested the State Government to make acquisition of certain land for the purpose of constructing a road to link up some plots with the nearby municipal road and thereby provide a convenient outlet to the inhabitants of that area, then, a notification by State Government under Section 6, in pursuance of that request, declaring the acquisition to be for a public purpose is justified. AIR 1960 J and K 78 & AIR 1965 SC 646, Disting. (Para 10)

The construction of the road does not bring in a benefit limited to any particular individual. As the ownership of the road when laid is to vest in municipality, the road will be the property of the municipality and will be available to be used by all the members of the public as of right and without any restriction. The persons living in the area are not a few individuals, but they are a section of the public at large and it is not only they but all persons who in-

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tend to come from and go to that area will have the advantage of the existence of the public way. (Paras 8, 10)

Moreover, the notification under Section 6 about the existence of the public purpose and the particular land being required for the said purpose is conclusive and not open to question. AIR 1963 SC 151, Rel. on.

(Para 10)
Cases Referred: Chronological Paras
 (1965) AIR 1965 SC 646 (V 52) =
 1966-1 SCJ 28, State of West Bengal
 v. P. N. Talukdar 6, 7, 9
 (1963) AIR 1963 SC 151 (V 50) =
 (1963) 2 SCR 774, Somawanti v.
 State of Punjab 9
 (1962) AIR 1962 SC 764 (V 49) =
 1962 Supp (2) SCR 149, R. L. Arora
 v State of Uttar Pradesh 7
 (1959) AIR 1960 J and K 78 (V 47) =
 Prem Nath v. State of Jammu and
 Kashmir 6

R Mohanty, for Petitioner; Standing Counsel for Opposite Parties

R. N. MISRA, J.:— This is an application under Articles 226 and 227 of the Constitution of India by the petitioner who is the recorded tenant of plot No 78 of khata No. 107 in mouza Bisinabar, Cuttack Town. Plots Nos 149, 150, 151 and 153 within the said mouza are homestead plots located in the neighbourhood of the petitioner's land, but plot No 78 intercepts these plots from the Municipal road. A sketch map is on record which shows the location of these plots at the spot. Plot No. 153 located nearabout is a big tank whose embankment was providing a circuitous approach from another municipal road to these plots from a different side.

The owners of these homestead plots who are quite a number of people approached the municipal authorities of Cuttack for construction of a road to link up these plots with the nearby municipal road and thereby provide a convenient outlet to the inhabitants of this area. The Municipal authorities decided that such a road in the interests of the inhabitants of the area should be provided and requested the State Government to acquire a part of the intervening Plot No. 78 of the petitioner to accommodate this proposed link road. The State Government took action under the provisions of the Land Acquisition Act (hereinafter referred to as the Act) and issued a notice under Section 4 and invited objections under Section 5-A of the Act. The petitioner's case is that he did not know about the notice under Section 4 and that for the first time he came to know about this acquisition when a notice under Section 6 of the Act dated 15-5-1965 was published declaring the acquisition to be for a public purpose. The petitioner's further case is that the acquisition is not for a public purpose and only 3 or 4 persons are the direct beneficiaries of this acquisition. The petitioner cannot be deprived of his property by the process under the Land Acquisition Act

in order to benefit some individuals, and the mere declaration under Section 6 of the Act that it is for a public purpose is not binding and cannot clothe the notification with the immunity that a valid notification under Section 6 of the Act is entitled to. Therefore, according to the petitioner, there is no public purpose and the acquisition must be quashed.

2. On behalf of the State of Orissa a counter-affidavit has been filed by the Additional District Magistrate of Cuttack. Therein it has been stated as follows:—

"From the materials on record it transpires that there was no connecting passage to plots Nos 149, 150, 151 and 153. As a lot of inconvenience and difficulties were being faced for going into and coming from the said plots certain members of the public made an application to the Municipality for construction of a road at Dhobi Lane. The matter was in due course placed before the Municipal Council and the Municipal Council decided and passed a resolution that the construction of a road in that locality was in the interest of and for the benefit of the public. The resolution to that effect was passed by the Municipal Council and necessary steps were taken for the acquisition of required land for the construction of the road. . . . That the purpose of acquisition of the land was for the benefit of a section of the community and it need not be necessarily for the benefit of the entire community."

3. Under the scheme of the Act, acquisitions are contemplated for the State, local bodies and companies. Part VII provides the procedure for acquisition of land for companies. Section 6 which deals with the declaration that the land is required for a public purpose provides as follows:—

"6 (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report if any, made under Section 5-A, sub-sec. (2), that particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders:

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing.

4. If the provisions of Section 6 are analysed, it clearly follows that a distinction has been maintained between acquisitions for the

purposes of the State and local bodies on one hand and for a company on the other. In Part VII the procedure to be followed for making acquisition for a company is indicated at length. The fact that there is no such procedure laid down in respect of an acquisition for the purposes of the State or for a local body clearly goes to show that for obvious reasons the Legislature has provided for a different machinery and proper safeguards when the power of acquisition provided under the Act is to be exercised for the benefit of the company. Sub-section (3) of Section 6 gives the declaration the status of conclusive evidence that the land is needed for a public purpose when it is for the State or a local body. But the conclusiveness that is given to the declaration under sub-section (3) in relation to the need for a company is not for the public purpose, but that the acquisition is for a company.

5. The notification under Section 6 of the Act is as follows:—

**"Revenue and Excise Department
Declaration**

The 15th May, 1965.

No. 32543-L.A.260/65—Cte-R. Whereas it appears to the Government of Orissa that lands are required to be taken by Government at the public expense for a public purpose, viz., for a road at Dhobi Lane (Buxi Bazar) in mouza town Bisinabar, Thana Cuttack No. 204, paragana Bakhrabad, district Cuttack, it is hereby declared that a piece of land measuring, more or less, 0.018 acre, bounded on the North and East—By plot Nos. 77 p & 151 p South and West — By plot Nos. 77 p & 69 is required within the aforesaid mouza town Bisinabar thana Cuttack, pargana Bakhrabad, district Cuttack.

This declaration is made, under the provisions of Section 6 of Act I of 1894, to all whom it may concern.

A plan of the land may be inspected in the office of the Land Acquisition Deputy Collector, Civil Branch, Collector, Cuttack.

By order of the Governor
S. Barik.

Assistant Secretary to Government."

6. Mr. R. Mohanty, appearing for the petitioner, contends that the beneficiaries under this acquisition are a few individuals and as such it cannot be considered to be for the benefit of the community, and therefore there is no public purpose. The notification under Section 6 is a colourable exercise of power and, therefore, the petitioner's homestead cannot be taken away and he cannot be deprived of his property against his volition under the cloak of a proceeding under the Land Acquisition Act. In support of his submission he relies upon two decisions in AIR 1960 J and K 78. Prem Nath v. State of J. and K. and AIR 1965 SC 616 (State of West Bengal v. P. N. Talukdar). On examination we find that the case before the Jammu and Kashmir High Court related

to an acquisition proceeding which really regularised certain previous illegal acts of the Chairman of the town area committee of Anantanag. The Chairman had illegally permitted one Qadir Suthu to raise construction on the properties of the petitioners, and later on the acquisition proceedings were taken to acquire these lands of the petitioners on some pretext or other, but Qadir Suthu remained in actual possession and enjoyment of the land and he was never dispossessed from the land as a result of the land acquisition proceedings. On the aforesaid finding of fact the High Court held that the declaration under Section 6 was only an example of abuse of power and it would be one issue in fraud of the powers conferred by the provisions of the Land Acquisition Act. Therefore, the principles laid down in the said case have no bearing on the point under examination.

7. In AIR 1965 SC 646 referred to above their Lordships were considering the case of acquisition for the purpose of the Ramkrishna Mission. They held that the Ramkrishna Mission is equated with a company being a society registered under the Societies Registration Act of 1860, and, therefore, an acquisition in its favour was required to satisfy the requirements of Part VII of the Land Acquisition Act. They referred to an earlier decision of their Court in AIR 1962 SC 764, (R. L. Arora v. State of Uttar Pradesh) wherein the procedural requirements of Part VII were examined at length. Wanchoo, J. delivering the leading judgment in the said case said:

"Therefore, though the words 'public purpose' in Sections 4 and 6 have the same meaning, they have to be read in the restricted sense in accordance with Section 40 when the acquisition is for a company under Section 6. In one case, the notification under Section 6 will say that the acquisition is for a public purpose, in the other case the notification will say that it is for a company. The proviso to Section 6 (1) shows that where the acquisition is for a public purpose, the compensation has to be paid wholly or partly out of public revenues or some fund controlled or managed by a local authority. Where however the acquisition is for a company, the compensation would be paid wholly by the company....."

In delivering the judgment in the 1965 case referred to above Wanchoo, J. reiterated the self-same view and the factual examination was confined to the requirements of Part VII in view of the fact that the acquisition was for the purposes of a company. Their Lordships of the Supreme Court ultimately came to hold that the acquisition for staff quarters cannot be said to be a public purpose as

"they are meant for occupation of individual members of the staff. We cannot accept the argument that an individual member of the staff must also be held to be a section of the public and therefore staff-

quarters would be useful to the public. That would in our opinion be reducing the idea of what is useful or can be used by a section of the public or can be used by a section of the public to absurdity. When we speak of a section of the public we must exclude from it an individual and what can be used by an individual cannot be said to be used by a section of the public which must always be more than one."

8. This decision of the Supreme Court cannot be applied to the facts of the present case in view of the fact that the acquisition in question is not for a company. We find that under Section 235 of the Orissa Municipal Act the Municipal Council has been authorised to lay out and make new public roads and sub-section (2) of that Section provides:

"Reasonable compensation shall be paid to the owners of any land or buildings or part of the building which are required for, or affected by, any such purposes."

The municipal authorities, in exercise of their powers under Section 235, requested the State of Orissa to make the acquisition in question and after acquisition the ownership of the road when laid is to vest in the municipality. The construction of the road does not bring in a benefit limited to any particular individual. The road would be the property of the municipality and would be available to be used by all the members of the public as of right and without any restriction. The persons living in the area are not a few individuals, but they are a section of the public at large and it is not only they but all persons who intend to come from and go to that area would have the advantage of the existence of the public way.

9. The learned Standing Counsel, appearing on behalf of the State, placed before us another decision of the Supreme Court in AIR 1963 SC 151 (Somawanti v. State of Punjab). In that case the acquisition was one for an industry in which the State Government were interested and payment of compensation was also partly made by them. It was in fact a third class of acquisition (the first one being for the purpose of the State and the local bodies and the second one being for companies) where the acquisition was primarily for a company, but it was also at the same time for a public purpose and the whole or part of the compensation was to be paid out of public revenues. This aspect of the matter was also discussed in AIR 1963 SC 646 referred to above, and in paragraph 9 of the judgment their Lordships upheld the contention that an acquisition of this type was also for a public purpose by stating as follows:—

"In such a case though the acquisition may look as if it is primarily for a company it will be covered by that part of Section 6 which lays down that acquisition may be made for a public purpose if the whole or part of the compensation is to be paid out

of the public revenues or some fund controlled or managed by a local authority." Mudholkar, J., speaking for the Court in AIR 1963 SC 151 referred to above, said:

"The Government has to be satisfied about both the elements contained in the expression 'needed for a public purpose or a company'. Where it is so satisfied, it is entitled to make a declaration. Once such a declaration is made sub-section (3) invests it with conclusiveness. That conclusiveness is not merely regarding the fact that the Government is satisfied but also with regard to the question that the land is needed for a public purpose or is needed for a company, as the case may be. Then again, the conclusiveness must necessarily attach not merely to the need but also to the question whether the purpose is a public purpose or what is said to be a company is a company. There can be no 'need' in the abstract. It must be a need for a 'public purpose' or for a company. As we have already stated the law permits acquisition only when there is a public purpose or when the land is needed for a company for the purposes set out in Section 40 of the Act. Therefore, it would be unreasonable to say that the conclusiveness would attach only to a need and not to the fact that that need is for a public purpose or for a company. No land can be acquired under the Act unless the need is for one or the other purpose and, therefore, it will be futile to give conclusiveness merely to the question of need dissociated from the question of public purpose or the purpose of a company..... The Act has empowered the Government to determine the question of the need of land for a public purpose or for a company and the jurisdiction conferred upon it to do so is not made conditional upon the existence of a collateral or extraneous fact. It is the existence of the need for a public purpose which gives jurisdiction to the Government to make a declaration under Section 6 (1) and makes it the sole Judge whether there is in fact a need and whether the purpose for which there is that need is a public purpose. The provisions of sub-section (3) preclude a court from ascertaining whether either of these ingredients of the declaration exists."

10. As we have already said, the facts of this case clearly go to show that what is really contemplated is the laying of a public passage, the ownership whereof is meant to vest in the Cuttack Municipality. The beneficiaries are the public at large and not the 3 or 4 individual owners of the plots referred to above. Once this fact is accepted, it is difficult to see any force in the contentions of Mr. Mohanty that the beneficiaries are a few individuals and, therefore, the notification under Section 6 is not justified. We have already extracted the decision of the Supreme Court wherein it has been said that the notification under Section 6 (3) about the existence of the public purpose and the

particular land being required for the said purpose is conclusive and not open to question. In the circumstances, the contention raised by Mr. Mohanty must be negatived and it must be held that the notification under Section 6 is for a public purpose as it purports to be and the writ application has no merit.

11. We, therefore, dismiss the writ application, but make no order as to costs.

G. K. MISRA, C. J.: 12. I agree.

Petition dismissed.

AIR 1970 ORISSA 237 (V 57 C 78)

R. N. MISRA, J.

Ramakrushna Mohanty, Appellant v. Radhakrushna Mohanty and others, Respondents.

Second Appeal No. 561 of 1965, D/- 25-11-1969, from judgment of 5th Addl. Sub. J., Cuttack, D/- 6-9-1965.

(A) Civil P. C. (1908), Section 11 — Res judicata — Previous Rent suit under Section 228 (1), Orissa Tenancy Act — Decision does not bar fresh suit for contribution when defendants in fresh suit had not participated in Rent suit and had no opportunity of being heard and issue of fraud was not involved in the former. (Para 7)

(B) Contract Act (1872), Section 69 — Joint liability — Contribution, suit for — Joint wrong-doers not entitled to sue for contribution. AIR 1951 All 774 (FB), Dissented.; AIR 1919 Pat 165 and AIR 1936 Pat 49, Followed. (Para 9)

(C) Civil P. C. (1908), Pre. — Precedents — Two consistent rulings of one High Court were preferred to one contrary F. B. ruling of another High Court. (Para 9)

(D) Limitation Act (1963), Article 48 — Suit for contribution — 'A' making deposit in Court for B on behalf of himself and others — 'A' filing suit for contribution against others — Period of 3 years commences to run not from the date of deposit but from the date of the appropriation of the deposit by B. (Para 10)

Cases Referred: Chronological Paras

(1951) AIR 1951 All 774 (V 38) = 1951 All LJ 521 (FB), Dharni Dhar v. Chandra Shekhar 5, 8

(1936) AIR 1936 Pat 49 (V 23) = ILR 15 Pat 219, Bishambhardeo Narayan Singh v. Hitnarayan Singh 5, 8

(1919) AIR 1919 Pat 165 (V 6) = 4 Pat LJ 486, Mahabir Prasad v. Darbhanga Thakur 8

(1799) 101 ER 1337 = 8 Term Rep 186, Merryweather v. Nixon 8

M. M. Das, for Appellant; M. Patra, H. K. Jena and B. Dagara, for Respondents.

JUDGMENT: The plaintiff is in appeal against a confirming judgment of the learned 5th Additional Subordinate Judge, Cuttack,

in a suit for contribution against defendants 1 and 2.

2. The plaintiff and defendants 1 and 2 who are his nephews were in possession of a homestead land to the extent of 12 decimals. In a partition the property and rent (sic) was being paid to defendant no. 4 together. On the allegation that defendant no. 4 and defendant no. 4 (sic) filed a rent suit for recovery of Rs. 11.19 by way of arrears of rent while nothing was due and in the said rent suit a decree was obtained by suppressing summons and the holding was put to sale also without issuing proper notices to the plaintiff who was a judgment-debtor and the plaintiff came to know about the auction sale only when it was about to be confirmed and, therefore, made the deposit to satisfy the decree, the present suit for contribution was filed. The plaintiff claimed recovery of Rs. 245.33.

3. The defence taken by defendants 1 and 2 was that they had paid their share to the plaintiff; the plaintiff was aware of the suit and was also in the know of the subsequent execution proceeding and had intentionally defaulted to make the payment; the rent suit was filed and the execution was taken on account of the default of the plaintiff and in the circumstances the plaintiff is not entitled to sue for contribution.

4. The trial court found that the default to pay arose out of a common wrong of all the parties, that is, the plaintiff and defendants 1 and 2, and in that view of the matter the plaintiff being one of the joint wrong-doers was not entitled to sue for contribution. The trial court also found that a major portion of the claim was also barred by limitation on the date of the suit. On these findings the suit was dismissed. On appeal the lower appellate court affirmed the decree of the trial court. The Second Appeal is directed against the appellate judgment.

5. Three questions are raised by Mr. Das, appearing for the plaintiff-appellant. They are:—

(1) In view of the findings recorded by the Rent Suit Officer in the execution proceeding it must be held that defendants 1 and 2 had colluded with defendant no. 4. The finding in the said case being inter partes is res judicata for the present suit. Therefore, the courts below went wrong in not relying upon the findings of the Rent Suit Officer and accepting the same on the basis of res judicata.

(2) The theory of joint wrong-doers being entitled to sue for contribution is not applicable in India as has been held by a Full Bench AIR 1951 All 774 (FB) Dharni Dhar v. Chandra Shekhar and, therefore, the trial court as also the court of appeal below went wrong in relying upon the decision of the Patna High Court in AIR 1936 Pat 49 Bishambhardeo Narayan Singh v. Hitnarayan Singh to hold that the suit was not maintainable.

(2) No part of the claim in the suit was barred by limitation and the courts below went wrong in negativing his claim on the question of limitation.

Each of the points needs examination.

6. There is some allegation in the plaint that defendants 1 and 2 had colluded with defendant no. 4. But in the present suit there is absolutely no evidence to support the allegation of collusion. The question raised is that there having been a finding recorded by the Rent Suit Officer in the execution proceeding, such finding is available to be used in the present suit and the defendants are barred by *res judicata* from disputing the position. The application filed before the Rent Suit Officer is not before us. The said order of the Rent Suit Officer which has been exhibited in the case states that the application before him was under Secs. 227 and 228 of the Orissa Tenancy Act. Section 227 admittedly would have no application to the facts of the case. Under Section 228 there are two sub-sections and sub-section (1) covers certain cases where auction sale has to be set aside while sub-section (2) refers to another set of cases where the same relief can be obtained. The relief ultimately granted in the case, as that order would show, is that the sale was vacated on accepting the entire decretal dues in satisfaction. Such an order fits in with the scheme of the Statute in sub-section (1) of Sec. 228 and does not comply with the requirements of sub-section (2) of Section 228 of the Orissa Tenancy Act. In view of the final direction given in the said order, it must be taken to be one coming within the meaning of Section 228 (1) of the Act. If it was a case covered by Section 228 (1), the question of fraud had not to be gone into, and therefore, cannot be said to have been in issue before the court for disposing of the application.

7. Then there is no evidence that the other two judgment-debtors, who are defendants 1 and 2 here, were appearing before the Rent Suit Officer. The plaintiff's case was that there was suppression of summons. There is no other material excepting the two references in the order sheet to a judgment-debtor appearing in the proceeding and asking for time to pay the decretal dues. Mr. Das contends that since it is the plaintiff's case that he for the first time came to know about the rent suit and its execution at a time when the sale had taken place, reference to some judgment-debtor without specifying the same must be by necessary application referring to either defendant no. 1 or defendant no. 2. By this process of elimination, to conclude that one of these two defendants had already appeared in the rent suit or its execution would be drawing an inference not available directly from the facts and I would be slow to do it. Therefore, I would hold that the matter before Rent Suit Officer was under Section 228 (1) of the Orissa

Tenancy Act and the question of fraud or collusion was not in issue. These two defendants had not participated in the proceeding and until it was shown that they had notice of the case it must equally be taken that they were not parties who had been heard or had been given an opportunity to be heard and had not availed of it and, therefore, any decision taken by the Rent Suit Officer cannot be *res judicata* against them. The first point raised by Mr. Das fails.

8. His next contention is that the principle of joint wrong-doers not being entitled to sue for contribution is not available in India. The Full Bench case in AIR 1951 All 774 refers to two Patna decisions in AIR 1919 Pat 165, Mahabir Prasad v. Darbhanga Thakur and AIR 1936 Pat 49 referred to above. In the first case, Chief Justice Dawson-Miller sitting with Adami, J. held that the exception as noted above applies to India. They also took into consideration the case of Merryweather v. Nixon, (1799) 101 ER 1337 and came to hold that the principle laid down therein was applicable to India. In the Allahabad case while two learned Judges took the view that the rule was not applicable to India Mr. Justice Agarwala did not agree to it.

9. In view of the facts that the Patna High Court has consistently taken the view indicated above, I would prefer to follow the rule in the Patna decisions in preference to that indicated in the Allahabad decision and conclude that a joint wrong-doer is not entitled to sue for contribution is applicable to India. In view of the finding already recorded by the courts below that the plaintiff was a joint wrong-doer in not paying the rent due and a further finding that the rent was actually due and had been properly sued for in the rent suit, I would hold that the plaintiff is not entitled to sue for contribution.

10. This leads to the ultimate question for determination relating to limitation. In view of the findings already recorded, limitation is not material to be decided. But since Mr. Das contended that there was no limitation I am prepared to examine the said question. It is admitted that a part of the payment was made on 15-6-60 and the suit was filed on 11-5-63 within 3 years from the date of the last payment. Mr. Das's contention is that the payment which the plaintiff made was only a deposit in the custody of the court and until it was directed to be appropriated and was in fact appropriated by the auction purchaser the money was still his though in the custody of the Court. It was open to the plaintiff in the present suit not to press his application in the rent execution proceeding and on his withdrawing the application in the said execution proceeding the money was available to be refunded to him. There can be no dispute to such a position. Therefore, until there was actual appropriation the ques-

tion of limitation cannot be raised. Since the order of appropriation was made on 15-6-60 only and the suit is within 3 years from that date, the question of limitation must be decided in favour of the plaintiff. The courts below went wrong in holding that the suit was out of time.

11. On the aforesaid analysis, there is no merit in the Second Appeal and the suit has been rightly dismissed in the courts below. The Second Appeal is dismissed. Parties will bear their own costs throughout.

Leave to appeal, as prayed for, is refused.
Appeal dismissed.

AIR 1970 ORISSA 239 (V 57 C 79)

R. N. MISRA, J.

Certificate Officer, Berhanpur and another, Appellants v. Kasturi Chand Malu and another, Respondents.

Second Appeal No. 562 of 1965, D/- 12-12-1969, from order of Addl. Sub. J., Berhampur, D/- 21-8-1965.

(A) Civil P. C. (1908), Sec. 80 — Notice — Is condition precedent for maintainability of suit even for injunction. AIR 1966 SC 1068, Rel. on. (Para 6)

(B) Civil P. C. (1908), Order 23, Rule 1 (2) (b) — Withdrawal of suit — Want of notice under Section 80, Civil P. C. is a technical defect, and plaintiff ought to be allowed to withdraw suit with permission for a fresh suit. (Para 6)

Cases Referred :	Chronological	Paras
(1966) AIR 1966 SC 1068 (V 53) =		
(1966) 1 SCR 986, Sawai Singhai v. Union of India		5
(1963) AIR 1963 Andh Pra 164 (V 50) =		
(1962) 2 Andh WR 234, Hussain Ali Mirza v. State of Andhra Pradesh		4
(1960) AIR 1960 Pat 530 (V 47) =		
1960 BLJR 432, State of Bihar v. Raghunandan Singh		4, 5
(1927) AIR 1927 PC 176 (V 14) =		
54 Ind App 338, Bhagchand Daga-dusa v. Secy. of State		5
Addl. Standing Counsel, for Appellants;		
S. C. Roy, for Respondents.		

JUDGMENT: Defendants 1 and 2, who are the Certificate Officer and the State of Orissa represented by the Collector of Ganjam, are the appellants in this appeal against a reversing judgment of the learned Additional Subordinate Judge, Berhampur, in a suit for declaration that the certificate proceedings for recovery of arrears of sales tax dues which are being pressed by defendant no. 1 are illegal and not in conformity with the provisions of the Madras Revenue Recovery Act, 1859 and for further relief for permanent injunction.

2. As it appears, the plaintiff, one Ramadeen defendant no. 3 and another Giridhari

lal Malu, not a party to the present suit, were partners of a firm known as Reedkaran Ramadin which was registered firm under the Indian Partnership Act, 1932. The firm came to be dissolved with effect from 15-5-56. Defendant no. 3 had undertaken to pay up the liability of sales tax and other public dues upto the date of dissolution. Bulk of the amount of sales tax as demanded have been paid, but the outstanding amount of Rs. 18,277-50 remained due for which certificate proceedings have been taken. Objections were raised before the Certificate Officer on various counts, but they were overruled and the properties were threatened to be sold. Steps were taken in appeal and revision under the said Act, but they proved futile. Ultimately the suit was filed.

3. The other defences taken in the suit may not be necessary to be indicated and it may be sufficient to state that one of the defences was want of notice under Sec. 80, Civil P. C. In paragraph 13 of the plaint it was stated:

"The notice under Section 80, Civil P. C. is not necessary as the public officers concerned have been informed of the several illegalities and irregularities etc., and were approached with prayers not to perform the sale. As the sale is proceeding on 25-8-1963 and no time is left to protect the plaintiff's rights the public officers cannot claim the statutory period of two months....." In paragraph 3 of the written statement by the two public officers it was contended:

"The plaintiff, before the institution of the suit has not served on the defendants the notice as required under Section 80, Civil P. C. and the contention advanced in para. 13 of the plaint that such notice is not necessary is untenable. The suit instituted without such notice is not maintainable in law." Issue no. 2 was framed in the suit to the following effect:—

"Is the suit instituted without notice under Section 80, Civil P. C. and not maintainable?"

4. The trial court disposed of the matter against the defendants holding,

"The learned advocate for the plaintiff has relied upon a decision reported in AIR 1960 Pat 530 wherein his Lordship has clearly observed that a notice u/s. 80, Civil P. C. is not necessary for any future act. That in the instant case the suit has been filed only for a future act of sale. Therefore, I hold that even though the suit was filed only one day after sending of notice u/s. 80 Civil P. C. the suit is maintainable and it is proper and valid and that even such a suit can be filed without any notice under Section 80, Civil P. C."

Before the Learned Appellate Judge this matter was further canvassed and he negatived the defence claim relying upon the decision of the Andhra Pradesh High Court reported in AIR 1963 Andh Pra 161, Hussain Ali Mirza v. State of Andhra Pradesh.

5. The question as to the requirement to notice under Section 80, Civil P. C. as a condition precedent to suits which are covered by that section came up for consideration before the Supreme Court in AIR 1966 SC 1068, *Sawai Singhai v. Union of India*. Chief Justice Gajendragadkar, speaking on behalf of the Court, stated:

"It is significant that in a large majority of cases, the plea that the Government raises is that notice is necessary and it is generally contended that the notice being defective in one particular or another makes the suit incompetent and in dealing with such pleas, the courts have naturally sought to interpret the notices somewhat liberally and have sometimes observed that in enforcing the provisions of Section 80, commonsense and sense of propriety should determine the issue. It is very unusual for the Government to contend that in a suit brought against it, no notice is required under Section 80. It is plain that such a plea has been raised by the respondent in the present case, because it helps the respondent to defeat the appellant's claim on the ground of limitation. In any case, the contention based on the object or purpose of the notice can hardly assist us in interpreting the plain words of Sec. 80. It will be recalled that prior to the decision of the Privy Council in *Bhagchand Dagadusa v. Secy. of State*, 54 Ind App. 338 = (AIR 1927 PC 176) there was a sharp difference of opinion among the Indian High Courts on the question as to whether Section 80 applied to suits where injunction was claimed. The Privy Council held that Section 80 applied to all forms of suit and whatever the relief sought, including a suit for an injunction. In dealing with the question about the construction of Section 80, the Privy Council took notice of the fact that some of the decisions which attempted to exclude from the purview of Section 80 suits for injunction were influenced by the 'assumption as to the practical objects with which it was

trained'. They also proceeded on the basis that Section 80 was a rule of procedure and that any construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the notion of justice. Having noticed these grounds on which an attempt was judicially made to except from the purview of Section 80 suits, for instance, in which injunction was claimed, Viscount Sumner, who spoke for the Privy Council, observed that 'the Act albeit a Procedure Code, must be read in accordance with the natural meaning of its words' and he added that 'Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions'."

Even after the aforesaid decision of the Judicial Committee some High Courts, took the view that notice for a case for injunction under section 80, Civil P. C. may not be necessary. One such instance is the case reported in AIR 1960 Pat 530 on which the trial court placed reliance.

6. The Supreme Court decision referred to above was not known by the time when the Second Appeal was filed. As it now transpires, notice under S. 80, Civil P. C. is necessary condition precedent and the present suit cannot be maintainable. In consideration of the view I have taken Mr. Roy prays that he may be permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action. I think, want of notice is a technical defect and the prayer of Mr. Roy should be allowed. I would, therefore, vacate the judgments of both the courts below and give leave to the plaintiff to file a fresh suit on the same cause of action. This would, however, be on payment of a consolidated cost of Rs. 100 (one hundred) to the State, on payment of which alone a fresh suit can be filed.

Order accordingly,

E N D

political control, contented and having a sense of security. It was also decided that a maximum of twenty five percent of superior posts (cadre posts) should be thrown open to the State Civil/Police Service Officers of outstanding merit as against the maximum of twenty percent of superior posts in the I. C. S./I. P.

3. Accordingly, the two All India Services were formed and they were put on a statutory basis under the Indian Civil Administrative (Cadre) Rules, 1950, the I. P. (Cadre) Rules, 1950 and the Indian Administrative and Police Service (Pay) Rules, 1950. This was followed by the All India Services Act, 1951, which the Indian Parliament passed under Article 312 (1) of the Constitution of India, which empowered the Government of India, in consultation with the State Governments, to make rules for the regulation of recruitment and conditions of service of the persons appointed to an All India Service. In terms of Section 3 of the All India Services Act, 1951, a series of rules were promulgated in consultation with the State Governments. Under the Indian Administrative Service/Indian Police Service (Recruitment) Rules, 1954, the I. C. S./I. P. officers became members of the Indian Administrative Service/Indian Police Service, subject to the provisions of Article 314 of the Constitution of India. Generally, these rules follow the pattern of the rules applicable to the former I. C. S. and I. P. officers. Attention may, however, be invited to the following rules which are relevant for deciding the point in controversy in the instant applications.

They are:

- The Indian Administrative Service (Recruitment) Rules, 1954;
- The Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955;
- The Indian Administrative Service (Appointment by Promotion) Regulations, 1955;
- The Indian Administrative Service (Appointment by Selection) Regulations, 1956;
- The Indian Administrative Service (Cadre) Rules, 1954;
- The Indian Civil Administration (Cadre) Rules, 1950;
- The Indian Administrative Service (Pay) Rules, 1954;
- The Indian Administrative and Police Services (Pay) Rules, 1950;
- The Indian Administrative Service (Regulation of Seniority) Rules, 1954;
- The Indian Police Service (Regulation of Seniority) Rules, 1954;
- Bihar Service Code, Appendix 6, Rule 14.

It may be stated that it is the last three in the series of rules which are crucial for determining the relative seniority of the petitioners as well as the direct recruits, other rules being more or less subsidiary to throw light upon the provisions of the Regulation of Seniority Rules. Here it is relevant to set out the following charts which would apply a bird's-eye view with regard to the relevant dates in connection with the question of seniority.

Name of Officer.	Date of appointment to the I. A. S.	Date of officiation in senior I. A. S. scale as originally agreed by Govt. of India.	Date of officiation in senior I. A. S. scale as proposed by State Govt.	Remarks.
1.	2.	3.	4.	5.
Shri S. C. Mishra	26-12-55;	28-12-54;	28-12-54;	The Govt. of India (Shri Prabhakar Rao's letter No. 5/27/55AIS(I), dated 14th August, 1956) have recognised their officiation with effect from the date of occurrence of the substantive vacancies. But these officers were in <i>ad hoc</i> list of 1954 and the State Govt. recommended that these officers should be on officiation in view of the provision in the Bihar Service Code.
Shri S. A. F. Abbas	26-12-55	15. 6-55	28-12-54	
Shri R. S. Mandal	26-12-55	1-10-55	28-12-54	
Shri S. S. Sahay	26. 9-56	Not yet agreed	28-12-54	Was Dy. Secy. Revenue in Dept. from 6.3-63.

1	2	3	4	5
Shri R. Sinha	17.10.56	do	28.12.54	Was Dy. Secy. Development Dept. from 1.4.54.
Shri R. C. Sinha	17.10.56	do	28.12.54	Was Secy. to Chief Minister from 22.9.52.
Shri S. K. Ghosh	17.10.56	do	28.12.54	Was Dy. Secy. Irrigation Dept. from 1.9.54.

Name of Officer	Date of continuous officiation in senior scale as accepted in 1958.	Year of allotment.	Year of re-allotment
Shri S. C. Mishra	28.12.54	1948	1950
Shri S. A. F. Abbas	28.12.54	1948	1950
Shri R. S. Mandal	28.12.54	1948	1950
Shri S. Sahay	28.12.54	1948	1950
Shri R. Sinha	28.12.54	1948	1952
Shri R. C. Sinha	28.12.54	1948	1952
Shri S. K. Ghosh	28.12.54	1948	1952

4. Rule 1 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954, deals with the title and Rule 2 contains the relevant definitions. It defines 'cadre' which means an Indian Administrative Service Cadre constituted in accordance with Rule 3 of the Indian Administrative Service (Cadre) Rules, 1954, Rule 2 (g), which is one of the contentious provisions, stood thus before it was amended.

"Senior post" means a post included under Item 1 of each Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955, framed under sub-rule (1) of Rule 4 of the Indian Administrative Service (Cadre) Rules, 1954, or any post declared equivalent thereto by the State Government concerned;

Rule 3 deals with the assignment of year of allotment and prior to amendment stood thus:

"3. Assignment of year of allotment.—

(1) Every officer shall be assigned a year of allotment in accordance with the provisions hereinafter contained in this rule.

(2) The year of allotment of an officer in service at the commencement of these rules shall be the same as has been assigned to him or may be assigned to him by the Central Government in accordance with the orders and instructions in force immediately before the commencement of these rules:

Provided that where the year of allotment of an officer appointed in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules has not been determined prior to the commencement of these Rules, his year of allotment shall be determined in accordance with the provision in clause (b) of sub-rule (3) of this rule and for this purpose, such officer shall be deemed to have officiated in a senior post only if and for the period for

which he was approved for such officiation by the Central Government in consultation with Commission.

(3) The year of allotment of an officer appointed to the Service after the commencement of these rules, shall be—

(a) where the officer is appointed to the Service on the results of a competitive examination, the year following the year in which such examination was held;

(b) where the officer is appointed to the Service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with Rule 7 of those rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former;

Provided that the year of allotment of an officer appointed to the Service in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service in accordance with Rule 7 of those Rules so started officiating, shall be deemed ad hoc by the Central Government in consultation with the State Government concerned;

Provided further that an officer appointed to the Service after the commencement of these rules in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules shall be deemed to have officiated continuously in a senior post prior to the date of the inclusion of his name in the Select List prepared in accordance with the requirements of the Indian Administrative Service (Appointment

by Promotion) Regulations framed under sub-rule (1) of Rule 8 of the Recruitment Rules, if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission.

Explanation 1.— An officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the senior grade he continues to hold without any break or reversion a senior post otherwise than as a purely temporary or local arrangement;

Explanation 2.— An officer shall be treated as having officiated in a senior post during any period in respect of which the State Government concerned certifies that he would have so officiated but for his absence on leave or appointment to any special post or any other exceptional circumstance.

(c) where the officer is appointed to the Service by selection in accordance with sub-rule (2) of R. 8 of the Recruitment Rules, such year as may be determined ad hoc by the Central Government on the recommendation of the State Government concerned and in consultation with the Commission:

Provided that he shall not be allotted a year earlier than the year of allotment of an officer appointed to the Service in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, whose length of service in the State Civil Service is more than the length of continuous service of the former in connection with the affairs of the State."

R. 4 provides for seniority of officers inter se. Sub-rule (4) of this Rule relates to the seniority of officers appointed to the Service on or after the 11th day of April, 1958, who were assigned the same year of allotment. Rule 5 deals with the seniority of officers placed in List II or List III by the special Recruitment Board and Rule 5-A with the seniority of officers appointed under the Indian Administrative Service (Special Recruitment) Regulations, 1956. Rule 5-B is not relevant. Rule 6 deals with the preparation of gradation list, 7 deals with fixation of seniority on transfer to another cadre, 8 relates to interpretation and 9 is repeal and saving. The relevant rules, therefore, on which stress has been laid are 2 (g) and 3, particularly Rule 3 (3) (b). Reference to sub-rule (1) of Rule 8 of the Recruitment Rules relates to recruitment by promotion and Rule 7 refers to recruitment as a result of a competitive examination.

I have already stated that so far as the direct recruits are concerned, they are given their year of allotment, being the year following the one in which such examination was held, in terms of Rule 3 (3) (a), but the year of allotment assigned to a promoted officer is the year of allotment of the junior-most of the direct recruits who started continuous officiation in a senior post from a date earlier than the date of commencement of such officiation by a promoted officer. The

claim of the direct recruits in this case is that they should rank higher than those promoted officers who were appointed to the Indian Administrative Service on a date later than their appointment, unless they started continuous officiation in a senior post, which officiation received approval of the Central Government in consultation with the Public Service Commission. 'Senior post', as I have already indicated, means a post included under Item I of each Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955, or a post declared equivalent thereto by the State Government concerned.

5. Mr. Daphtary appearing on behalf of petitioner Ram Chandra Sinha (C. W. J. C. No. 854/68) has contended that the decision of the Government of India allotting certain years, being the year 1948 in the case of his client petitioner Ram Chandra Sinha, must be taken to be final as this decision was arrived at after a full consideration of the letter of the State Government, being the letter of Shri M. S. Rao, dated the 9th July, 1958 (annexure C, page 13, of the brief in C. W. J. C. No. 853/68-Volume III), which approval was communicated to the State Government in the letter of Shri Narayanaswamy, Deputy Secretary, Government of India. The reason assigned by the Government of India for revising this decision, stating that the Government of India's previous decision was incorrect, must be held to be invalid and the order quashed inasmuch as there was no error or misrepresentation in the letter of Shri M. S. Rao. The Government of India took a decision after a mature consideration of the reasons assigned in Shri M. S. Rao's letter and reversed that decision without hearing the petitioners, which amounted to a violation of the principle of natural justice. He has referred in this connection to the decision of the Supreme Court in Union of India v. T. R. Varma, AIR 1957 SC 882. On behalf of the Union of India as also the direct recruits, it has been urged that the orders passed in regard to the seniority of these officers are all administrative orders in which no reasons are to be assigned, no officer has got any vested right to be heard in person and the principle of natural justice cannot be invoked in a case like this. It is true, no doubt, that the previous order was passed in September, 1958 and the promoted officers continued to hold rank higher than the direct recruits from that date onwards up to 1967 when the previous decision was revoked and the seniority of these officers was ordered to be revised. In my opinion, the contention put forward on behalf of the petitioners cannot be accepted as correct. In a matter of administration, it is open to the departmental authority to pass any suitable order, if materials be on record for assessing the merit of claim or claims of the officer or officers concerned. If, however, any officer feels aggrieved by

such an order, it is open to him to put in a representation for reconsideration of the decision and it can well be taken as established that if the authority taking the decision is satisfied that there is substance in the grievance made by the officer adversely affected by that order, the decision must be altered and justice done between the parties. It is true that normally this should be done within a reasonable time to avoid further complications by virtue of any officer having enjoyed the benefit of that decision for such a long time and, unless there be very compelling reason to do so, such a decision should not be altered if a long time has passed since the decision taken one way and alteration sought to be made on a subsequent date. As an abstract question of administrative policy, however, it is difficult to uphold the contention that if a decision has been arrived at by the Government on the administrative side, it cannot be altered if the Government is satisfied that the decision was wrong. In this particular case, it has been urged on behalf of the direct recruits that there is no delay caused on account of any inaction or acquiescence on their part. In fact, after the rejection of the representations by Shri P. S. Appu, Shri K. A. Ramasubramanian and Shri S. D. Prasad, the opposite party questioned the correctness of the decision of the Government of India allotting the particular years to the promotees as early as 1960. It was the Government of Bihar that did not forward their representations to the Central Government upto the year 1965 and then two years were taken for the decision to be arrived at. It cannot be urged that there is no substance in the contention raised on behalf of the opposite party although it is unfortunate that the matter has taken such a protracted course and the promoted officers have enjoyed high posts by virtue of their seniority for at least nine years after the year of allotment ordered in their favour in 1958. As I have already indicated, there is no question either of violation of the principle of natural justice in this case because there is no provision for a personal hearing and, as for detailed objection by the petitioners, the matter was gone into and, although the Government of India adhered to its decision of 1967, it must be assumed that it felt satisfied that the decision taken in favour of the direct recruits was a correct decision. The decision of the Supreme Court not being a decision in an administrative matter cannot be deemed to have any relevance in the case of an administrative order passed by the Government.

6. The second point raised by Mr. Daphtary, objecting to the stand of the letter of the Government of India, that consultation with the Public Service Commission was not held is that this stand cannot be taken to be legal or even factually correct. This is not stated in the counter-affidavit filed on

behalf of the Union of India in all the petitions although this statement finds place in the counter-affidavit filed in the case of petitioner Ramchandra Sinha. He has urged, however, that the select list of officers for promotion to the Indian Administrative Service cadre was actually prepared in 1954, and not in 1955. In that year the seniority rules were promulgated in September, they were well known to the authorities, and approval was given to the ad hoc list by the Union of India in consultation with the Chairman of the Public Service Commission and this list was ready in December, 1954. It is true, no doubt, that the ad hoc list was not a select list which contained the list of officers found fit for promotion, but the ad hoc list referred to the fitness of certain officers for officiation in a senior post.

Mr. Daphtary has urged that this ad hoc list consisting of officers who were considered fit for officiation in a senior post must be taken to be sufficient compliance with the proviso to Rule 3 (3) (b), because when the Chairman of the Public Service Commission was satisfied about the fitness of all the petitioners for officiation in a senior post and the Union Public Service Commission approved it, this should be sufficient compliance with the requirement of the said proviso. Learned Counsel for the Union of India and the direct recruits have contended against the correctness of this argument. It is accordingly necessary to quote here the background in which the ad hoc list was prepared and which is referred to in the letter of Shri M. S. Rao (annexure C, page 23, of the brief in C. W. J. C. No. 853 of 1968, Volume III):

"After careful consideration the State Government have come to the conclusion that the term 'current waiting list of District Magistrates' must include the select list prepared each year under Regulation 7 of the I. A. S. (Appointment by Promotion) Regulations and any other list of State Civil Service Officers approved by the Union Public Service Commission for officiation or trial in posts carrying pay in the senior I. A. S. scale. We have first the list which was prepared by an ad hoc committee presided over by the Chairman, Union Public Service Commission. This committee met in September, 1954, before the I. A. S. (Appointment by Promotion) Regulations were issued, but after the I. A. S. (Recruitment) Rules had come into force. This Committee selected State Civil Service Officers for substantive appointment in the vacancies that existed in promotion quota. At the same time, it prepared a list of State Civil Service Officers considered suitable for officiation in posts in senior I. A. S. scale. This latter list which may for the sake of convenience be called the 'ad-hoc list 1954' was approved by the Union Public Service Commission in their letter, dated the 28th December, 1954. The ad hoc committee was constituted on the same lines as the selection committee under

the I. A. S. (Appointment by Promotion) Regulations and the only reason why it was an ad hoc committee is that the Regulations had not been issued by the Central Government."

It may be stated that earlier dates of continuous officiation in a senior post were recommended in Shri Rao's letter but the Government of India chose to circumscribe it to the date of the preparation of the ad hoc list which was the 28th of December, 1954, in regard to these petitioners. In fact, there was nothing irregular in granting approval of officiation from a date when the ad hoc list was prepared of officers who were considered fit for holding senior posts and as such qualified for promotion to the cadre of the Indian Administrative Service.

7. It has, however, been urged on behalf of the Union of India by Mr. C. B. Agarwala as also on behalf of opposite party Nos. 3 to 14, the direct recruits, that, in any case, this approval was given without the concurrence of the Public Service Commission. It has been urged by Mr. Daphtry on behalf of petitioner Ram Chandra Sinha that, in the first place, preparation of the ad hoc list in consultation with the Chairman of the Union Public Service Commission and formally approved by the Union Public Service Commission must be taken to be sufficient so far as the preparation of the list for officiation in a senior post was concerned. But, even assuming that there was no such approval, consultation with the Public Service Commission was merely directory and not imperative. He has referred to *Montreal Street Rly. Co. v. Normandin*, 1917 AC 170 = (AIR 1917 PC 142); *State of U. P. v. Manbodhan Lal Srivastava*, AIR 1957 SC 912 and *Bhopal Sugar Industries Ltd. v. Income-tax Officer, Bhopal*, AIR 1961 SC 182. It is true, no doubt, that so far as the decisions of the Supreme Court are concerned, it has been ruled that consultation with the Public Service Commission under Article 320 of the Constitution of India is not mandatory but purely directory, i. e. even if it be found that there was no actual consultation, it would not affect the validity of an appointment made or an order passed. It has, however, been urged on behalf of the Union of India that where such a power has been conferred on the Government under an Act for making any appointment in consultation with the Public Service Commission, omission to do so may not be fatal to the appointment, but such a power cannot be claimed under any rule. If any rule made by the Executive Government provides for such consultation, it must be held to be imperative and any act done without compliance with such a rule must be held to vitiate the order passed. Making an appointment in consultation with the Public Service Commission is one thing but giving approval to a recommendation of the State Government without consulting the Public

Service Commission is quite different. Failure in the former case may be a mere irregularity so as not to shake the validity of the act, but failure to observe the requirement of the rule framed by the Executive Government for consultation with the Public Service Commission must be distinguished and treated as imperative. To my mind, however, it is difficult to draw such a line of distinction. If the argument were to prevail that where consultation with the Public Service Commission is provided for under any legislative enactment, failure to carry it out may be merely an irregularity, but where such a provision has been made in the rule, it must be treated as violative of an imperative provision, would amount to saying that every provision of a rule irrespective of its character must always be treated as literally binding. In my opinion, however, there is no warrant for such contention. All provisions of law whether as an Act passed by the Parliament or any rule, regulation, bye-law or executive instruction, must be interpreted by the canons which are applicable to the interpretation of any enactment put on the statute book by the Legislature. It is well settled that they are all in the nature of laws prevailing in the country and the same principle should apply in interpreting them, and whether a particular provision is directory or mandatory must depend upon the circumstances of each case in construing rules and regulations in the same manner as will apply in construing an Act passed by the Parliament. In the present case whatever might be the legal effect of the preparation of the ad hoc list, it seems clear that the Government of India gave its approval to the ad hoc list which was drawn up by the State Government in consultation with the Chairman of the Union Public Service Commission and duly approved by the Commission. The Government of India in 1958, therefore, in accepting the recommendation contained in the letter of Shri M. S. Rao was clearly influenced by the consideration that a list which had the approval of the Chairman of the Union Public Service Commission and the Commission (sic) could well be taken to have been made in compliance with the rule and as such further reference to the Union Public Service Commission would be a superfluous act. It is notable that the rules regarding seniority were promulgated on the 8th September, 1954, before the approval of the Union Public Service Commission was granted for the ad hoc list prepared. It was in that sense that no reference was made and, as has been held by the Supreme Court in the above cases that consultation with the Public Service Commission is a directory provision, in the special circumstances of this case, it is conspicuous that it was not necessary to make a further reference, though as a matter of abundant caution the same could have been done before granting approval.

The stand in the counter-affidavit of the Union of India that formal approval of the Public Service Commission was not obtained in 1958 has no merit, because this has reference, obviously, to consultation which, in the circumstances of this case, would have been as an act purely *ex majorie cautela*. The preparation of the ad hoc list by the selection committee presided over by the Chairman of the Union Public Service Commission, which is a list of officers in which the petitioners are included as considered fit for officiation in a senior post and the approval of such a list by the Union Public Service Commission must be taken to be sufficient compliance with the second proviso requiring approval of the period of such officiation prior to the date of the inclusion of their names in the select list by the Central Government in consultation with the Commission. It may be stated that the letter by Shri S. P. Mukherjee Under-Secretary to the Government of India, dated the 7th May, 1957, No. 3/35/57 (page 102, Vol. I of the brief in C. W. J. C. 853/68) also refers to the question of seniority and disapproval is expressed only in respect of 'fit for trial list' and not 'fit for officiation list'.

8. It has been further contended in regard to the approval of the Central Government that it was necessary that it should be given only after formal consultation with the Union Public Service Commission, and where the Central Government would give such an approval without consulting the Union Public Service Commission, it would not be valid in terms of Rule 3 (3) (b), proviso two. Reliance has been placed on the following passage in Craies Statute Law, at page 260:

"If there be any one rule of law clearer than another, it is this, that where the Legislature have expressly prescribed one or more particular modes of dealing with property, such expression always excludes any other mode, except as specifically authorised." This does not appear to have any relevance so far as the present proceeding in regard to the exercise of power by the Government of India in granting approval is concerned. Reference has been made to the decision of the Supreme Court in the case of Patna Improvement Trust v. Smt. Lakshmi Devi, AIR 1963 SC 1077 and the case of K. S. Srinivasan v. Union of India, AIR 1958 SC 419. The decision in the case of Patna Improvement Trust, AIR 1963 SC 1077, however, is not relevant because it does not relate to a decision of the Government of India in consultation with the Union Public Service Commission, but to acquisition of land under the Land Acquisition Act only after a valid notification under Section 4 (i) of the Act or a declaration under Section 6 of the Act. This case, therefore, is of no assistance to learned counsel for the opposite party.

The decision in Srinivasan's case, AIR 1958 SC 419 has no particular bearing because that also related to the construction of rules 4 (b) and 3 of the Central Government Civil Services (Temporary Service) Rules, 1949, as to whether they were directory or mandatory. The real question in that case was whether without any declaration of a temporary post as quasi-permanent, it could acquire last character, although this was to be done in consultation with the Union Public Service Commission. Their Lordships did not decide that question. S. K. Das, J., who delivered that judgment, in paragraph 22, spoke thus:

"Rule 4 (b) of the Temporary Service Rules states that when recruitment to a specified post is required to be made in consultation with the Public Service Commission, no declaration under Rules 3 and 4 (a) shall be issued except after consultation with the Commission. In the view which we have taken of the order dated December 14, 1953, it is not really necessary to decide in the present case whether the provisions of Rule 4 (b) are merely directory or mandatory. It is sufficient to state that the Public Service Commission was not consulted before the order dated December 14, 1953 was issued, and the appointing authority did not intend the order as a declaration under Rules 3 and 4 (a)."

The conclusion drawn, therefore, from non-consultation with the Public Service Commission was that the authority did not really make any declaration at all. The decision thus rested upon a conclusion of fact; but so far as the effect of Rule 4 (b) was concerned, it was left open. No doubt, the principle underlying Article 320 of the Constitution is distinct from the provision of a rule to be administered by a subordinate authority, but upon that also, it was observed that quasi-permanent status was a creature of the rules, and Rule 4 (b) requires that no declaration under Rule 3 shall be made except after consultation with the Public Service Commission.

9. It has been urged by learned counsel for the Union of India, on the authorities of East Riding County Council v. Park Estate (Bridlington) Ltd., 1957 AC 223 and Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur, AIR 1965 SC 895 that even if the provision with regard to consultation with the Public Service Commission be held to be directory, there should be a substantial compliance with the requirement of such a provision and not that it should be completely dispensed with. No doubt, in the above case AIR 1965 SC 895, their Lordships of the Supreme Court had to deal with a situation in which there was substantial compliance with the requirement of the rule and this was adverted to in specific terms. The question for consideration was the validity of the publication of a resolution passed in Hindi in a Urdu Newspaper of

considerable local circulation and whether such publication was in conformity with section 94 (3) of the U. P. Municipalities Act (Act 2 of 1916 as amended by Act 7 of 1953). That, however, is not the ratio of that decision. So far as the directory provision is concerned, it has been held, as I have already indicated in a series of decisions that failure to comply with such a provision does not render ipso facto the act done as invalid. The court is at liberty to examine all the circumstances of the case in order to pronounce upon the validity or otherwise of such an act in the event of non-compliance with the directory provision of law. In the instant case, however, even assuming that substantial compliance with the directory provision is necessary, it has been done beyond question. When the ad hoc list was being prepared regarding the fitness of the officers of the State Civil Service for promotion to the rank of the I. A. S. it was prepared sanctioning their fitness for officiation in a senior post. This list was prepared, as I have already said, by a special committee appointed on the same lines as Rule 3 under the I. A. S. (Appointment by Promotion) Regulations, presided over by the Chairman of the Union Public Service Commission and this recommendation had the formal sanction of the Commission on the 28th of December, 1954. It is true, no doubt, that this committee formally recommended the fitness of the officers for officiation in a senior post and the State Government later on recommended that the posts they had held with effect from that date should be treated as continuous officiation for the purpose of determining seniority; and the Central Government in the circumstances disclosed, accepted that recommendation. It is difficult to come to any other conclusion than that this was substantial compliance with the requirement that the Central Government should grant its approval in consultation with the Public Service Commission in regard to the posts held by the promoted officers as a case of continuous officiation, which fact would be taken into account for determining seniority of the officers concerned. The East Riding County Council Case, 1957 AC 223 has no bearing on the point under discussion.

10. It has also been contended by Mr. Daphtary that there is nothing on record to show that there was no consultation with the Public Service Commission even in a more formal manner inasmuch as the denial to it is given by an Under Secretary in the Home Ministry of the Union Government, who admittedly had no concern with the department, and the approval was given in the letter of Shri Naravanswamy to the recommendation of the State Government in September, 1958. It is well settled that he was not competent to do so and the only person who could really give the denial would be the person who dealt with the matter, such as Shri Narayan-

swamy, or some other person who would be in a position to speak from personal knowledge of what happened when approval was accorded by the Government of India. It may also be noticed that in this case there is no statement on record that the Union Public Service Commission was consulted in the matter as was done in Srinivasan's case, AIR 1958 SC 419 where the Public Service Commission was consulted and which refused to give its approval to the post of the petitioner in the Supreme Court as equivalent to the post of Public Relations Officer which was a quasi-permanent post. There is substance in this contention also on behalf of the petitioners. The counter-affidavit stating that the Public Service Commission was not consulted, or stating the circumstances in which it was not consulted, will be relevant for enabling the court to come to a correct conclusion as to the effect of failure to consult the Union Public Service Commission. I have already referred to Srinivasan's case and I may add that whereas the majority did not think it proper to express any opinion as to whether the provision of Rule 4 (b) of the Central Civil Services (Temporary Service) Rules, 1949, was directory or mandatory, Bose, J. clearly stated that consultation with the Public Service Commission by the Department concerned even in respect of this rule must be held to be directory and not mandatory on the authority of several decisions of the Supreme Court as also the decision of the Privy Council in 1917 AC 170 = (AIR 1917 PC 142).

11. The next question which has been argued at great length by learned counsel for the parties refers to the expression 'senior post' the exact scope of which is to be precisely determined, inasmuch as it is the continuous officiation only in a senior post which is necessary for deciding the comparative seniority of a direct recruit and a promoted officer, if both have officiated in such a post. It is true that the posts the petitioners were holding on the date of the preparation of the 'fit for officiation' or ad hoc list in December, 1954 could not be regarded as senior cadre posts included under item 1 of each schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955, because they were holding posts of the rank of Additional District Magistrates as Deputy Secretaries some of which were ex-cadre posts or in other posts under the State Government held by them. It is, therefore, clear that they could claim the benefit of Rule 3 (3) (b), second proviso, only if it could be established that these posts were equivalent to a senior cadre post and were declared as such by the State Government.

It has been contended on behalf of the Union of India that although prior approval was given in September, 1956 by the Government of India treating the posts held by the petitioners as equivalent to senior cadre

posts, this was under a mistaken notion on account of the representation made by the State Government contained in the letter of Shri M. S. Rao. The Government of India was under the impression that these officers already were holding posts which were equivalent to senior cadre posts on the 28th of December, 1954; so that there could be no technical objection to accepting the recommendation of the State Government in respect of the petitioners. It is contended, however, that it was not so, and these posts were declared equivalent by the State Government after the appointment of the petitioners to the Indian Administrative Service with effect from the 26th of December, 1955. This will be a case, therefore, of retrospective declaration which is not contemplated under R. 2 (g) which covers only the case of a prospective declaration. It has been urged, however, by Mr. Daphtary for petitioner Ram Chandra Sinha, that the ground assigned in the letter of the Government of India for revising its previous decision of 1953 is not sustainable inasmuch as declaration contemplates an existing fact and not necessarily bringing into existence new fact although it may signify either according to the circumstances of a case. If the word 'declaration' has been used in Rule 2 (g), it must be reasonably construed as referring to a post which was not declared a senior post prior to the appointment of an officer of the State Civil Service to the cadre of the Indian Administrative Service.

Our attention has been drawn by learned counsel to the Indian Administrative Service (Cadre) Rules, 1954, of which Rule 9 lays down that a non-cadre officer cannot hold a cadre post excepting for a short period not exceeding three months, and if it is for a longer period, not without the approval of the Central Government as provided in sub-rules (2), (3) and (4). That being the position, there could be no occasion for declaration by the State Government of a non-cadre post as equivalent to a cadre post held by an officer of the State Civil Service. This limitation in regard to a non-cadre Officer is general and not the exceptional situation which arises for determining seniority when such non-cadre officer has been selected for promotion to the I. A. S. Cadre. It is also true, no doubt, that under Rule 9 of the Indian Administrative Service (Pav) Rules, 1954, an I. A. S. Officer can be deputed to a non-cadre post only when it is declared as such; without that there may be technical objection to his drawing the salary to which he is entitled as a cadre officer. Mr. C. B. Agarwala has contended that 'declaration' here only refers to a prospective declaration and the same principle should apply to 'declaration' as contemplated in Rule 2 (g). Mr. Daphtary, however, has contended, in reply, that even in respect of Rule 9, it is not necessary that a declaration should always

precede the deputation of an I. A. S. Cadre Officer to a non-cadre post without which such officiation will be void, but it only contemplates the factum of a declaration. Mere failure to make the declaration prior to the deputation of an I. A. S. officer to hold such a post cannot reasonably be taken to render the holding of such post as void and depriving the officer of the privileges of the Service to which he belongs, such as salary, leave, pension, etc., but that such a declaration has to be made. There is no authority to the contrary as the word 'declaration' implies that this amounts to recognising a fact, vide Maxwell (page 213, 11th edition). See also Government of India's decisions at page 238 and Pay Rule 9 of the All India Services Manual. But, even assuming that in respect of Rule 9 such a prior declaration is necessary, this cannot affect the meaning of 'declaration' in Rule 2 (g) of these Rules. The real meaning of 'declaration' in R. 2 (g) is to be read in conjunction with the second proviso to Rule 3 (3) (b) which has used the expression "shall be deemed to have officiated continuously in a senior post", which implies that in the present context, in any case, the possibility of a declaration at a subsequent stage is not ruled out. The objection emphatically formulated in the counter-affidavit on behalf of the Union of India, as also urged by learned Counsel for the Union, is that if such retrospective declaration were permissible it would result in much mischief and the State Government might declare any post as equivalent to a cadre post much later than the appointment of an officer of the State Civil Service to the Indian Administrative Service, only to enable him to obtain the benefit of seniority as against the direct recruits. This has been repeated several times in the counter-affidavit as also has been put forward as a principal ground even in the letter of the Government of India, dated the 20th September, 1967, finally allowing the representations of Shri Ram Suhrmanian and Shri S. D. Prasad. It is urged that this apprehension is not well founded. If the rule making authority has conferred such wide power upon the State Government, there is a definite policy behind it which has been dealt with in the decision of the Supreme Court in Anand Prakash Saxena v. Union of India, AIR 1968 SC 751. The policy underlying this provision has been thus stated in paragraph 21 (at page 760) of the report:

"The object of Rule 3 (3) (b) is to fix the seniority of the promotees in relation to direct recruits. The promotees obtain promotion after long service in the State Civil Services. From the point of view of the promotee, his seniority should be counted from the date of his joining the State Civil Service. From the point of view of the direct recruit, the seniority of the promotee should be counted from the date of his ap-

pointment to the Indian Administrative Service.

Rule 3 (3) (b) attempts to strike a just balance between the conflicting claims. It gives the promotee the year of allotment of the junior-most direct recruit officiating continuously in a senior post earlier than the date of commencement of such officiation by the promotee. If no direct recruit was officiating continuously in a senior post on an earlier date the seniority of the promotee is determined *ad hoc*. In our opinion, the rule is not arbitrary or discriminatory and is not violative of Articles 14 and 16 of the Constitution."

If this is the policy of the Government of India as provided in Rule 3 (3) (b), it must be given an interpretation which is in consonance with this policy. If it were to be held that unless an officer of the State Civil Service, before his appointment to the Indian Administrative Service, holds a post which is declared as equivalent to a senior cadre post, he cannot get the benefit of this officiation, it is likely to result in substantially defeating the policy of the Government, even if not entirely. There may be a few cases in which the State Civil Service officers are actually holding a post of equal responsibility but the declaration of the equivalence has no relevance prior to this appointment and the expressions 'an equivalent post' or a post of equal rank and responsibility would have no meaning. I am, therefore, inclined to accept the contention of Mr. Daphtary, on behalf of the petitioners, that the word 'declaration' even generally and more so in the present context cannot be construed as having only prospective effect, but it must be taken in a more general sense of treating a post of equal rank and responsibility as equivalent post at any time. If, however, the State Government would declare a post of a distinctly lower rank as equivalent to a senior cadre post, in the first place, the Central Government will not accept it and, even if it were so, the court of law on a consideration of the fact might strike it down as unreasonable and invalid declaration, and the promotee cannot get the benefit of seniority by virtue of such declaration. The apprehension, therefore, expressed in the counter-affidavit is ruled out, in the first instance, by the requirement of the second proviso to this rule which is that (sic) in the next place there should be either holding of a regular senior post or of a post equivalent thereto which is held by a promoted officer continuously with the approval of the Central Government and the Central Government, as I have already indicated, generally, acting on the approval of the Public Service Commission. An extreme case of an absurd situation, therefore which is the basis of the apprehension, cannot arise. If, on the contrary, it were to be accepted that the word 'declaration' should be taken only to refer to a prospective declaration amounting to creation or

bringing into existence a new post with the nomenclature of equivalence with a cadre post then this is bound to nullify the policy of the Government in respect of the promoted officers as it was laid down in R. 2 (g) and Rule 3 (3) (b) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954. This also has been clearly brought out, if I may say so with respect, in the judgment of the Supreme Court in Anand Prakash Saxena's case, AIR 1968 SC 754. Mr. Agarwala has placed reliance on the case of Champaklal Chimanlal Shah v. Union of India, AIR 1964 SC 1854 in which the question for consideration was the definition of quasi-permanent service under Clauses (i) and (ii) of Rule 3 of Central Civil Services (Temporary Service) Rules, 1949. That rule stands as follows:

"A Government servant shall be deemed to be in quasi-permanent service:—

(i) if he has been in continuous Government service for more than three years;

(ii) if the appointing authority, being satisfied as to his suitability in respect of age, qualifications, work and character, for employment in a quasi-permanent capacity has issued a declaration to that effect, in accordance with such instructions as the Governor-General may issue from time to time."

Leaving aside some uncertainty as to the wording of these two clauses of rule 3 and as to whether a 'comma' occurs with 'and' towards the end of Clause (i) or a mere 'semi-colon' or a 'semi-colon' with 'and', it is a case where the two clauses were read together as conjunctive with reference to the clauses as such and the subsequent rules, and in that context, therefore, a formal declaration was necessary. The formal declaration of a temporary post as a quasi-permanent post has been held to be imperative before a temporary post can be clothed with the character of a quasi-permanent post, but, in the present context, the word 'declaration' has to be read in the light of Rule 3 (3) (b) and the intention of Government sought to be carried out in determining the seniority of various categories of recruits to the Indian Administrative Service, and Champaklal's case is not relevant for this purpose.

12. Reference has been made to Civil Appeals Nos. 942 and 943 of 1966 (The Income Tax Officer, Alleppey v. N. C. Ponnose decided in the Supreme Court on the 28th of July, 1969) for the proposition that no retrospective operation could be given by a departmental authority to any rule. In that case a Tahsildar who had no authority, on the relevant date, to attach an assessee's property for realisation of Income-tax dues under the Finance Act, 1963, was held not competent to do it and his act could not be held to be valid retrospectively. That was how the Supreme Court ruled in this case and ruled in favour of the creditor who sought to attach it in execution of his own

dues. The relevant observation on the point runs thus:—

"The legal fiction could not be extended beyond its legitimate field and the aforesaid words occurring in Section 4 of the Finance Act, 1963, could not be construed to embody conferment of a power for a retrospective authorisation by the State in the absence of any express provision in Section 2 (44) of the Act itself. It may be noticed that in a recent decision of the Constitution Bench of this court in *B. S. Vadera v. Union of India*, AIR 1969 SC 118 it has been observed with reference to rules framed under the proviso to Article 309 of the Constitution that these rules can be made with retrospective operation. This view was, however, expressed owing to the language employed in the proviso to Article 309 that 'any rules so made shall have effect subject to the provisions of any such Act'."

This case, therefore, relates only to the scope of the power of the executive authority. If Rule 3 (3) (b) cannot be construed to confer any privilege upon a promoted officer, undoubtedly, the act of the Central Government or the State Government giving the benefit to him would not be held to be valid. If, however, the rule empowers the State Government to do it, the decision in this case would be no bar; on the contrary, this rule itself says that if the rule makes it retrospective, the authority concerned has got the power to apply it retrospectively and if the word 'declare' in Rule 2 (g) is held to cover not only the case of a future declaration but also recognising the existence of a fact, then this decision would lend support to the petitioners' contention and would not go against it. The decision of the Supreme Court in Civil Appeal No. 2162 of 1963 (*State of Orissa v. B. K. Mohapatra*), disposed of on 11-4-1969 = (reported in AIR 1969 SC 1249) deals with a case where a police officer's name was only included in the 'fit for trial list' and, as such, the observation in this judgment can have no effect where the petitioners were not in the 'fit for trial list', because it was a different list altogether as referred to in the above letter of Shri M. S. Rao. They were included in the ad hoc list, which is different from the 'fit for trial list' as the letter of Shri Rao itself has clearly stated. The implication of the ad hoc list is almost that of a select list, because the ad hoc list was prepared keeping in view the Regulation of Seniority Rule, 1955, which was available to the State of Bihar and to the Central Government in a draft form, and it was thus that approval was given by the Union Public Service Commission. The decision, therefore, in the Orissa case must be held to be not applicable to such a list. Another decision in Civil Appeal No. 1464 (N) of 1963 (*Purtabpore Co. Ltd. v. Cane Commr. of Bihar*, disposed of on 21-11-1968) = (reported in AIR 1970 SC 1896) also is of no assistance to learned

counsel for the opposite party respondents. That relates to the case of an order of the Cane Commissioner of Bihar and it was held that the right acquired by the owner of a mill to purchase the sugarcane from a certain area could not be affected on a subsequent date. This decision, therefore, also has no bearing on the question for consideration in the present case. In Writ Petn. Nos. 173 to 175 of 1967 (*A. K. Kraipak v. Union of India*, disposed of on 29-4-1969) = (reported in AIR 1970 SC 150) it has been held that the dividing line between the administrative power and quasi judicial power is quite thin and is being gradually obliterated. This is a complete answer to the contention raised on behalf of the opposite party respondents that the order passed by the Government of India is an Administrative order and, therefore, it cannot be quashed. Hegde J., in this judgment, has made an exhaustive review of the case laws on this point and has come to that conclusion. In that case the petitioners were gazetted officers serving in the Forest Department of the State of Jammu and Kashmir. They felt aggrieved by the selection made from among the officers serving in the said department to the Indian Forest Service which was constituted in 1966 under Section 3 (i) of the All India Services Act, 1951. The order passed by the selecting authority was quashed. It is no longer open, therefore, now to contend that the matter of the claim of an officer to appointment by promotion when the same has not been made in accordance with the rules and procedure, and even in regard to the basic concept of justice, cannot have any value. The following quotation was made from the judgment of Shah, J., in *State of Orissa v. Dr. (Miss) Binapani Dei*, (1967) 2 SCR 625 = (AIR 1967 SC 1269):—

"We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences as already stated, must be made consistently with the rules of natural justice....."

13. I have dealt with the argument of learned Counsel for the opposite party respondents on the footing that Rule 2 (g) is to be construed with Rule 3 (3) (b) and that the scope of the word 'declaration' in Rule 2 (g) is to be gathered with reference to what is laid down in the latter rule. The argument, however, may also be considered in the light of the submission made by learned Counsel for the opposite party respondents in so far as the contention has been that Rule 2 (g) refers only to the post declared as equivalent to a cadre post as contemplated in Rule 9 of the pay Rules and that the declaration must, in any case, be only prospective. It is urged that Rule 3 (3) (b), which relates to the comparative seniority of a direct recruit with reference to a promoted

officer, should be construed independently of Rule 2 (g). It appears, however, that even on such a construction the conclusion is not altered. The comparative seniority provision gives the benefit of continuous officiation to a promoted officer with effect from the date prior to the inclusion of his name in the select list if such period of officiation is approved by the Central Government in consultation with the Commission, inasmuch as such officiation shall be deemed to be officiation in a senior post. Senior post is defined in Rule 2 (g) which is different from the cadre post; and any post declared as equivalent to a cadre post shall also be treated as a senior post in terms of this rule. Let us take the definition of senior post as incorporated in this rule. The proviso lays down that even where there is no actual continuous officiation in such a senior post, i. e., in a cadre post or in a post declared equivalent thereto by the State Government, nevertheless, the holding of any post by a promoted officer prior to the inclusion of his name in the select list shall amount to his holding a senior post, provided officiation in such a post is approved by the Central Government in consultation with the Commission. To my mind, it is an additional privilege granted to a promoted officer that whenever he has officiated in a post involving discharge of duties of equal responsibility with the senior post independent of all other considerations if the Central Government is satisfied that the post as such is of equal status in consultation with the Public Service Commission, such officiation shall inure for the benefit of the promoted officer irrespective of whether it is, or can be, a declared post as contemplated in Rule 2 (g). The crux in the matter of allowing the benefit of continuous officiation for the purpose of seniority may not be any kind of declaration at all involving the difficulty as to prospective or retrospective declaration, but the mere recognition by the Central Government of the status of the post in consultation with the Public Service Commission, (sic) and there is no time-limit as to when such approval is granted, as the proviso does not lay down any point of time at which such approval is to be extended by the Central Government. The word 'deemed' in itself postulates recognition of a past fact almost on the same footing as 'declaration' but, if anything, it is even freer from ambiguity than the word 'declared'. Oxford Concise Dictionary puts one of the meanings of the word 'deem' as 'as if it were' which means that although it was not so there before in fact; the authority having the power to grant recognition will do it as such and then it will be considered to be on the same footing. In Stroud's Judicial Dictionary (Volume I-3rd Edition) it is said at page 751 'when a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequen-

ces'. It is not necessary to refer to the various contexts in which there are very nice sets-of meaning of this word. It is sufficient to state as is mentioned in Words and Phrases (Volume 11, page 481) that the word, 'deemed' as used in an Act providing that after the death of the husband the wife's legal settlement shall be "deemed" to be the place where he was last legally settled, it is equivalent to the expression "shall be taken to be". Hence, in this context also, if the Central Government gives its approval to a promoted officer officiating continuously on a certain post as a senior post, it shall be taken to be officiation in a senior post. It is true, no doubt, that such approval must be given in a bona fide manner as, in fact, was done in the present case, because Shri M. S. Rao brought to the notice of the Central Government the circumstances in which a proposal was made for fixing the year of allotment with reference to the post which these officers were holding and also with reference to the letter of Shri Prabhakar Rao and Appendix 6, Rule 14, of the Bihar Service Code, pointing out that the officers for whom the year of allotment was to be fixed concerning their officiation on the 28th of December, 1954, were treated to be in the current waiting list of District Magistrates. Reference may be made in this connection to paragraph 12 in Shri M. S. Rao's letter, the relevant portion of which has been quoted at page 19 of this judgment. Even in the remarks column of Annexure A (at page 30 of the paper book in C. W. J. C. No. 853/68-Volume III), which has been quoted at page 9 of this judgment, Shri M. S. Rao pointedly brought to the notice of the Central Government the contents of the letter of Shri Prabhakar Rao, No. 5/27/55 AIS(i), dated the 14th August, 1956, in which the suggestion was that the period of continuous officiation of these officers should be recognised with effect from the date of occurrence of the substantive vacancies, but the recommendation of the Bihar Government was that since these officers were included in the ad hoc list of 1954, they should be held to be in officiation in view of the provisions of the Bihar Service Code. Shri Narayanswamy's letter was addressed to the Government of Bihar in answer to this and there is no question, therefore, of any kind of misrepresentation whatsoever. The stand in the counter-affidavit of the Union of India that there was misconception caused by the letter of the Government of India is without any substance, and that is why in the impugned letter dated the 20th September, 1967, of the Government of India, there is no reference to any misconception or misrepresentation but only to what the Government of India regarded as an error on its part in giving its approval to the proposal of the Government of Bihar which amounted to a retrospective declaration of the posts held by the petitioners as senior posts. If,

therefore, the conclusion be, even on the assumption of the correctness of the argument on behalf of the Union of India, that Rule 2 (g) is not applicable to the case of the promoted officers, then it is not that prior officiation cannot be equated with officiation in a senior post but that the matter is governed entirely by the second proviso to Rule 3 (3) (b), and in that case, the question of declaration does not arise and it is only the acknowledgment of such officiation by the Central Government deeming such officiation to be an officiation in a senior post that will confer the benefit on the promoted officer. The entire basis of the objection in the revised order of the Government of India, therefore, based on retrospectivity completely disappears. It has rightly been urged by Mr. Daphtry, on behalf of the promoted officers, that the question of any misrepresentation or any misconception being caused by the letter of the Chief Secretary of Bihar, Shri M. S. Rao, is wholly irrelevant and, as has been held in *S. K. Ghosh v. Union of India*, AIR 1968 SC 1385, the revision of that order by the Central Government is arbitrary and liable to be struck down as violating Article 16 of the Constitution.

14. It has further been urged that Rule 2 (g) is intended only to cover continuous officiation in a senior post or declared equivalent to it only in respect of direct recruits and does not cover the case of a promoted officer. In the case of the latter, he must hold directly a senior cadre post such as the post of a District Magistrate or any other post included in the cadre list approved by the Central Government as the post included in the I. A. S. cadre for every State must have the approval of the Central Government. To my mind, this contention is, examined on its merit, equally fallacious as I have already said in the preceding paragraph. Rule 3 (3) (b) refers to comparative seniority and if the provision in regard to the equivalence were confined only to direct recruits, then the wording of the proviso should have been different. As it stands, it obviously applies to both categories of officers not only holding of senior posts but also of equivalent posts, and the argument must be overruled as being without substance. A single Judge decision of the Calcutta High Court in *Arum Ranjan Mukherjee v. Union of India*, (1967) 2 Lab LJ 289 (Cal), has, if I may say so with respect, taken the correct view with regard to the scope of Rule 2 (g) and held that it is applicable retrospectively and State Government can say so by mere expression of intention without following any particular form.

15. Yet another consideration in regard to the construction to be put upon the second proviso to Rule 3 (3) (b) is that even if Rule 2 (g) be held to be applicable only to direct recruits in so far as the second part of it regarding equivalence is concerned, as

has been contended by learned counsel for the opposite party-respondents and also for the Union of India, then for the purpose of continuous officiation the proviso will have to be read in wider amplitude since the wording of this proviso is that such a promoted officer shall be deemed to have officiated continuously in a senior post. This 'deeming' provision as has been authoritatively recognised by judicial pronouncements as also in books on canons of interpretation is significant, for in that case even where no declaration of senior post is formally made in terms of this proviso where such continuous officiation by a promoted officer prior to the inclusion of his name in the select list is approved by the Central Government in consultation with the Commission, such officiation must be taken to be officiation in a senior post. If the language were, however, that such an officer must have officiated continuously in a senior post prior to the date of his inclusion in the select list etc., if the period of such officiation is approved by the Central Government in consultation with the Commission, then possibly this proviso will be governed entirely by rule Rule 2 (g) and in that case senior post would mean a post included in item one of each Schedule or any post declared equivalent thereto by the State Government concerned. But in view of the fictional recognition given to the holding of a post on account of the use of the word 'deemed', it seems reasonable to hold that a promotee is entitled to get the benefit of continuous officiation for the purpose of seniority even where he has not held a senior post in the formal sense of the term as defined in Rule 2 (g). If the Government of India in consultation with the Public Service Commission would be satisfied about the nature of the post held by a promoted officer, as to the nature of its rank and seniority as being equal to a senior post, the necessity of a formal declaration would be altogether dispensed with as already held and, in that view of the matter, the question of retrospective declaration will not even arise. The stand of the State of Bihar as contained in the letter of Shri S. V. Sohoni appears to me sound. The following passage in this letter is relevant:—

"(c) the use of the word 'deemed' in the second proviso of Rule 3 (3) (b) of the Regulation of Seniority Rules is very significant. It seems to confer wide powers on the Central and State Governments for periods to be counted towards continuous officiation even if the officer might not in fact, have held a post which was already a declared 'senior post'. In its legal sense, the word 'deemed' means that something must be assumed to be a fact, whether it may or may not be so. Whenever this word is used in a Statute, whatever act is required to be deemed or taken as true of any person or thing, it must in law, be considered as having already been duly adjudg-

ed or established concerning such person or thing accordingly. Accordingly, the use of the word 'deemed' in the second proviso of Rule 3 (3) (b) of the Regulation of Seniority Rules indicates that it was not even necessary to declare the posts held by the abovementioned officers as equivalent to cadre posts under Rule 2 (g) of the Regulation of Seniority Rules."

Thus, the same conclusion is arrived at by a proper construction of the second proviso to Rule 3 (3) (b) as it stands or by reading it in juxtaposition with rule 2 (g), in which case the contention put forward on behalf of the Union of India and opposite parties 3 to 8 that rule 2 (g) is applicable only to a post to be declared as equivalent to a cadre post under Pay Rule 9, cannot be regarded as having any force. I may also invite attention to the fact that in the subsequent decision of the Government of India even Pay Rule 9 has been construed otherwise and even a cadre officer can now be deputed to a non-cadre post. This is incorporated as sub-rule (4) to Rule 9, added on the 22nd of June, 1960, and it stands thus:—

"Notwithstanding anything contained in this rule, the State Government concerned in respect of any posts under its control, or the Central Government in respect of any post under its control, may, for sufficient reasons to be recorded in writing, where equation is not possible, appoint any member of the service to any such post without making a declaration that the said post is equivalent in status and responsibility to a post specified in Schedule III."

This is so even in respect of Clause (i) of Rule 9 upon which learned Counsel for the opposite party have banked in support of their contention of retrospectivity but the argument loses much of its force when it is borne in (mind that—Ed.) there is no provision corresponding to Rule 9 of the Pay Rules, 1954, in respect of a post in the State Civil Service. I am satisfied, therefore, that the approval by the Government of India to the recommendation contained in Shri M. S. Rao's letter of July, 1958, in regard to the continuous officiation of these officers in a senior post with effect from 28-12-54 in respect of the petitioners, must be taken to be the approval of the Government of India duly given consistent with proviso two to Rule 3 (3) (b).

16. It is also contended that Rule 2 (g) cannot legitimately be taken to include, or to have reference to, a post in State Civil Service, because if it were so, it would be ultra vires the powers of the Parliament. Declaration is to be made by the State Government in regard to the rank of a post held by a provincial civil officer whereas this rule has been promulgated by the Central Government affecting the service conditions of officers who do not belong to the Central Service, but belong to the Civil Service of

the State. Such a provision by the Central Government in regard to the State Civil Service could not be made either by the Parliament of India or the rule-making authority under the Central Act. The Parliament or the Central Government might do so in regard to the Central Service but to attempt to do so concerning the service conditions of State Civil Service Officers, would be unconstitutional. This contention too appears to me to be without substance. These rules have been made under the power conferred upon the Central Government under Section 3 of the All India Services Act, 1951, as I have stated above, and lays down the principle in regard to the determination of seniority of an officer to be recruited to the All India Service. To argue, therefore, that this rule by the rule making authority of the Central Government seeks to affect the service conditions of an officer of the State Civil Service, is altogether incorrect. By this rule, it is intended only to treat certain categories of posts which are not cadre posts as equivalent thereto, so that a senior member of the State Civil Service may not suffer unduly in rank when he is appointed to the Indian Administrative Service in relation to an officer who has been recruited as a result of a competitive examination.

17. It has also been contended that the year of allotment of direct recruits having once been determined under Rule 3 (3) (a), it cannot be altered. It has been argued on behalf of the direct recruits that if the promoted officers are given a year of allotment earlier than the year of allotment of the direct recruits in terms of rule 3 (3) (b) and the proviso, this would deprive them of their vested right. That right is acquired by virtue of the year of allotment itself. It appears to me, however, that there is no force in this contention either. Rule 3 (3) (a) deals with the year of allotment of a direct recruit as such. Clause (b), however, deals with the comparative seniority. There is no question, therefore, of any vested right to be acquired by any officer because all these rules taken together, which are intended to cover the seniority of officers recruited to the Indian Administrative Service from various sources, also refer to the comparative seniority of the various categories of the officers. It has, however, been contended that the provision of Rule 3 (3) (a) is to be read in conjunction with Rule 4 (3). That rule, so far as it is relevant, provides thus:—

"4. Seniority of officers.—

(3) The seniority of officers appointed to the Service after the commencement of these rules and before the 11th day of April, 1958, who are assigned the same year of allotment shall be in the following order, that is to say—

(i) Officers appointed to the Service on the results of a competitive examination in accordance with Rule 7 of the Recruitment

Rules ranked inter se in accordance with Rule 10 of the Indian Administrative Service (Probation) Rules, 1954.;

(ii) officers appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules ranked inter se in the order of the date of their appointment:

x x x x x

It has been contended that once a particular year of allotment has been assigned to a direct recruit and a promotee also is given the same year of allotment, automatically, all the officers directly appointed will rank senior to those who entered the Service by promotion from the rank of State Civil Service. In my opinion, however, Rule 4 (3) has no such effect. Paragraph 21 itself in Anand Prakash Saksena's case, AIR 1968 SC 754 is relevant on this matter. It states "This contention is devoid of merit. The seniority of direct recruits inter se and promotees inter se is fixed by Rule 4. The object of Rule 3 (3) (b) is to fix the seniority of the promotees in relation to the direct recruits". This shows that, in the opinion of their Lordships of the Supreme Court, Rule 4 deals only with inter se ranking of officers of both categories. So far as their comparative seniority is concerned, they refer to Rule 3 (3) (b) alone as being relevant. The argument of learned Counsel for the Union of India and the direct recruits even from this angle cannot be taken to be correct.

18. It has also been urged that, in fact, there was no factual officiation by the promotees in senior-scale posts. Reference in this connection is made to the posts held by the petitioners. In this connection, I may quote here the relevant passage from Shri Sohoni's letter to the Secretary (Services), Ministry of Home Affairs, Government of India, New Delhi (vide Annexure 'E' of the brief in C. W. J. C. No. 853/68, page 99 at 113 Vol. III).

"5. All the promoted officers, except Shri Alam, held the same post or similar posts from a date much earlier than 28th December, 1954, which is the date from which the benefit of continuous officiation has been given to them under the second proviso to Rule 3 (3) (b) of the Regulation of Seniority Rules. Shri S. C. Mishra was appointed as Director of Gram Panchayats on 20th August 1948. This post is now a senior cadre post of the I. A. S. After that, he held the post of Deputy Secretary in the Local Self Govt. Depart. from the 9th October, 1949. On 4th August, 1954, he was appointed to the cadre post of Deputy Secretary in the L. S. G. Department, in addition to his own duties as Chairman of the Patna Improvement Trust. He held this post till 18th March, 1955. Shri S. A. F. Abbas was Development Training Officer in the Administrative Training School on 20th December, 1954. He joined this post on 23rd December, 1954. Be-

fore that, he was Additional Deputy Secretary in the Development Department from 22nd April, 1953, and Secretary to Food Production and Development Commissioner from 13th January, 1950. For about six months in 1953-54, he officiated as Registrar, Co-operative Societies, which is a senior cadre post. The same post of Secretary to the Food Production and Development Commissioner has been converted into that of Deputy Development Commissioner and has since been included in the cadre. Therefore, Shri Abbas can legitimately claim that he held a senior post continuously from 13th January, 1950. Shri R. S. Mandal was appointed as Mayurakshi Resettlement Officer on 5th July, 1949, which was a post in the rank of Additional District Magistrate. He joined as Additional Collector, Santhal Parganas, on 3rd November, 1950. In 1952, he was transferred as Deputy Director of Development and Rehabilitation in the Damodar Valley Corporation and succeeded Shri K. S. V. Raman, I. C. S., as Director, Development and Land Acquisition in the Damodar Valley Corporation in August, 1953, which post he held on 28th December, 1954, and continued to hold till June, 1958. Therefore, in his case also, it can be said that he continuously held a senior post from 3rd November, 1950, if not from 5th July, 1949. Shri R. C. Sinha was appointed as Secretary to the Chief Minister on 8th February, 1949. In 1952, the duties and responsibilities of the post of Secretary to the Chief Minister were reappraised and the State Government upgraded the post to the status of Deputy Secretary to Government with effect from 22nd, September, 1952. He held this post on 28th December, 1954, and left it only in 1961.

Thus, while these officers were holding posts equivalent to senior cadre posts from a date much earlier than 28th December, 1954, the benefit of continuous officiation was limited upto 28th December, 1954, only. I may point out that, in a sense, it is arbitrary. This is the date when the list of officers considered suitable for officiating appointment to senior cadre posts in the I. A. S. was approved by the Union Public Service Commission. This list was called the ad hoc list because, at the time it was prepared, the Indian Administrative Service (Appointment by Promotion) Regulations had not come into force, but the Seniority Rules were promulgated on September 9, 1954. The former Regulations were in the draft stage. However, in preparing the list, the same procedure, as was prescribed subsequently in the Regulations, was followed; and the list was prepared on a rigorous test of merit. After the Promotion Regulations were finalised, all these officers were included in the first 'Select List' which became operative on 26th December, 1955. Due to delay in finalisation of the Promotion Regulations, there was delay in the preparation of the

'Select List'. The record of service of these officers will show that these officers would have been included in the 'Select List' if the preparation of such a list had been undertaken earlier. Therefore, they have suffered for no fault of theirs and for a circumstance which could have been avoided if the fact of their officiation were reported timely to the Central Government and the Union Public Service Commission. Thus, it has been unfair to limit the benefit of continuous officiation from 28th December, 1954. If the matter were now re-opened, in all fairness, the year of allotment of these officers should be determined on the basis of the actual date on which they were appointed to the posts intrinsically equivalent to senior cadre posts. If this is done, it will be found that most of the officers held such posts from dates which were earlier than that of continuous officiation of any direct recruit to the I. A. S. in Bihar, and, in that case, their seniority will have to be re-fixed on an ad hoc basis under the first proviso to rule 3 (3) (b) of the Regulation of Seniority Rules.

6. In view of what has been stated above, the State Government strongly support the prayer contained in the representations filed by the promoted officers affected by the decision of the Government of India, communicated in their letter dated 20 September, 1967. The least that should be done is to revoke this decision and restore the previous year of allotment, and fixed finally in Government of India's letter No. 6/18/56-AIS(II), dated 3rd September, 1968".

The letter of Shri S. V. Sohoni, points out the posts which the officers held at the time of their promotion for appointment to Indian Administrative Service as also the date from which the benefit of continuous officiation was allowed to them by the Central Government and how these posts were of equal responsibility with any senior post held by any senior person; and even assuming that the salary was not the same, it would not make the least difference inasmuch as what equivalence requires is not equality in salary but the nature and the duties involved in it which would make it equal to the senior post. In that view of the matter, even the post of an Additional District Magistrate could well be equated by the State Government to the post of a District Magistrate, as in fact it has been subsequently done, and the ex-cadre post of Deputy Secretary might well be equated to the post of a Deputy Secretary which is a cadre post when the incumbents were already declared to belong to the current list of the District Magistrates. The Government of India was fully justified in approving the officiation of these officers in such posts as officiation in equivalent posts.

19. Learned Counsel has relied upon two decisions in support of his contention. One is the case of S. M. Naqavi v. President of India, ILR 47 Pat 533 = (1968 Lab IC

1426) and another is D. R. Nim v. Union of India, AIR 1967 SC 1301. In the case of S. M. Naqavi, ILR 47 Pat 533 = (1968 Lab IC 1426) a Division Bench of this court has taken the view that the benefit of continuous officiation is admissible to an officer whose name was included in the ad hoc list, but not to an officer whose name was included only in the 'fit for trial list' because such a list was not within the contemplation of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955, as the Government of India made clear beyond doubt in the following passage:

"The question whether the officiation in senior posts of the State Civil Service Officers after inclusion of their names in the 'fit for trial list' should or should not be taken into account for the purpose of seniority, on their subsequent appointment to the Indian Administrative Service, has been engaging the attention of the Government. As the Government are aware, the Indian Administrative Service (Appointment by Promotion) Regulations do not provide for the preparation of any such 'fit for trial' list. Such a list has been defined merely to enable the State Government to try out a few officers irrespective of their seniority with a view to test their suitability for senior posts, and is intended only to avoid specific references to the Union Public Service Commission for casual short term appointments of the State Civil Service officers to senior Indian Administrative Service posts. The Union Public Service Commission, who were consulted in this respect, have advised that any officiation of the State Civil Service Officers included in the 'fit for trial list' should not be taken into account to determine their seniority in the Indian Administrative Service. The Government of India have accordingly decided that wherever such lists have been prepared in some States, the officiation in the senior posts of the State Civil Service Officers included in the 'fit for trial list' cannot be counted for the purpose of determining the seniority of such officers under the Indian Administrative Service (Regulation of Seniority) Rules, 1954." — (vide page 510 of S. M. Naqavi's case, ILR 47 Pat 533 = (1968 Lab IC 1426)).

As their Lordships have observed in this judgment, the view of the Central Government in regard, however, to the officers included in the ad hoc list was different as is stated in paragraph 12 of the judgment at page 513 (of ILR 47 Pat) = (at p. 1429 of Lab IC). As explained above, as to why the Government of India took up a different attitude in regard to the officers included in the ad hoc list is not material but definitely there was no misconception in the mind of the Home Ministry of the Central Government in regard to this matter. If the contention of Learned Counsel for the Union of India and for opposite party Nos. 3 to 8 be accepted as correct that Rule 2 (g) does not

apply to officers of the State Civil Service, then any difficulty created by lack of formal declaration in regard to the senior posts held by them will completely disappear, as already stated, inasmuch as the second proviso to Rule 3 (3) (b) itself will be deemed to have been carried out in the manner in which the ad hoc list was prepared and approval of the Union Public Service Commission was granted to it. In the case of D. R. Nim, AIR 1967 SC 1301, a date of continuous officiation was assigned to a police officer who was promoted from U. P. Police Service as a result of a competitive examination held in 1938. He was appointed Superintendent of Police with effect from the 25th of June, 1947. He officiated till he was appointed to the Indian Police Service against the promotion quota of the Indian Police Service cadre of Uttar Pradesh with effect from the 22nd of October, 1955. After the promulgation of the rules and regulations in regard to the determination of seniority of officers appointed by promotion came into force, the seniority of the appellant D. R. Nim also had been determined. He was given a year of allotment by the Central Government which he challenged as arbitrary. The Government of India explained the reasons for assigning him that date, being the 19th of May, 1951, by virtue only of instructions issued vide Shri R. C. Dutt's letter No. 1/18/58-AIS, dated the 22nd of June, 1951. It was held by the Supreme Court that this date was fixed without taking into consideration the period of officiation of the appellant as officiating Superintendent of police with effect from the 25th of June, 1947. Sikri, J., who spoke for the Court, put the point as follows:—

"The above statement of the case of the Government further shows that the date, May 19, 1951, was an artificial and arbitrary date having nothing to do with the application of the first and the second proviso to R. 3 (3). It appears to us that under the second proviso to Rule 3 (3) the period of officiation of a particular officer has to be considered and approved or disapproved by the Central Government in consultation with the Commission considering all the relevant facts. The Central Government cannot pick out a date from a hat — and that is what it seems to have done in this case — and say that a period prior to that date would not be deemed to be approved by the Central Government within the second proviso."

Unlike Nim's case, AIR 1967 SC 1301, the Government of India gave its approval to the recommendation in the letter of Shri M. S. Rao on foot of the ad hoc list accepted by the Union Public Service Commission on the 28th of December, 1954. The names in the ad hoc list were treated by the State Government in terms of Appendix 6, Rule 14, of the Bihar Service Code, as those of officers fit for appointment as District Magistrates. Since the Bihar Government under its own code could draw up such a list — and this

was mentioned in the letter of Shri M. S. Rao and full circumstances also stated as to how all the other officers should get the benefit of the ad hoc list — when the Government of India gave its approval to the ad hoc list as such, such an approval cannot be held to be arbitrary or erroneous or given under any misconception but based on good reason, and the year of allotment proposed by the State of Bihar was accordingly approved by the Central Government. Nim's case, AIR 1967 SC 1301 therefore, which is relied upon by learned Counsel for the opposite party respondents, appears to me to be an authority in favour of the petitioners that where a date of officiation has been approved by the Government on intelligible basis, this must be upheld as correct, as was done in the present case. If a arbitrary and artificial date were given without considering the circumstances set out in detail in the above letter of the Government of Bihar, the decision in this case might well be cited as an authority in support of the case of the direct recruits. The position being quite different, it appears to me that the crux is where approval has been given taking into consideration all the circumstances of a case which are rational and intelligible, that approval cannot be withdrawn by the Government of India to the prejudice of the interest of the officer affected by such withdrawal.

20. It has also been contended that even assuming that Shri Narayanswamy's letter dated the 3rd September, 1958, be construed as approval of the officiation of the promotees within the second proviso to Rule 3 (3) (b) of the seniority Rules, that approval having been again withdrawn by the Government of India, it is the same as not having been given at all and it could not be challenged. This argument has only to be stated in order to be rejected. If the Government of India be taken to have given a valid approval, as has been contended on behalf of the petitioners and if the petitioners have acquired a right to continue on the post, it would be unintelligible to argue that the same authority could withdraw the approval and jeopardise the interest of the employees in a capricious way. It is as good as saying that if a person is once appointed by the Government, the Government being an appointing authority and having the power to dismiss the Government servant can do so without valid reason. This will be fundamentally opposed to the security of tenure of the Government employee, that once he acquired a right to continue in the post, Government can remove him, at its option. It is, therefore, difficult to understand the contention urged on behalf of the opposite party respondents that if it lay on the part of the Government of India to grant approval, which was done in 1958, the approval can be withdrawn in 1967. It must be taken as well established that the validity of the approval of 1958, if at all, may be challenged; but

once it is found that it was a valid approval, it would not be open to the Government to withdraw it on the ground that the authority which can grant approval also would be at liberty to withdraw it.

21. It has also been urged that the order of the Central Government is final. To this contention it is urged in reply that if this position be taken at its face value, then there is more substance in the objection by the petitioners that the order of the Central Government passed in 1958 accepting the date of continuous officiation proposed in Shri M. S. Rao's letter should be taken to be final. No provision is made for appeal against such an order in the Civil Services (Classification, Control and Appeal) Rules and as such the Government of India would have no power to revise it. In any case, it is difficult to support the contention on behalf of the opposite party respondents that the order passed by the Government of India cannot be quashed by this Court. Learned Counsel for the opposite party respondents has relied upon a decision of the Supreme Court in *Parry and Co. Ltd. v. Commercial Employees Association*, AIR 1952 SC 179 in which it is stated that a writ of certiorari will not lie merely on the ground that a decision by an inferior Tribunal with jurisdiction is erroneous. That, however, was a decision of a quasi-judicial authority under the provisions of Section 51 of the Bihar Shops and Establishments Act. But it may be noticed that even in that judgment, it was conceded by Mr. Issacs that in spite of such a statutory provision the superior Court is not deprived of its power to issue a writ although it can do so only on the ground of manifest defect of jurisdiction or of a manifest fraud of the party procuring it. The decision of the Government of India is not the decision of a Tribunal and, in that view of the matter, the case is clearly distinguishable.

22. It has also been urged that the present writ petition is barred on the principle of constructive res judicata and judicial propriety. Reference is made in this connection to the order passed by this Court, to which I was a party, in *C. W. J. C. No. 787 of 1967*. This was a petition filed by some of the direct recruits (Shri K. A. Ramasubramaniam, Shri S. D. Prasad and Shri P. S. Appu) for a writ of mandamus directing the State of Bihar to give effect to the decision of the Government of India revising the seniority list of the petitioners vis-a-vis the opposite party respondents. It is true, no doubt, that when the State of Bihar expressed its willingness to implement the decision of the Government of India, the writ application had to be allowed. Learned Counsel for the opposite party respondents has urged that the State was bound, therefore, by its own agreement to abide by the decision of the Government of India. The promoted officers filed an application in that case for being impleaded as party on the ground that their interest

was being adversely affected by the stand of the State of Bihar and as such they sought an opportunity to oppose the application of the direct recruits. Their prayer was refused. It is urged, however, on behalf of the petitioners that this cannot operate as res judicata. In order to understand the contention, the following paragraph of the order passed by this Court may be quoted:—

"In the circumstances, the writ application should stand allowed as the opposite party to this application, the State of Bihar, has accepted the point of view of the petitioners and the order of the Government of India will be implemented. There is opposition to this on behalf of the promoted officers affected by this order. There is an application filed by them to the effect that they should be joined as opposite party to this application and matter may be considered on merit in their presence. The admission of the claim of the petitioners by the State of Bihar should not be taken to be sufficient to dispose of this application because, in the very nature of it, this application involves some prejudice to the interest of the promoted officers which is the direct consequence of the admission made by the State of Bihar.

Having heard learned Counsel for the parties at some length, the petitioners insisting upon the application being allowed in view of the stand of the State of Bihar and Mr. Balbhadra Prasad Singh for the promoted officers opposing it on the ground of the prejudice caused to the promoted officers, it appears to us that this application as it is at present constituted has to be allowed. We are not prepared at this stage to add the promoted officers as parties to this application and their application is, therefore, rejected. The present application, however, stands allowed.

This order is, however, without prejudice to the right of the promoted officers to agitate this question, if they are advised to do so, in an application properly framed for that purpose.

It has been contended by Mr. Basudeva Prasad for the opposite party respondents that this would operate as res judicata on the authority of the Supreme Court in *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1. That was a case in which a reporter attached to the English Weekly "Blitz" wanted to publish a detailed report of the proceedings in the Court which however, Justice Tarkunde of the Bombay High Court disallowed on a grievance made by one of the witnesses. This was an oral order. The reporter, Naresh Shridhar Mirajkar, felt aggrieved by the order and moved the High Court of Bombay by a writ petition under Article 226 of the Constitution. That petition was, however, dismissed on the ground that the impugned order was a judicial order of the High Court and was not amenable to a writ under Article 226. Mirajkar, however, made an application under Article 32

of the Constitution praying to the Supreme Court for enforcement of a fundamental right under Article 19 (1) (a) and (g) of the Constitution. This was dismissed by the Supreme Court on the ground that since he made an application under Article 226 in the High Court of Bombay and it was dismissed, the proper remedy for the petitioner was to file an appeal against the judgment of the Bombay High Court. The same not having been done, the decision would operate as *res judicata* and the petitioner could not seek the same remedy in the Supreme Court by way of an application under Article 32 of the Constitution. It is true that their Lordships followed that course on the ground that the order passed by the learned Judge, Justice Tarkunde, was not collateral in the sense that the jurisdiction of the Judge to pass that order could be challenged otherwise than by a proceeding in appeal. Mr. Basudeva Prasad has contended that although the petitioner, Mirajkar, in that case was not directly a party to the proceedings before the learned Judge on the criminal side, yet an order passed against him was held to be conclusive. Likewise, the petitioners in the present case, although not parties to the above writ application (C. W. J. C. No. 787 of 1967), must be held to be affected by this order of the Court refusing to make them party. They should have gone up in appeal to the Supreme Court against that order and failing that they must be bound by that order. In my opinion, however, the contention is absolutely devoid of force. It is true that the prayer of the petitioners to be impleaded as parties to that application was rejected but, in the first place, they were no parties to that application and as such they would not be bound by that order and, in the second place, it is clearly stated in the order itself that the application was being allowed without prejudice to the right of the petitioners, which means that they would be at liberty to agitate the question in an independent application to be filed by them. It is well-known principle of *res judicata* that where a court keeps an issue open giving opportunity to the parties to re-agitate the question, it does not come within the principle of *res judicata* at all, because this implies an order of the Court not to decide a point where the Court directly leaves open an issue to be agitated in a future proceeding. The contention, therefore, of Mr. Basudeva Prasad must be rejected. Learned Counsel has also referred to Halsbury's Laws of England, volume 22 (third Edition), p. 780, Articles 1660 and 1661. They, however, deal with conclusiveness of judgments and merger of cause of action in judgment which are general principles and have no bearing upon the point raised in the instance case.

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23. It has further been contended that no writ can issue to perpetuate an illegality. In my opinion, since I have already held that no illegality was committed by the Gov-

ernment of India in granting approval to the date of officiation of the petitioners in senior posts or in posts equivalent to senior posts for the purpose of seniority, the withdrawal thereof by a subsequent deed would be an illegality and there is no reason why the same should not be quashed by a writ of *certiorari*.

24. It has been contended that *certiorari* cannot be issued to quash the order of the Central Government because the interpretation put by the Central Government on Rules 2 (g) and 3 cannot be characterised as perverse. The view taken by the Central Government, if anything, is at least plausible. Reference has been made in support of this contention to the case of Principal, Patna College, Patna v. Kalyan Srinivas Raman, AIR 1966 SC 707. That was a case where an order of the Vice-Chancellor in regard to the University Regulation concerning the percentage of a candidate was quashed by the High Court, but the Supreme Court set aside that order on the ground that merely because the construction put by the High Court on the Regulation appeared to it to be more reasonable than the construction put upon it by the Vice-Chancellor would not justify quashing of the order. That, however, was a case where there was considerable ambiguity in the Regulation concerned and the various Articles of the Regulation were examined to come to that conclusion. Unlike that case, the petitioners had an order passed in their favour by the Central Government fixing the seniority in September 1958 and they held high posts under the Government by virtue of such seniority, but, as a result of the revised order, they would lose their seniority and would have to revert to lower posts after nine years. Apart from the propriety of the course adopted by the Central Government, in such circumstances, this would be a fit case in which if the High Court is satisfied about the error in the order of the revision passed by the Government of India, to quash it, and not that no *certiorari* could issue in this case. Every canon of justice in the present circumstances would be attracted in favour of the petitioners and it cannot be reasonably argued that no *certiorari* can issue in this case on the authority of the case of a student seeking admission to an examination on the interpretation of an ambiguous rule in respect of which the interpretation of the Vice-Chancellor, being equally plausible, was upheld by the Supreme Court. Moreover, the present case is not of the type dealt with by their Lordships of the Supreme Court. It is not a simple case but consideration of a number of rules and regulations is involved and, if anything, according to the petitioners, the second proviso to Rule 3 (3) (b) is clear enough and the interpretation sought to be put upon it on behalf of the petitioners was accepted by the Government of India after mature consideration as all the relevant factors in regard to the

officiation by the petitioners were set out in the letter of Shri M. S. Rao, which was accepted by the Central Government.

25. I may also clarify the position in regard to the preparation of the ad hoc list which received the approval of the Union Public Service Commission on the 28th of December, 1954. I have already said that although the Indian Administrative Service (Appointment by Promotion) Regulations, 1955, came into force in 1955 (6th June, 1955), this was already in a draft form well known to the Central Government as also the Governments of the various States and the selection committee was appointed in terms of Regulation 3 of these Regulations. Regulation 4 deals with the conditions of eligibility for promotion and regulation 5 provides for preparation of a list of suitable officers, which was done in this case in September 1954. Regulation 6 provides for consultation with the Commission which, in this case, was done, as the list prepared by the committee presided over by the Chairman of the Union Public Service Commission was submitted to the Public Service Commission as spoken of in Regulation 6, and the Commission gave its approval duly on the 28th of December, 1954. It is true, no doubt, that the select list was formally prepared only after these Regulations were actually made and promulgated in a formal manner, but the entire procedure prescribed in these Regulations has been followed. The contention, therefore, that there was no consultation with the Public Service Commission, as is sought to be denied in the counter-affidavit by the Union of India, is misconceived. The confusion has been caused because these Regulations came into existence in 1955, but what was required to be done under the provisions of these Regulations, in fact, had been done in 1954, exactly in the manner contemplated in these Regulations and, in that view of the matter, the requirement of the second proviso to Rule 3 (3) (b) is complied with and the petitioners must be deemed to have officiated continuously in a senior post approved by the Central Government in consultation with the Public Service Commission. The Government of India was, obviously, aware of this position and that probably explains why the reason assigned in the final letter of the Government of India, dated the 20th September, 1967, which is sought to be quashed, has not referred to non-consultation with the Union Public Service Commission but merely to the defect that no declaration could be made by the State Government of treating any post which is not a cadre post as equivalent thereto with retrospective effect, which is supposed to have been done in the letter sent to the Accountant-General, Bihar, in respect of the petitioners in Annexure D series to the counter-affidavit by opposite party Nos. 3 to 8 (vide page 37 of the paper book in C. W. J. C. No. 853/68-Volume III). In my opin-

ion, this erroneous conception on the part of Home Ministry of the Union of India has led to the withdrawal of the approval granted nine years before to the recommendation contained in the letter of Shri M. S. Rao. It is clear that there are two shields in this case on which the petitioners may rely in support of their case. One is, that the statement contained in the letter of Shri M. S. Rao regarding the nature of the posts held by the petitioners in itself should be deemed to be a declaration inasmuch as no formal act is to be done, to enable the State Government to treat a particular kind of post as a senior post, if Rule 2 (g) is interpreted in a comprehensive manner to include not only 'declaration' under Pay Rule 9 but, further, the declaration to be made by the State Government in regard to a post under its control. But, as I have already said, even leaving this matter out of consideration, the second shield on which the petitioners can rely is the second proviso to Rule 3 (3) (b) which uses not only a word similar in import as 'declare' but of a clearer character by using the word 'deem', which has been recognised in the cases referred to earlier as also in the following cases: *Muller v. Dalgety & Co., Ltd.*, (1909) 9 CLR 693 at p. 696, *Re Rogers & McFarland*, (1909) 19 OLR 622 at p. 631 and *R. v. Norfolk County Council*, (1891) 60 LJQB 379 at p. 380.

In *Muller's* case, (1909) 9 CLR 693 per Griffith, C. J.—

"The word 'deemed' is more commonly used for the purpose of creating a 'statutory fiction' that is, for the purpose of extending the meaning of some term to a subject-matter which it does not properly designate...." In *Re Rogers and McFarland*, Riddell, J. held—"It would, I think, be quite impossible for us, so far as the authorities go, to hold that 'deemed' means anything less than 'adjudged' or 'conclusively considered' for the purposes of legislation". In (1891) 60 LJQB 379, Cave, J. observed—"Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless.....it is to be deemed to be that thing."

26. Another feature of some importance in support of the contention raised in Shri Sohoni's letter (annexure E, page 99 of the brief in C. W. J. C. No. 853/68-Volume III) with regard to Rule 3 (3) (b), that will act as the second and independent shield apart from Rule 2 (g), is that under Rule 2 (g) what is defined is a senior post, which is a cadre post included in item 1 of the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 or any post declared equivalent thereto by the State Government concerned. How-

ever, so far as the second proviso is concerned, reference is not made to a post to be held by such an officer, but privilege is conferred upon the officer. The Central point in Rule 2 (g) is the 'post' but the central point in the second proviso is the 'officer concerned', and it is said that if an officer has officiated continuously in a post, it shall be deemed to be a senior post if such officiation prior to the date of the inclusion of his name in the select list is approved by the Central Government in consultation with the Commission. The question of any declaration is completely ruled out so far as the 'deeming' provision under this proviso is concerned. I may reiterate that where the post held by such an officer is not a senior post in terms of Rule 2 (g), i. e., not declared as such, but nevertheless if the Central Government is satisfied that it is a post of a character which should give the officer concerned the benefit of continuous officiation for the purpose of seniority, in consultation with the Commission, such a post shall be taken to be a senior post in the eye of law.

In such a case the question of declaration of any kind becomes redundant; and if that be so, the entire basis of the reasoning in the letter of the Government of India, dated the 20th September, 1967 (annexure I, at page 19 of the brief in C. W. J. C. No. 853 of 1968, Volume III), loses all its force. It is a pure question of interpretation of this rule and since such an act is of a quasi-judicial character, it has got to be quashed as an invalid order and, more so, because the effect of it is to put the petitioners in a rank much lower than what they have enjoyed for at least nine years prior to the order of reversion to a different lower rank. Hence, this is a fit case for issue of a writ of certiorari to quash the subsequent order of the Central Government.

(contd. on Col. 2)

Names of officers.

1. Sri Satish Chandra Mishra
2. Sri Syed Abul Fazlul Abbas
3. Sri Ram Sewak Mandal
4. Sri Sinheshwar Sahay
5. Sri Ram Chandra Sinha
6. Sri Ramanand Sinha
7. Sri Samir Kumar Ghosh

In substance, the grievance of the petitioners is that their year of allotment [given under Rule 3 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954] was varied by the Central Government by an order dated the 20th September, 1967, with the consequence that all of them have come down in the gradation list [prepared under Rule 6 of the said Rules] of the members of the Indian Administrative Service so far as this State is concerned. These Rules had come into effect from the 8th September, 1954.

27. The argument in regard to the scope of Rule 2 (g) bearing on the scope of the term 'declaration' and Rule 3 (3) (b) and proviso thereof has been reiterated as learned counsel for the Union of India and for Respondents Nos. 3 to 14 have urged it with slightly different shades. Since the applications are being allowed on the general ground of invalidity of the order of the Government of India revoking the approval given to the seniority of the promoted officers in 1958, it is not necessary to set out in detail the specific facts of each case.

28. The applications are thus allowed. The order of the Government of India dated the 20th of September, 1967 is quashed and it is directed that the petitioners must continue to hold rank as assigned to them in 1958. There will be no order as to costs.

U. N. SINHA, J. 29. I have perused the judgment prepared by the learned Chief Justice and I agree that all the writ applications should be allowed and that the order of the Central Government dated the 20th September, 1967, be quashed by a writ of certiorari. I shall mention the salient features of these writ applications and my conclusions thereon.

30. There are seven petitioners in these six writ applications as follows:—

- C. W. J. C. 853/68 — Sri Syed Abul Fazlul Abbas and Sri Ram Sewak Mandal.
- C. W. J. C. 854/68 — Sri Ram Chandra Sinha.
- C. W. J. C. 877/68 — Sri Samir Kumar Ghosh.
- C. W. J. C. 878/68 — Sri Satish Chandra Mishra.
- C. W. J. C. 879/68 — Sri Sinheshwar Sahay.
- C. W. J. C. 880/68 — Sri Ramanand Sinha.

They were promoted to the Indian Administrative Service from the Bihar State Civil Service in the years 1955 and 1956 as follows:—

Date of promotion.

- | | |
|---|------------|
| — | 26-12-1955 |
| — | 26-12-1955 |
| — | 26-12-1955 |
| — | 26-9-1956 |
| — | 17-10-1956 |
| — | 17-10-1956 |
| — | 17-10-1956 |

31. The grievance of the petitioners is based on the fact, that, by an order dated the 3rd September, 1958, the Central Government had given a more advantageous year of allotment to the petitioners, with the result that they were much higher up in the gradation list. By that order all the seven petitioners had been allotted the year 1948 and had been placed below Sri B. B. Sri-vastava, I. A. S., who was a direct recruit of the year 1948. By the latter order passed in 1967, the petitioners of C. W. J. C. 853/68, 878/68 and 879/68 have been re-allotted

the year 1950 and have been placed below Sri S. D. Prasad, a direct recruit of the year 1950 and above Sri P. S. Appu, a direct recruit of the year 1951. The petitioners of C. W. J. C. 854/68, 877/68 and 880/68 have been re-allotted the year 1952 and have been placed below Sri K. K. Srivastava, a direct recruit of the year 1952, and above Sri R. B. Lal, a special recruit of the year 1952. When the petitioners had been allotted the year 1948 earlier, all of them were much higher than Sri S. D. Prasad in the gradation list. The earlier order of the Central Government of the year 1958 was based on the recommendation of the Government of Bihar made on the 9th July, 1958. The letter from the Government of Bihar to the Government of India had been written by Sri M. S. Rao, the then Chief Secretary to the Government of Bihar, Appointment Department, and I shall henceforth refer to this letter as Shri Rao's letter. The letter in reply from the Government of India to the Government of Bihar was written by Sri S. Narayanswamy, Deputy Secretary to the Government of India, Ministry of Home Affairs, and I shall refer to this letter as Sri Narayanswami's letter. It will be necessary to quote the relevant portions from the letter of Sri Rao. After mentioning the names of all the petitioners in Paragraph 9 of his letter Sri Rao had mentioned in the same paragraph as follows:—

"As all these officers started continuous officiation in the senior scale after 15th December, 1953 their year of allotment is to be determined under Rule 3 (3) (b) of the I. A. S. (Regulation of Seniority) Rules, 1954. The first proviso to Rule 3 (3) (b) will not apply to these officers." Thereafter Sri Rao stated as follows in Paragraphs 10 and 11:—

"10. The Government of India have already recognised the period of officiation in senior posts of some of these officers, the details of which are given in Annexures 'A' to this letter. For the reasons given below the State Government proposed to make certain alterations noted in Column 5 of Annexure 'A' in the dates of commencement of continuous officiation of some of officers.

11. When a State Civil Service Officer's name is included in the Select List prepared under Regulation 7 of the I. A. S. (Appointment by Promotion) Regulations, 1955, and he is appointed on a particular date to a cadre post or an equivalent post in accordance with Rule 9 of the I. A. S. (Recruitment) Rules, 1954, his officiation in senior posts for purposes of the I. A. S. (Regulation of Seniority) Rules begins from that date."

Referring to Annexure B of his letter Sri Rao stated as follows:—

"Annexure 'B' to this letter gives a complete gradation list of the officers of the State I. A. S. Cadre who are employed in

posts in the senior scale worked out according to the principles recommended by the State Government in the earlier paragraphs. The Government of India are requested to notify the gradation list accordingly."

With respect to the petitioner of C. W. J. C. No. 854 of 1968, Sri Ram Chandra Sinha, a specific reference was made by Sri Rao in his letter in the following words:—

"On a straightforward application of the provision in the Bihar Service Code, those officers who were holding posts of Deputy Secretaries to Government on the relevant dates get the benefit. But where a junior officer was a Deputy Secretary and got the benefit of the Rule, the State Government have decided that it would be appropriate to allow the benefit to officers higher in the list even though they were not actually Deputy Secretaries to Government. One such officer is Shri Ram Chandra Sinha who has all along been Secretary to the Chief Minister. And another is Shri Rash Bihari Lal, who has been Director of Public Relations. These two posts are not inferior in duties and responsibilities to a post of Deputy Secretary to Government. Two other officers, Shri Anwar Karim and Shri S. M. Naqvi were holding posts of Additional Collectors. In this state, State Civil Service Officers of A. D. M.'s rank are appointed Additional Collectors or Deputy Secretaries to Government."

It was on this letter that the Central Government had given the year of allotment to all the petitioners in 1958. The impugned re-allotment appears to have been made on the representation made by three of the respondents in these cases, who are Sri K. A. Ramasubramaniam, Sri S. D. Prasad and Sri P. S. Appu. In the letter of the Central Government sent to the Government of Bihar dated the 20th September, 1967, the date of appointment of the petitioners to the Indian Administrative Service, the date of their commencement of continuous officiation in the senior posts other than those declared equivalent to cadre posts and the relevant date for determining their seniority were given as follows:—

(for dates of seniority see page 422)

[The date of appointment of Sri S. Sahay (Sri Sinheshwar Sahay) to the Indian Administrative service should be 26th September, 1956 and not 26th September, 1955].

32. In order to appreciate the contentions raised in this Court as to how the Central Government had made a change in the year of allotment, it will be necessary to quote a letter sent from the Central Government to the Government of Bihar on the 28th August, 1968. The letter was sent by Sri R. D. Thappar, Joint Secretary to the Government of India, Ministry of Home Affairs to Sri S. V. Sohoni, Chief Secretary to the Government of Bihar. It stated as follows:—

		Date of appointment to I. A. S.	Date of commencement of continuous officiation in senior posts other than those declared equivalent to cadre posts retrospectively.	Relevant date for determining seniority.
1.	Shri S. C. Mishra	26.12.1955	23. 7.1956	26.12.1955
2.	Shri S. A. F. Abbas	26.12.1955	27. 1.1956	26.12.1955
3.	Shri R. S. Mandal	26.12.1955	24. 9.1956	26.12.1955
4.	---	---	---	---
5.	---	---	---	---
6.	---	---	---	---
7.	Shri S. Sahay	26. 9.1955	26. 8.1956	26. 9.1955
8.	Shri Ramanand Sinha	17.10. 1956	20. 7. 1958	17.10.1956
9.	---	---	---	---
10.	Shri R. C. Sinha	17.10.1956	14.1.1957	17.10.1956
11.	Shri S. K. Ghosh	17.10.1956	4.12.1956	17.10.1956
12.	---	---	---	---

"Dear Shri Sohoni,

Please refer to your D. O. letter No. 37/ C. S. (R) dated 18-3-68 to Sri Prasad forwarding views of the State Government on the representations of Sri S. C. Mishra and other promoted officers against the decision of the Govt of India communicated with this Ministry's letter D/- 26-5-64 — AIS (II) dated 20-9-67.

2. These representations and views of the State Government have been examined carefully. We have also had the benefit of the opinion of the Solicitor General on the various issues arising out of this case. We have been advised categorically that the State Government is not competent to declare as equivalent to a senior post in the cadre retrospectively and for purposes of determining seniority under the second proviso to Rule 3 (3) (b) of the IAS (Regulation of Seniority) Rules 1954 officiation in the senior post declared as equivalent by the State Government requires approval of the Central Government and U. P. S. C. before it can count on 'continuous officiation'. In view of this opinion, the Government of India do not find any reason to alter the decision taken in their letter dated 20-9-67. They therefore reject the representations of Sri S. C. Mishra and other promoted officers who may be informed accordingly.

Yours sincerely,
Sd. R. D. Thapar."

It appears that this letter had been sent from the Central Government on the representations made by relevant rules from the Indian Administrative Service (Regulation of Seniority) Rules, 1954 may now be quoted. Rule 2 (g) of the Rules reads as follows:—

"2. Definitions — In these rules, unless the context otherwise requires—

.....

.....

(c) 'Senior post' means a post included under Item 1 of each Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 framed under sub-rule (1) of Rule 4 of the Indian Admin-

istrative Service (Cadre) Rules, 1954, or any post declared equivalent thereto by the State Government concerned."

[The definition of 'Senior post' has undergone many changes, but according to the learned counsel for all the parties, the definition given above will govern these cases.] Rule 3 of the Rules, so far as it is applicable, is quoted below:—

"3. Assignment of year of allotment. — (1) Every officer shall be assigned a year of allotment in accordance with the provisions hereinafter contained in this rule.

(2)
(3) The year of allotment of an officer appointed to the Service after the commencement of these rules, shall be—

(a)
(b) where the officer is appointed to the service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with Rule 7 of those rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former.

Provided that the year of allotment of an officer appointed to the service in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service in accordance with Rule 7 of those Rules so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned.

Provided further that an officer appointed to the Service after the commencement of these rules in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules shall be deemed to have officiated continuously in a senior post prior to the date of the inclusion of his name in the Select List prepared in accordance with the requirements of the Indian Administrative Service (Appointment by Promotion) Regulations framed under sub-

rule (1) of Rule 8 of the Recruitment Rules, if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission."

33. At this stage a few facts have to be mentioned from the writ application filed by Sri Ram Chandra Sinha in C. W. J. C. 854 of 1968, as Sri Daphtary has based some argument on these facts. It is stated in paragraph 40 of the application that this petitioner had received Annexure I, dated the 25th September, 1967, which had mentioned, amongst others, that Sri Ram Chandra Sinha had been allotted the year 1952 and that the petitioner had written to the Chief Secretary, Bihar, on the 6th January, 1968 to take up the matter with the Government of India. On the 10th September, 1968 the Chief Secretary of Bihar had informed the petitioner that the Government of India had sent the letter dated the 28th August, 1968, which has been quoted above (from Sri R. D. Thapar to Sri S. V. Sohoni). The petitioner has stated in paragraph 43 of his application that on the 11th September, 1968 he had sent a letter to the Chief Secretary, Bihar, requesting him to furnish copies of the following papers:— (a) letter of the Government of India dated the 20th September, 1967, and (b) documents on the basis of which seniority of the petitioner was fixed in the year 1958 and the documents relied upon for changing the decision in 1967. According to the petitioner, no reply was sent to this letter nor has he been given the papers asked for.

34. The first contention raised by Sri C. K. Daphtary is that after his client, Sri Ram Chandra Sinha had been allotted the year 1948, by the Central Government, acting under the appropriate rules, this allotment should not have been changed by the Central Government without giving an opportunity to his client to show that the first allotment should not have been varied. It is contended that there had been a violation of natural justice in the procedure adopted by the Central Government. Sri Daphtary has argued that if the Central Government had proposed to reopen the question of allotment under the Regulation of Seniority Rules, his client may have shown that he was entitled to a year of allotment even earlier than 1948. Our attention has been drawn to paragraph 44 of Sri Ram Chandra Sinha's writ application, where it has been mentioned that the seniority of the petitioner has to be fixed under the first proviso to Rule 3 (3) (b) and not under the second proviso, and, therefore, consultation with the Union Public Service Commission was not necessary in this case. Whatever may be the merit of the last contention raised by Sri Daphtary, his argument that the Central Government should not have made any change in the year of allotment, in 1967, in the circumstances that it was made, is not without force. By re-allotment of the year,

Sri Ram Chandra Sinha's seniority has been reduced by twelve places in the gradation list between 1958 and 1967. [As a matter of fact, the seniority of all the petitioners has been affected by the order passed by the Central Government in 1967]. In the counter-affidavit filed on behalf of the Union of India it has been stated in paragraph 23 that in their letter dated the 9th July, 1958, the State Government had not placed all facts in their proper perspective. It is stated further, that acting on the basis of incorrect information, the Government of India had agreed to assign a certain year of allotment in 1958. In this connection, Sri C. B. Agarwala, appearing on behalf of the Union of India, has referred to Sri Rao's letter and has argued that the State Government had never mentioned in this letter that certain posts had been declared earlier as equivalent posts within the meaning of Rule 2 (g), quoted above. It is difficult to accede to the contention raised by Sri Agarwala in this context. Clearly, all aspects of the matter were placed by the State Government before the Central Government, requesting the latter to notify the gradation list according to the recommendation. Paragraph 16 of Sri Rao's letter had stated thus:—

"The second proviso to Rule 3 (3) (b) of the I. A. S. (Regulation of Seniority) Rules 1954, says that an officer promoted to the service after the commencement of these rules shall be deemed to have officiated continuously in a senior post prior to the date of inclusion of his name in the select list prepared in accordance with the requirements of the I. A. S. (Appointment by Promotion) Regulation if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission. The officers whose cases are being considered here were approved by the Central Government, in consultation with the Union Public Service Commission, as being suitable for officiation or for trial in senior posts in the I. A. S. Cadre. Under the provision in the Bihar Service Code, these officers were entitled to pay in the senior I. A. S. scale while holding posts of Deputy Secretaries to Government. A number of posts of Deputy Secretaries in Government are actually held by Cadre officers and several of the posts are included in the State I. A. S. Cadre. The State Government, therefore, recommend that the period during which they were allowed pay in the senior I. A. S. scale under the provision of the Bihar Service Code, after having been included in one of the lists prepared in consultation with the Commission, should be recognized by the Central Government under the second proviso to Rule 3 (3) (b) of the I. A. S. (Regulation of Seniority) Rules."

With respect to Sri Ram Chandra Sinha, in particular, paragraph 17 of Sri Rao's letter stated as follows:—

"It will appear from Annexure 'A' that there are four officers Sarvashri Ram Chandra Sinha, Rash Behari Lal, Anwar Karim and S. M. Naqvi, who have been given this benefit. Sri Ram Chandra Sinha has been holding the post of Secretary to the Chief Minister, and Shri Rash Behari Lal the post of Director of Public Relations. These two posts are equivalent in duties and responsibilities to a post of Deputy Secretary to Government. Shri Anwar Karim and Shri S. M. Naqvi were holding posts of Additional Collector, of the same rank as A. D. M. when officers below them in the list were already Deputy Secretaries to Government."

So it is difficult to appreciate the argument that the State Government had not given the correct facts or that the question of declaration of equivalence was not brought to the notice of the Central Government in 1958. The main argument of Sri C. B. Agarwala is that declaration of equivalence under Rule 2 (g) of the Indian Administrative Service (Regulation of Seniority) Rules has to be a deliberate communication or publication of a decision taken by the State Government and that the communication or publication must be with prospective effect and cannot be made retrospectively with effect from an anterior date. In my opinion, whether a declaration of equivalence will be effective retrospectively or not can arise only when steps are taken under Rule 3 of the Regulation of Seniority Rules for the allotment of a year contemplated by it and the effect of a declaration going backwards is inherent in its conception, if facts necessitate retrospective declaration. The declaration of equivalence has to be made under the Regulation of Seniority Rules, which came into force on the 8th September, 1954, and Rule 2 (g) of the Rules mentions that by 'senior post' is meant a post included under item 1 of each schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955. The Indian Administrative Service (Fixation of Cadre Strength) Regulations came into force on the 22nd October, 1955 and without any retrospective effect the gap between the 8th September, 1954 and the 22nd October, 1955 could not have been filled up. Furthermore, if Sri C. B. Agarwala's contention, that, a declaration of equivalence under Rule 2 (g) of the Regulation of Seniority Rules had not been made by the State Government earlier than Sri Rao's letter, is valid, then it is difficult to appreciate as to the basis on which the Central Government had in their letter dated the 20th September, 1967 fixed the "relevant date for determining seniority" as the 26th December, 1955 in the case of Sri Satish Chandra Mishra, Sri Syed Abul Fazlul Abbas and Sri Ram Sewak Mandal, 26th September, 1956 in the case of Sri Sinheshwar Sahay, and, 17th October, 1956 in the case of Sri Ramanand Sinha, Sri Ram Chandra

Sinha and Sri Samir Kumar Ghosh. As stated earlier, these were the dates on which these officers were substantively promoted to the Indian Administrative Service. Taking one example for this purpose, it may be mentioned that Sri Satish Chandra Mishra was the Chairman of the Patna Improvement Trust on the 26th December, 1955. If he was holding a non-cadre post and a non-declared post, then this could not have been the relevant date for allotting a year under the Regulation of Seniority Rules. The contention put forward on behalf of the direct recruits on the interpretation of Rule 2 (g) of the Indian Administrative Service (Regulation of Seniority) Rules is in variance with the argument of Sri Agarwala. Sri Basudeva Prasad has argued that Rule 2 (g) did not confer any power to make any declaration and he argued that if Rule 2 (g) defines senior posts and for the purpose of defining senior posts mention about the declaration is necessary in regard to non-cadre posts, such a declaration has to be made under some power lying outside the seniority Rules. It is difficult to hold that Sri Basudeva Prasad's contention is valid to any extent.

The second contention of Sri C. B. Agarwala is that consultation with the Union Public Service Commission contemplated by Rule 3 (3) (b) second proviso of the seniority Rules was mandatory, and as there was no such consultation in 1958, the Central Government was entitled to make a re-allotment in 1967. But, in my opinion, reading the letters written by Sri Rao and Sri Narayanaswamy as a whole, it is clear that there was a substantial compliance with this proviso in this context. How the matter had been considered by the Union Public Service Commission was mentioned in detail in paragraphs 12 and 13 of Sri Rao's letter. I may mention that the inclusion of the petitioners' names in the ad hoc list dated the 28th December, 1954 may not have been accepted by the Central Government for the purpose of taking into consideration continuous officiation for the purpose of the second proviso to Rule 3 (3) (b) of the Seniority Rules, without anything more, but, this list had been followed by a Select List of 1955, which had been approved by the Union Public Service Commission on the 26th December, 1955 and the Central Government must have taken this into consideration in accepting the State Government's recommendation made in 1958 that the petitioners' continuous officiation in a senior post should start from the 28th December, 1954, when the ad hoc List had been approved by the Union Public Service Commission. What the Union Public Service Commission had approved on the 28th December, 1954, was known to the Central Government as will appear from the letter from the Union Public Service Commission dated the 28th December, 1954,

which is on the record. Sri Narayanswamy's letter dated the 3rd September, 1958 shows that consultation with the Union Public Service Commission or its approval was found necessary in certain matters and in the case of Sri Huda, approval of the Union Public Service Commission was asked to be intimated to enable the Central Government to determine his year of allotment. In the case of Sri Rizvi and Sri Naqvi it had been mentioned that they were in the "Fit for Trial" List of 1956 and were included in the Select List of 1956, which was approved by the Commission on the 18th February, 1957, and, therefore, it is quite clear that some distinction was made by the Central Government between the officers who had been included in the ad hoc List of 1954 and those who were included in the "Fit for Trial" list of 1956.

The reason is not far to seek. The ad hoc list in which the names of the petitioners were included was approved by the Union Public Service Commission on the 28th December, 1954, whereas the Indian Administrative Service (Appointment by Promotion) Regulations 1955 had come into effect on the 6th June, 1955, which contemplated lists of suitable persons for promotion. Obviously, for this reason the Central Government had accepted the recommendation of the Union Public Service Commission with respect to the petitioners, made in December, 1954 and followed up by the inclusion in the Select List of December, 1955 and had given the earlier year of allotment to the petitioners in 1958. In my opinion, it was a matter of regret that the Central Government had found it necessary to reconsider its decision in September, 1967. Under Rule 8 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954, if any question arises relating to the interpretation of these rules, the matter is required to be referred to the Central Government, whose decision thereon is taken to be final, and, therefore, when the Central Government had come to a conclusion with respect to the year of allotment, in 1958, it should have adhered to its decision with respect to such an important matter. In my opinion, the reasons advanced in this Court by the Central Government for its decision, given in September, 1967, cannot be accepted to be valid reasons; and, therefore, the petitioners are entitled to the relief claimed by them.

UNTWALIA, J. 35. I also agree with my Lord the Chief Justice that all the Writ applications should be allowed and the impugned order be quashed by a writ of certiorari. I would, however, like to record my views as hereunder on some of the points involved and canvassed in these cases.

36. Since the order passed in 1958 was an administrative order — pure and simple,

as I am inclined to think, it is difficult to accept the contention that under no circumstances the Central Government can review the order determining seniority of various officers. In the first instance, although in one sense it concerns the persons whose seniority was determined by the order, it cannot be said that the order has got to be made after giving opportunity to all the officers concerned either of being heard or of making representation in writing. At the stage when the seniority inter se was determined of the promoted officers vis-a-vis direct recruits in the year 1958, the stage of exercise of the power in a quasi-judicial way had not reached. Any authority who makes an administrative order must be deemed to have the power to modify, revise or review the order on a proper case being made out or if exigencies of the situation so require. But at the second stage when the order was reviewed in the year 1967, in my opinion, although the character of the order remained administrative, the power had to be exercised quasi-judicially. The earlier order could not be varied without giving an opportunity of representation to the officers against whom it was varied. I would have held that the power so exercised without giving an opportunity to the officers concerned violated the principles of natural justice and the order was liable to be quashed on that ground alone but I do not think it advisable to do so in the present cases. There are two reasons for this. Most of the officers concerned subsequently had made their representations, and the Government of India, on a consideration of the viewpoints presented by them, reiterated its earlier decision made in September, 1967 and rejected their representations. Secondly, the viewpoints of both sides have been thoroughly and elaborately argued before us on merits and, therefore, it is just and proper to decide which of the two orders—one of the year 1958 and the other of 1967—is correct in law on merits.

37. On the 21st of October, 1946 an agreement was entered into between the Government of India and the Governments of the then Provinces regarding the constitution of an Indian Administrative Service to provide officers for the Central Government and the Governments of the various Provinces including Bihar. The strength including both the number and character of posts of the Service was to be as specified in the Schedule appended to the Memorandum of Agreement. The total authorised strength of the Service was 96 for the Province of Bihar, out of which 50 specified posts were senior posts under the Provincial Government and 17 under the Central Government. Recruitment to the Service was to be by direct recruitment or by promotion of the members of the Provincial Civil Service. Direct recruits were to be selected on the results of a competitive examination. Twenty

five per cent of the superior posts which, in case of Bihar, came to 17 could be filled up by promotion of the members of the Provincial Civil Service. In the Schedule given at page 55 of the All India Services Manual, 1967 Edition, only 8 posts of Deputy, Joint or Additional Secretaries to Government were shown as senior posts under the Provincial Government. The posts of other such secretaries to the Government were not senior posts; that is to say, all posts of Deputy, Joint or Additional Secretaries were not scheduled as senior posts.

38. In exercise of the powers conferred by sub-section (2) of Section 241 and Section 247 of the Government of India Act, 1935 and the Agreement aforesaid dated the 21st October, 1946 the Governor-General of India, in consultation with the Provincial Governments, made the Indian Civil Administrative Cadre Rules, 1950. A 'cadre officer' under the said Rules meant an officer belonging to any of the categories specified in Rule 4, the last category of which was of the members of the Indian Administrative Service. A 'cadre post' meant any duty post included in the Schedule. Rule 5 provided that except with the sanction of the Government of India no cadre post could be filled otherwise than by a cadre officer unless in the opinion of the Provincial Government the vacancy was not likely to last more than 3 months or there was no suitable cadre officer available for filling the vacancy, and that if a person other than a cadre officer was appointed to a cadre post for a period exceeding 3 months, the Provincial Government was to report the fact to the Government of India together with the reasons for making such an appointment.

39. The All India Services Act, 1951 (Act LXI of 1951) passed by the Central Parliament came in force on the 29th October, 1951. Section 3 provides that the Central Government may, after consultation with the Governments of the States concerned, make rules for the regulation of recruitment and the conditions of service of persons appointed to an All India Service, which included the Indian Administrative Service. Under Section 4 all rules in force immediately before the commencement of this Act and applicable to an All India Service continued to be in force and were to be deemed to be rules made under this Act. On the 8th September, 1954 came into force the following Rules framed under Act LXI of 1951—

(i) The Indian Administrative Service (Cadre) Rules, 1954,

(ii) The Indian Administrative Service (Recruitment) Rules, 1954.

(iii) The Indian Administrative Service (Regulation of Seniority) Rules, 1954.

(iv) The Indian Administrative Service (Pay) Rules, 1954.

40. On the 6th of June, 1955 came into force the Indian Administrative Service (Appointment by Promotion) Regulations, 1955 made in pursuance of sub-rule (1) of Rule 8 of the Indian Administrative Service (Recruitment) Rules, 1954. The Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955 made under sub-rule (1) of Rule 4 of the Indian Administrative Service (Cadre) Rules, 1954 came into force on the 22nd of October, 1955. For discussion of the points at issue, it will be necessary to refer to the relevant provisions of the Rules and Regulations aforesaid. Therefore, for the sake of brevity and convenience, the four Rules hereinafter shall be referred to as the Cadre Rules, Recruitment Rules, Regulation of Seniority Rules and the Pay Rules and the two Regulations will be referred to as Appointment by Promotion Regulations and Fixation of Cadre Strength Regulations.

41. It appears that there have been amendments in the various provisions of the Rules and Regulations from time to time. At all places in my judgment except otherwise indicated reference will be made to those provisions of the Rules and Regulations which were there at the relevant time in the years 1954 to 1958.

42. Appointment by promotion to the Service was made even before coming into force of the Rules and Regulations of 1954 and 1955 in accordance with the Memorandum of Agreement and the previous Rules. Since all the petitioners were appointed to the service in the years 1955 and 1956 their cases will be governed by the Rules and Regulations which had been framed by them. It may, however, be stated here that the original definition of the 'senior post' in Clause (g) of Rule 2 of the Regulation of Seniority Rules of 1954 made reference to a post included under Item 1 of each Schedule to "the Indian Administrative Service (Cadre) Regulations, 1954". Some such Regulation was under contemplation in the year 1954 but finally the Regulation was the Fixation of Cadre Strength Regulations of 1955 effective from 22-10-1955. An ad hoc list was prepared with the approval of the Union Public Service Commission on 28-12-1954. All these petitioners along with some others were shown in that list as "fit to hold in an officiating capacity, Indian Administrative Service Cadre posts" (vide annexure 3 to the Writ Application in C. W. J. C. 877/68). But that was not the Select List within the meaning of Regulation 7 of the Appointment by Promotion Regulations, 1955. The Select List prepared under Regulation 7 undisputedly was the one which was finally approved by the Union Public Service Commission on 26-12-1955. The names of all the petitioners find place in this List. Sarvashri Mishra, Abbas and Mandal were appointed to the Service on 26-12-1955, Shri Sahay was appointed on 26-9-1956 and Sarvashri Ramanand Sinha, R. C. Sinha and

S. K. Ghosh were appointed to the Service on 17-10-1956. All these seven petitioners by the first order of the Government of India were assigned 1948 as the year of allotment which was changed to 1950 in the case of the first three, 1951 in the case of Shri Sahay and 1952 in the case of last three by the impugned order of the Central Government made in 1967. The question in this case in which of the two assignments of the year of allotment to the various petitioners is correct in law.

43. Under Rule 7 of the Recruitment Rules, the direct recruits, respondents 3 to 14, were appointed to the Service through competitive examinations held in the years 1947 to 1951. Under Rule 8 came the petitioners by promotion from the State Civil Service. Rule 11 of the Recruitment Rules provided that all rules corresponding to these rules in force immediately before their commencement stood repealed but any order made or action taken under the repealed rules was to be deemed to have been made or taken under the corresponding provisions of the Recruitment Rules, 1954. The expression in the various parts of the Regulation of Seniority Rules e. g.—

"An officer appointed in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules"

or

"in accordance with Rule 7 of those Rules" has got to be read to mean with the help of Rule 11 of the Recruitment Rules that the said expression not only means appointment in accordance with Rule 8 (1) or Rule 7 of the Recruitment Rules, 1954 but even the appointment so made in accordance with the previous rules repealed by the Recruitment Rules. The matter becomes quite obvious when the language of the provisos to sub-rule (2) of Rules 3 and 4 is kept in view. If that were not so, the first part of both the provisos would read with reference to the dates as follows—

"Provided that where the year of allotment or the seniority of an officer appointed after 8-9-54 has not been determined prior to or before 8-9-54."

The expression will be meaningless. But if the said provisos are read with the help of Rule 11 of the Recruitment Rules, as I have indicated above, it would mean that where the year of allotment of an officer appointed in accordance with the rules which existed before 8-9-54 has not been determined prior to 8-9-54, his year of allotment was to be determined in accordance with the provision in Clause (b) of sub-rule (3) of Rule 3. Respondents 3 to 14, the direct recruits, undisputedly were all appointed to the Service before 8-9-1954. It cannot, therefore, be said that the years of allotment which were assigned to them were in accordance with Clause (a) of Rule 3 (3) because that applies to an officer appointed to the Service after 8-9-1954. Substantially, however, there was

no difference and each of the respondents was assigned the year of allotment on the results of the competitive examination the year following the year in which such examination was held, and it continued to be the same under sub-rule (2) of Rule 3. The petitioners, however, as stated above, were all appointed to the Service after commencement of the Recruitment Rules. Hence, their year of allotment had to be determined with reference to Clause (b) of sub-rule (3) of Rule 3. Under this clause the year of allotment of the juniormost direct recruit who officiated continuously in a senior post from a date earlier than the commencement of such officiation by a promoted officer has to be assigned to the latter. Although neither Rule 3 nor Rule 4 of the Regulation of Seniority Rules provides in express terms that a member of the Service, who has been assigned prior year of allotment, will be senior to the one who has been assigned a later year of allotment, be he a direct recruit or a promotee, it is obvious that an officer getting a prior year of allotment will be senior to the one getting a later year. When officers belonging to either class are given the same year of allotment, their seniority inter se as also in relation to each other is determined under Rule 4. Under sub-rule (3) of Rule 4, as it stood before the amendment brought about in the year 1958, as between the officers appointed to the Service on the results of the competitive examination and officers appointed by promotion, the former getting the same year of allotment en block ranked senior to the latter who were assigned the same year of allotment irrespective of the fact whether some in the former group had officiated or not continuously in a senior post from a date earlier than the date of commencement of such officiation by the latter. But after amendment in the year 1958 in that regard too, the seniority of all officers appointed to the Service on or after the 11th day of April, 1958 who are assigned the same year of allotment has been made to depend upon the dates of their respective officiation in a senior post.

44. All the petitioners, as stated above, were assigned 1948 as their year of allotment by the order of the Central Government made in 1958 on the footing that all of them had officiated continuously in a senior post from the 28th of December, 1954 the date when their names were included in the Ad hoc List, if not earlier. The juniormost direct recruit who had started officiating continuously in a senior post earlier than 28-12-1954 had, had his year of allotment, 1948. On that footing, in accordance with Rule 4 (3) of the Regulation of Seniority Rules, as it stood then, all the petitioners were placed below the direct recruits who had been assigned 1948 as the year of allotment notwithstanding the fact that some of

them had not officiated continuously in a senior post prior to 28-12-1954.

45. The first proviso to Clause (b) was not attracted in the petitioners' cases as, on the facts which are not in dispute, none of them started officiating continuously in a senior post from a date earlier than the date on which any of the direct recruits — respondents 3 to 14—so started officiating. The expression "officers recruited to the Service in accordance with Rule 7 of those Rules", meaning thereby Rule 7 of the Recruitment Rules, has got to be given the meaning which I have explained above to cover the cases of respondents 3 to 14 who were recruited before coming into force of the Recruitment Rules, 1954, otherwise there will be no express rule in the Regulation of Seniority Rules for fixation of Seniority of the officers appointed after 8-9-1954 in relation to those appointed before that date. The second proviso to Clause (b) of sub-rule (3) of Rule 3 of the Regulation of Seniority Rules will govern the cases of the petitioners in so far as the period of their continuous officiation in a senior post from 28-12-1954 to 26-12-1955 is concerned. In view of the principle of law laid down by the Supreme Court in Civil Appeal No. 2162 of 1968 decided on 11-4-1969 = (reported in AIR 1969 SC 1249) the Ad Hoc List prepared in consultation with, and approval of, the Union Public Service Commission on 28-12-1954 in so far as the petitioners are concerned, cannot be taken to be a Select List, even assuming such an ad hoc List prepared in respect of those found suitable for promotion to the Service, a point which was not decided in the Orissa case, could be held to be a Select List within the meaning of appointment by promotion Regulations. In case of the petitioners, even the Ad hoc List prepared had found them fit to hold in an officiating capacity Indian Administrative Service Cadre post; in other words, it was a fit for trial list. Neither Mr. Daphtary nor any other learned Counsel appearing for the petitioners contended otherwise.

46. The question, however, is whether the petitioners' period of officiation in a senior post prior to their inclusion in the Select List prepared on 26-12-1955 can be said to have been approved by the Central Government in consultation with the Union Public Service Commission within the meaning of the second proviso to Rule 3 (3) (b) of the Regulation of Seniority Rules. It is only then that they can be said to have officiated continuously in a senior post prior to 26-12-1955, not otherwise. It is to be remembered that the period of officiation in a senior post by a promoted officer after the inclusion of his name in the Select List but before he is appointed to the Service under Regulation 9 of the Appointment by Promotion Regulations did not require the approval of the Central Government. The first proviso to clause (b) of sub-rule (3) of R. 3

provides for a situation which is not covered by Clause (b). The second proviso cuts down the period of officiation either under Clause (b) or under the first proviso to that period only which has been approved by the Central Government in consultation with the commission, if the said period relates to a date prior to the inclusion of the name of the promoted officer in the Select List. In D. R. Nim v. Union of India, AIR 1967 SC 1301 while considering the identical provisions of the Rules and Regulations of the All India Public Service, Sikri, J., said at page 1303 (column 1)—

"The second proviso limits the operation of the first proviso by dividing the officiating period into two classes: first, a period before the date of inclusion of an officer in the Select List, and secondly, the period after that date. The first period can only be counted if such period is approved by the Central Government in consultation with the Commission."

This case has been followed in the Orissa Case, (Civil Appeal No. 2162 of 1968 decided on 11-4-1969 = (reported in AIR 1969 SC 1249) and it has been said—

"...the object of the second proviso is to cut down the period of officiation which would be taken into consideration under Rule 3 (3) (b)."

In my opinion, Mr. C. B. Agarwala, on the basis of the aforesaid two decisions of the Supreme Court was right in his submission that the word 'deemed' in the second proviso refers to the period of officiation as approved by the Central Government. Even though the actual period of officiation in a senior post before the inclusion of the name of the promoted officer in the Select List may be longer, the promoted officer will get advantage only of such period as has been approved by the Central Government in consultation with the Commission. Thus, by a legal fiction he will be deemed to have officiated continuously in a senior post for that period only. It does not mean that a post which is not a senior post as defined in Clause (g) of Rule 2 of the Regulation of Seniority Rules will be deemed to be a senior post merely because continuous officiation in such a post has been approved by the Central Government in consultation with the commission. But, I shall presently show, the same result will follow by a different process of reasoning.

47. When the relevant Rules and Regulations were framed in 1954-55, some confusion cropped up in relation to the definition of the cadre post or a senior post. Experience made the Government wiser, and by subsequent amendments the confusion or the defect, if any, which was there has been removed. I have already stated that in Clause (b) of Rule 2 of the Indian Civil Administrative Cadre Rules, 1950 'Cadre post' meant any duty post included in the

Schedule; it was not confined to the senior cadre posts only as mentioned in item 1 or 2 of the Schedule. In the Indian Administrative Service (Cadre) Rules, 1954, as they stood prior to the amendment, the expression 'cadre post' meant any of the posts specified as such in the Regulations made under sub-rule (1) of Rule 4. The Fixation of Cadre Strength Regulations, 1955 specified in the Schedule to those Regulations the posts borne on, and the strength and composition of, the cadre of the Indian Administrative Service of the various States. These Schedules have been amended from time to time. But what I want to point out is that in the Schedule appertaining to each State are mentioned not only the senior cadre posts but also the Junior ones. The definition of 'Cadre post' given in the Cadre Rules, 1954 was amended by a notification dated the 5th April, 1966 and thereafter it meant any of the posts specified under Item 1 of each cadre of the Schedule to the Fixation of Cadre Strength Regulations, 1955, that means the senior posts only under the State Government. Under Rule 9 of the cadre Rules a cadre post in a State could be filled up by a person who was not a cadre officer under certain circumstances and for a limited period enumerated in the said rule. Regulation 8 of the Appointment by Promotion Regulations provides that a member of the State Civil Service after his name is included in the Select List can be appointed to a cadre post in accordance with the provision of Rule 9 of the Cadre Rules. Such officiation in the senior cadre post undoubtedly can be counted for the purposes of determining the seniority of the promoted officer when he is finally appointed to the Service from the Select List under Regulation 9 of the Appointment by Promotion Regulations. It was rightly urged on behalf of the Union of India and respondents 3 to 14 that a member of the State Civil Service could be appointed to the Indian Administrative Service only by his appointment to a senior post because he is appointed against the promotion quota of the senior cadre posts only. It was further pointed out on their behalf that under Rule 9 of the Pay Rules, 1951 no member of the Service can be appointed to a post other than a post specified in Schedule III unless the State Government concerned in respect of post under its control or the Central Government in respect of post under its control, as the case may be, makes a declaration that the said post is equivalent in status and responsibility to a post specified in the said Schedule.

Out of Schedule III, we are concerned with group B. in these cases, which relates to posts carrying pay in the senior time-scale of the Indian Administrative Service under the State Governments including posts carrying special pay in addition to pay in the time-scale. Rule 3 of the Pay Rules prescribes the time-scales of pay

on Junior scale as also on Senior Scale. I shall advert to these provisions of the Pay Rules a bit later after I have discussed the main contentious question with reference to the definition of 'senior post' given in Cl. (g) of Rule 2 of the Regulation of Seniority Rules.

48. According to the definition, as it stood at the relevant time, 'senior post' meant a senior cadre post under the State Government or "any post declared equivalent thereto by the State Government concerned". No mode was prescribed for declaring a post equivalent to the senior cadre post nor was it indicated at what time the post was to be declared equivalent whether it could be declared only prospectively or it could be so done retrospectively or, to be more accurate, retroactively. It created some confusion or it might have given a long handle to State Government to show favour to the promoted officers by declaring any post equivalent to a senior cadre post for the purpose of giving undue weightage to the promoted officers in the matter of seniority in relation to the direct recruits. It seems to me that this led to a drastic amendment of the definition of 'senior post' which, as it stands now after the 17th April, 1967, means a senior cadre post under the State Government and includes a post included in the number of posts specified in items 2 and 5 which are also senior posts in the Schedule to the Fixation of Cadre Strength Regulations and the posts added to the cadre under the second proviso to sub-rule (2) of Rule 4 of the Cadre Rules, 1954. The amendment has completely done away with the power of the State Government to declare any post equivalent to a senior cadre post. Not only that, by the same Notification of amendment dated 17-4-1967, second proviso to Rule 3 (3) (b) has been deleted and in its place a new Explanation as no. 1 has been introduced, whereunder the period of continuous officiation of a promoted officer in a senior post shall, for the purposes of determination of his seniority, count only from the date of his inclusion of his name in the Select List, or from the date of his officiating appointment to such senior post whichever is later.

49. But fortunately for the petitioners and unfortunately for respondents 3 to 14 we are concerned in these cases with the definition of senior post as it stood at the relevant time before the amendment. To my mind, if the power of the State Government of declaring any post equivalent to a senior cadre post as envisaged under cl. (g) of R. 2 of the Regulation of Seniority Rules is to be interpreted to mean a prospective declaration only, such an interpretation will rob the power of the main purpose for which it was conferred at the nascent stage of the Service wherein members of the State Civil Service were allowed to enter by promotion after giving them some weightage in the mat-

ter of seniority by striking out a just balance between the conflicting claims of the direct recruits and the promotees in respect of inter se seniority, as observed by the Supreme Court in paragraph 21 at page 760 in the case of *Boddu Venkatakrishna Rao v Smt. Boddu Satyavathi*, AIR 1968 SC 751. Such a power of declaring any post equivalent to a senior cadre post is not to be found in Indian Civil Administrative (Cadre) Rules, 1950 nor was any similar rule shown to us which governed the field before 8-9-1954 when the Regulation of Seniority Rules, 1954 came into force. The question of assignment of the year of allotment to a promoted officer cropped up only when he was appointed to the Service and not before. The question of declaring a post held by the promoted officer before his promotion equivalent to a senior cadre post did not arise or in any event such declaration was not necessary before his promotion and appointment to the Service. It was only after his appointment that the State Government could feel the necessity to declare that the post held by the promoted officer before his appointment to the Service was a post equivalent to the senior cadre post. If the declaration related to a period after the inclusion of the name of the officer in the Select List, no check by approval of the Central Government was provided for. But if it related to a period prior to that, a check was provided for under the second proviso to clause (b) of sub-rule (3) of Rule 3.

If the Central Government considered the declaration by the State Government of a post equivalent to a senior cadre post as mala fide, unjustified or unreasonable, it could withhold its approval of the period of officiation in the allegedly senior post prior to the date of inclusion of the name of the officer in the Select List. But if it gave its approval on a consideration of the materials placed before it, as, I shall presently show, was done in these cases, it is not correct to say as has been said later by the Central Government in its impugned order that the State Government had no power to declare a post equivalent to a senior cadre post retrospectively. Almost all the petitioners continued in the same post even on appointment to the Service which they were holding on 28-12-1954. In view of the provision contained in Rule 9 of the Pay Rules, Mr. C. B. Agarwala had to concede that those posts, although they were not added to the cadre of senior post in the Schedules to the Fixation of Cadre Strength Regulations, had to be taken as senior posts and the officers concerned were entitled to the senior time-scale of pay under Rule 3 of the Pay Rules read with Rule 9. Learned Counsel, however, contended that under Rule 9 of the Pay Rules a prior declaration has to be made before a member of the Service is appointed to a post other than that specified in Schedule III but he had to concede that if due

to a mistake a member of the Service is appointed to a post other than the post specified in Schedule III, the mistake can be rectified by a subsequent declaration and the member of the Service cannot be made to suffer in regard to his pay, etc., for the said mistake. I am, therefore, inclined to think that the declaration of the posts held by the petitioners as equivalent to senior cadre posts made by the State Government was in one sense a declaration of an existing fact which existed on 28-12-1954 or in another sense, preferably in that the declaration clothed the said posts with the status of a senior post within the meaning of clause (g) of Rule 2 of the Regulation of Seniority Rules retrospectively. The effect of the declaration was not retrospective in the sense that by a legal fiction the fact of declaration was pushed back to an anterior date but it had a retro-active effect in the sense that the declaration when made clothed the post with the character of a senior post from an anterior date. Such a declaration in relation to a particular post, undoubtedly, could inure to the advantage of a direct recruit also for the purpose of finding out the date of his officiation in a senior post, if that post was held by him.

50. It would appear from the facts stated in *Shri M S Rao's* letter dated the 9th July, 1958 as also in various other annexures and affidavits filed in these cases on the basis of which a statement was prepared by learned Counsel for the Union of India showing the posts held, periods and upgradation orders issued by the State Government, that correspondence started between the Government of Bihar and the Central Government as soon as petitioners Mishra, Abbas and Mandal were appointed to the Service on 26-12-1955. The correspondence related to the fixing of the date of officiation in a senior post. The Government of India in its letter dated the 14th August, 1956 written by *Shri Prabhakar Rao* agreed to the date of officiation in senior Indian Administrative Service scale and consequently in a senior post as 28-12-1954, 15-8-1955 and 1-10-1955 respectively in the cases of the said three petitioners. In *Shri M. S. Rao's* letter of the 9th July, 1958 recommendations were made to the Central Government for accepting the date of officiation in senior Indian Administrative Service scale in cases of all the petitioners from 28-12-1954. One of the points made out on behalf of the respondents was that this recommendation was only for fixation of the date of officiation in senior Indian Administrative Service scale and not in a senior post.

In my opinion, throughout the letter, it would be noticed, fixation of the date of officiation in senior Indian Administrative Service scale was meant for fixation of date of officiation in a senior post for the purpose of determining the relative seniority of the promoted officers vis-a-vis the direct recruits.

In this connection, I may pointedly refer to the statement in paragraph 10 of the letter—

"The Government of India have already recognised the period of officiation in senior posts of some of these officers the details of which are given in Annexure 'A' to this letter."

In Annexure 'A', however, in the third column the heading was—

"Date of officiation in senior I. A. S. scale as agreed by Government of India."

And, as against this heading, the three dates with reference to petitioners Mishra, Abbas and Mandal were shown as already alluded to. The case made out in the letter of the State Government dated the 9th July, 1958 in substance was like this. Under sub-paragraph (2) of Paragraph 14, Appendix 6 of Bihar Service Code if the post of a Deputy Secretary to Government, which was not a cadre post, "is held by an officer of the Indian Administrative Service or a Deputy Collector whose name is on the current waiting list for District Magistrates or who would have otherwise been appointed as a District Magistrate the post shall pay in the senior scale of the Indian Administrative Service plus a special pay of Rs. 150/-." The clear view of the State Government expressed in the letter of the 9th July, 1958, was that to all intents and purposes and in substance the ad hoc List prepared with the approval of the Union Public Service Commission on 28-12-1954, in which the names of the officers belonging to the State Civil Service had been included, had the effect of a waiting list for District Magistrates entitling the said officers to get pay in the senior scale of the Indian Administrative Service plus a special pay of Rs. 150/- if they were holding the post of a Deputy Secretary to the Government. Many of the petitioners were holding such posts on 28-12-1954. Some who were senior to them were holding special post and they could not be debarred from reaping the advantage of the said provision in the Bihar Service Code. That being so, the recommendation was that all those officers should get "the benefit of officiation in the senior scale for purposes of seniority with effect from the date on which their name was included in anyone of the lists which are equivalent to, in fact, covered by the term 'waiting list for District Magistrate.'" In my opinion, reading the letter of the State Government as a whole, it would be noticed that it had the effect of declaring the posts held by the petitioners on 28-12-1954 as senior posts within the meaning of clause (g) of Rule 2 of Regulation of Seniority Rules. The declaration in unequivocal or express language is not to be found in the letter of the State Government because the period of officiation commencing from 28-12-1954 as suggested by the State Government required the approval of the Central Government. Letters in express language to that effect were written to the Accountant-General, Bihar, in the

subsequent years 1959, 1960 and in some other years, too, as would appear from annexures D/2 and D/3 to the counter-affidavit of respondents 3 to 8 in C. W. J. C. 853 of 1968 as also from various other annexures as mentioned in the statement given by learned Counsel for the Union of India. It would appear from that statement that such letters were written to the Accountant-General as and when approval was accorded by the Central Government. The question of writing such letters in express language to the Accountant-General, it seems to me, arose because his office, as usually known, being too technical would not sanction the payment in the senior scale for a Senior Post without an express or unequivocal declaration to that effect by the State Government. For the purpose of determination of seniority, however, the letter written by the State Government in the language in which it was couched by Shri M. S. Rao in view of the law not being very clearly provided in cl. (g) of Rule 2 of the Regulation of Seniority Rules had the effect of declaring the posts held by the petitioners as senior posts. That it was so understood by the Central Government will be clear from its letter dated 3-9-1958, a copy of which is Annexure 2 to the writ application in C. W. J. C. 854 of 1968. While according sanction to the proposal of the State Government contained in its letter dated the 9th July, 1958 the Central Government said in regard to the petitioners and a few others that it accepts the recommendation of the State Government, "who may be finally allotted to the year 1948 and placed below Shri B. B. Shrivastava, I. A. S. (1948 R. R.)". In regard to Shri Nageshwar Prasad Sinha, another officer who is not a petitioner in these cases, it was stated in the letter aforesaid of the Central Government that "he may be allowed to count for the purpose of seniority his officiation in equivalent post" from the 24th December, 1955. I fail to understand the argument put forward on behalf of the respondents that the Central Government was made to accord its approval by misrepresentation of facts by the State Government or by any wrong statement. In any event, this is not the ground mentioned in the review order under challenge in these cases passed in the year 1967. The only ground mentioned in the said order, as I read it, is that since the Central Government had been advised that there could be no retrospective declaration of a senior post under Rule 2 (g) of the Regulation of Seniority Rules, it proposed to revise the order of allotment and to fix the same with reference to the dates of substantive appointment to the Service. It may, however, be pointed out here, as I have already stated, that most of the petitioners continued to hold the same posts even after their appointment to the Service, which they were holding on 28-12-1954. It would appear from the statement supplied by the learned Counsel for the

Union of India on the basis of the materials in these cases that petitioner Mishra, apart from holding the post of Deputy Secretaries — either cadre or non-cadre, was holding the post of the Chairman, Patna Improvement Trust, on 28-12-1954 which post he was holding from before and continued to hold until 13-2-1958. Similarly, petitioner Abbas held the post of Development Training Officer, Administrative School, on 28-12-1954 and held it until 27-12-1956. Petitioner Mandal was Director of Rehabilitation and Development, Damodar Valley Corporation, on 28-12-1954 and held it up to 4-6-1956. Petitioner R. C. Sinha was Secretary to the Chief Minister on 28-12-1954 and continued to be so till May, 1958. Petitioner S. Sahay was Deputy Secretary, Revenue Department on 28-12-54 and continued as such till the date of his appointment to the service. Petitioners Ramnand Sinha and S. K. Ghosh were Additional Deputy Secretaries to the Government of Bihar on 28-12-1954 and continued to be so until their appointment to the Service or shortly thereafter. It would bear repetition to say that such posts as were held by many of the petitioners on 28-12-1954 became senior posts from the date of their appointment to the service as conceded to by Mr. C. B. Agarwala, learned Counsel for the Union of India, with reference to Rule 9 of the Pay Rules. It would be highly unjust and illogical to hold that the posts which the petitioners were holding on 28-12-1954 could not be declared to be senior posts within the meaning of Rule 2 (g) of the Regulation of Seniority Rules, even though in substance the declaration was made in the letter of the State Government dated the 9th July, 1958, and in express language in letters written subsequently to the Accountant-General. In my opinion, on a wrong view of the law the Central Government has revised its previous order. In any event, in the confused state of law, as it existed at the relevant time, it is difficult to find that the order of the Central Government made in the year 1958 was such as could justify its revision 9 years later.

51. Apropos the strenuous argument put forward on behalf of the respondents that the approval given by the Central Government in its letter dated 3-9-1958 for the period of officiation of the petitioners in senior posts before inclusion of their name in the Select List was invalid as it was in violation of the mandatory requirement of the second proviso to Rule 3 (3) (b) of the Regulation of Seniority Rules inasmuch as the approval was accorded without the consultation with the Union Public Service Commission, I would lay stress on the fact that neither in the impugned order nor in any of the counter-affidavits filed on behalf of the respondents there is a clear statement of fact that the approval was accorded by the Central Government without such consultation. Even assuming it was so, the failure on the part of the Central Government to perform its duty of con-

sulting the Commission before according the approval will not invalidate the order made in favour of the petitioners. The requirement of the approval by the Central Government under the proviso aforesaid is undoubtedly mandatory. But the requirement of the Central Government to consult the Commission before according the approval cannot be held to be mandatory so as to result in the nullification of the approval given in breach of the said requirement. I don't think that inclusion of the petitioners' name in the ad hoc List with the approval of the Commission had, in any manner, the effect of approval of the period of officiation in question by the Central Government in consultation with the Commission. The two types of consultation were different and distinct; one could not take the place of the other. I am, however, inclined to think that in the state of law as it existed in the years 1954 to 1958 the Central Government might not have thought it necessary to consult the commission for according its approval to the period of officiation of the petitioners in senior posts when the period proposed by the State Government was to commence only from 28-12-1954 the date when the petitioners' name had been included in the Ad hoc List with the approval of the Commission. It may well be that the Central Government thought that to all intents and purposes the Ad hoc List was in substance the select List and for according approval to the period of officiation in a senior post from that date it was not quite necessary to consult the Commission. Whatever might have been the cause of the failure, if any, of the Central Government to consult the Commission, it is clear that the alleged failure cannot entail the nullification of the order made by the Central Government in favour of the petitioners in the year 1958.

Petitions allowed.

AIR 1970 PATNA 432 (V 57 C 78)

FULL BENCH

MISRA, C. J., N. L. UNTWALIA AND G. N. PRASAD, JJ.

Madan Mohan Prasad and others, Petitioners v. Government of Bihar and others, Respondents.

Civil Writ Judn. Case No. 183 of 1968, D/- 26-9-1969.

(A) Civil Services — Bihar Superior Judicial Service Rules (1946), Rule 16 (e) — Expression "may have been allowed to officiate continuously" — Interpretation — Expression means actual and continuous officiation and not fictional or notional one — Seniority cannot be given to promoted officer on basis of notional or fictional officiation. (Para 13)

EN/FN/C191/70/DVT/M

(B) Civil Services — Bihar Superior Judicial Service Rules (1946), Rule 16 (e) — Seniority — Determination of — Officer working on special post — Upgradation of post — Effect — Officer is deemed to have officiated in promoted post from date of upgradation — Recourse to upgradation of post — It is valid if done without violating any law or principle. (Para 14)

(C) Civil Services — Bihar Superior Judicial Service Rules (1946), Rule 3 (2) — Amendment of Schedule appended to Rules — Upgradation of post — Amounts to amending Schedule — Can be done retrospectively — Publication in Gazette is not necessary. (Paras 15, 17)

(D) Constitution of India, Article 309, Proviso — Framing of rules — Power of authority under Proviso — Can be exercised both prospectively and retrospectively in absence of appropriate legislation. AIR 1969 SC 118, Foll. (Para 15)

(E) Constitution of India, Article 166 (1) — Conduct of Government business — Officer working on special post — Upgradation of that post — Order need not be expressed in the name of Governor. AIR 1964 SC 1823, Foll. (Para 17)

(F) Constitution of India, Article 233 — Appointment of District Judges — Post of Additional District and Sessions Judge although not subordinate to, is of grade lower than that of District and Sessions Judge — Vacancy in post of District Judge cannot be equated with vacancy in post of Additional District Judge. (Para 20)

(G) Constitution of India, Articles 233, 235 — Appointment of District Judges — Power vests in Governor — Prior consultation with High Court necessary:

On harmonious construction of Articles 233 and 235 it is clear that appointment of persons to be and the posting, meaning the first posting on such appointment and promotion of District Judges which expression includes Additional District Judges in any State, is within the power of the Governor who has to exercise that power in consultation with the High Court. Apart from these three matters the entire control over District Courts or Courts subordinate thereto vests in the High Court. Clause (1) read with clause (2) of Article 233 clearly suggests that appointment to the Superior Judicial Service can be from two sources, namely, Subordinate Judicial and the Bar as envisaged by the second clause. (Case law discussed).

(Para 23)

(H) Constitution of India, Articles 235, 162 — Control over Subordinate Courts — Seniority of officers employed in State Judicial Service — Determination of — Power vests solely in High Court — Exercise of power is subject to Rules framed under Article 309 — State Government cannot fix seniority in

exercise of power under Article 162 as it is subject to power under Article 235.

(Paras 24, 28, 30)

(I) Constitution of India, Article 233 — Word "posting" — Meaning of.

'Posting' means assignment of job and in common parlance it means giving of a post to a person appointed and the place of first posting, it cannot mean a place in the gradation list which has got to be determined in accordance with the Rules. (Para 30)

Cases Referred: Chronological Paras

- (1970) AIR 1970 SC 385 (V 57) = Civil Appeals Nos. 942 and 943 of 1966, D/- 28-7-1969, I.-T. Officer v. M. C. Ponnose 16
- (1969) AIR 1969 SC 118 (V 56) = 1968-3 SCR 575, B. S. Vadera v. Union of India 15, 16
- (1969) AIR 1969 Punj and Har 257 (V 56) = 1969 Lab IC 958, Suresh Kumar v. Union of India 16
- (1968) AIR 1968 SC 647 (V 55) = 1968-2 SCR 154, State of Orissa v. Sudhansu Sekhar Misra 26
- (1968) AIR 1968 Ker 17 (V 55) = 1967 Ser LR 298 (FB), C. K. Madhavan Nair v. Registrar, High Court of Kerala 16
- (1968) AIR 1968 Ker 42 (V 55) = 1967 Ser LR 553 (FB), Hari Haran Pillai v. State of Kerala 16
- (1968) AIR 1968 Ker 158 (V 55) = ILR (1967) 2 Ker 355 (FB), N. Srinivasan v. State of Kerala 27
- (1967) AIR 1967 SC 903 (V 54) = 1967-1 SCR 454, State of Assam v. Ranga Mohd. 26
- (1966) AIR 1966 SC 447 (V 53) = 1966-1 SCR 771, State of W. B. v. Nripendra Nath Bagchi 25
- (1966) AIR 1966 SC 1987 (V 53) = 1967-1 SCR 77, Chandramohan v. State of U. P. 23
- (1964) AIR 1964 SC 1823 (V 51) = 1964-6 SCR 368, R. Chitralekha v. State of Mysore 17
- (1963) AIR 1963 SC 395 (V 50) = 1962 All WR (HC) 746, Bachhitar Singh v. State of Punjab 17
- (1962) AIR 1962 SC 1704 (V 49) = 1963-1 SCR 437, High Court, Calcutta v. Amal Kumar Roy 23
- (1962) AIR 1962 All 328 (V 49) = ILR (1962) 1 All 793 (FB), Ram Autar Pandey v. State of U. P. 16
- (1961) AIR 1961 SC 816 (V 48) = 1961-2 SCR 874, Rameshwar Dayal v. State of Punjab 23
- (1959) AIR 1959 SC 65 (V 46) = 1959 SCR 1424, Chaikomall and Sons v. State of Delhi 17
- (1952) AIR 1952 SC 181 (V 39) = 1952 Cri LJ 955, D. M. Pangurkar v. State of Bombay 17
- (1952) AIR 1952 SC 317 (V 39) = 1952 Cri LJ 1269, State of Bombay v. Purushottam Jog Naik 17.

- (1951) AIR 1951 SC 467 (V 38) =
1952 SCR 110, *Harla v. State of Rajasthan* 18
(1945) AIR 1945 Nag 218 (V 32) =
ILR (1945) Nag 762, *Babulal v. King Emperor* 18
(1944) AIR 1944 Nag 40 (V 31) =
ILR (1944) Nag 150, *Shakoor v. Emperor* 18
(1918) 1918-1 KB 101 = 87 LJKB 122, *Johnson v. Sargant* 18

Basudeva Prasad, Amla Kant Choudhury, Tarkeshwar Dayal, Karuna Nidhan Keshav, Revinandan Sahai, Narendra Prasad and Mrs. Sudha Rai Jayaswal, for Petitioners, M. C. Chagla, S. Sarwar Ali and Uday Pratap Singh (for State), J. C. Sinha, Lakshman Saran Sinha and Janardan Pd Singh, (for Respondent No. 2) and K. P. Verma and Bindabasinini Pd. Sinha, (for Respondent No. 4), for Respondents.

UNTWALIA, J.— This is an application under Article 226 of the Constitution of India, which involves the question of determination of seniority of the petitioners vis-à-vis respondents 2 to 4, the first respondent is the Government of Bihar. It also raises an important constitutional question as to whether the State Government are competent to determine the seniority of an officer belonging to the Superior Judicial Service (hereinafter called the Service) or whether it is within the competence and power of the High Court to take a final decision on their administrative side in that regard.

2. There are three petitioners in this writ application. Their case is that three vacancies in the post of Additional District and Sessions Judges occurred between 1958 and 31st of January, 1959. On the 14th of March, 1959 respondent No. 1 advertised the said three posts borne on the cadre of the Service to be filled up by direct recruitment from the Bar in accordance with Rule 5 (a) of the Bihar Superior Judicial Service Rules, 1916 (hereinafter called the Rules). On or before the 31st of March, 1959 the petitioners along with some others applied for being appointed to the posts. Eventually they were so appointed on 21-4-1960. They were confirmed in the posts of Additional District and Sessions Judge in April, 1961. Their case further is that respondents 2 & 3 were never promoted from the post of Sub-Judge which they were holding substantively to the post of Additional District and Sessions Judge according to law and although there was no vacancy in any such post on the 17th of June, 1959, the Government of Bihar by their order dated the 6th of September, 1960, a copy of which is Annexure 'D' to the writ application, which order was never published in the Bihar Gazette, purported to upgrade the post of the Deputy Registrar of the Patna High Court, which post Shri Chandrika Prasad Sinha, respondent No. 2, was holding and that of the Secretary, Bihar Legislative

Assembly, which post was held by Shri Enayetur Rahman, respondent No. 3, retrospectively with effect from the 17th of June, 1959, till those posts were held by them.

The intention of the said upgrading was to indirectly confer seniority on respondents Nos 2 and 3 by giving them fictitious officiation in a post in the service for the purpose of placing them in a more advantageous position than that of the petitioners in the matter of promotion and other service benefits. The said upgrading was done even in contravention of the recommendation of the Patna High Court, which was only for a limited upgrading of the said posts for a short period of 3 months 14 days, i.e., from the 17th June to 1st October, 1959, purely in fulfilment of the requirements of the 'next below rule' as Shri Jitendra Narain, respondent No. 4, started officiating in a temporary leave vacancy in a post of Additional District Judge from the 17th of June, 1959.

When respondent No. 2 was appointed as District and Sessions Judge on 25-4-1961, the petitioners felt surprised on their apparent supersession by respondent No. 2. On inquiries they learnt towards the end of August, 1961, that respondents 2 and 3 had somehow been treated as senior to them and that the seniority list of the Service had also been altered by placing respondents 2 and 3 over the petitioners. A true copy of the seniority list is Annexure 'E' to the writ application.

3. The petitioners' case proceeds further thus. They also came to know that respondent No. 4 who had been appointed as Additional District Judge on the 19th of September, 1960 long after the petitioners' appointment and was thus junior to them had made a representation to the Government claiming seniority over them on the ground that respondents 2 and 3 had been allowed retrospective fictional promotion as Additional District Judge with effect from the 17th of June, 1959 even though there was no vacancy in the cadre then.

On the 3rd of September, 1961, the petitioners made representation to the Government both against the aforesaid illegal seniority of respondents 2 and 3 and the seniority claimed by respondent No. 4. In February, 1963, the petitioners came to know that the Government had rejected their representation and they had also illegally decided that respondent No. 4 should be placed above them in the seniority list even though he was to be junior to the petitioners for other purposes of the service. The petitioners' case is that respondent No. 4 was working on the post of a Sub-Judge all along during the relevant period except for the brief period of 3 months 14 days when he had officiated in a temporary leave vacancy from 17-6-1959 to 1-10-1959. He reverted to the post of the Subordinate Judge from 2-10-1959. During the period in question some of his judgments delivered as Sub-Judge were subject-

matter of appeal before the District Judge. The petitioners also state that the Patna High Court had recommended for rejecting the representation of respondent No. 4 for giving seniority to him and the Government's decision is against the recommendation of the High Court.

4. The petitioners attack the order of the State Government contained in their letter dated the 6th September, 1960 (Annexure D), the seniority list (Annexure E) and the decision of respondent No. 1 to place respondent No. 4 also above the petitioners on various grounds which, as formulated by Mr. Basudeva Prasad, learned Advocate for the petitioners, at the time of the hearing of the writ application, may be stated thus —

(i) The seniority list (Annexure E) has been framed in contravention of the provision of law contained in Rule 16 (e) of the Rules.

(ii) The order of the State Government dated 6-9-1960 contained in Annexure 'D' to the writ application as also the order of the State Government dated 24-1-1968, a copy of which is Annexure 'B' to the counter-affidavit of respondent No. 4, giving fictitious officiation with retrospective effect is ultra vires and illegal.

(iii) There was no vacant post of an Additional District Judge available before 1-11-1959 and, therefore, creation of new posts for respondents 2 and 3 by the State Government was ultra vires Article 166 of the Constitution read with Rule 14 (2) of the Rules of Executive Business and Item 3 (c) of the 3rd Schedule appended to the said Rules.

(iv) There was no vacancy available in the post of Additional District Judge for respondent No. 4 in the *promotees'* quota between 1-11-1959 and 19-9-1960.

(v) Respondents 2 and 3 having never been appointed to the substantive post of Additional District Judge in accordance with Rules 5 and 15 of the Rules, their seniority cannot be determined with reference to Rule 16 (e).

(vi) The seniority of respondents 2 to 4 having been fixed without any basis in law and in an illegal and arbitrary manner infringes the fundamental rights of the petitioners in the matter of their employment under Article 16 (1) of the Constitution.

(vii) Under Article 235 of the Constitution, it is the exclusive power of the High Court on their administrative side to promote Subordinate Judges to the posts of Additional District Judge and to determine the seniority of a Judicial Officer; the State Government, as against the decision or recommendation of the High Court, had no power to determine the seniority of respondent No. 4 and give him a place over the petitioners.

5. In pursuance of the rule issued to the respondents, cause has been shown on behalf of the State Government, respondent No. 1, by their learned Counsel Mr. M. C. Chagla.

Mr. J. C. Sinha, appeared for respondent No. 2 and Mr. K. P. Verma, learned Government Advocate, appeared for respondent No. 4; nobody appeared separately for respondent No. 3. All the points urged by Mr. Basudeva Prasad, learned Counsel for the petitioners, were combated by one Counsel or the other. I shall deal with their argument in my judgment while discussing the points involved in the case. But before I do so, it would be convenient to refer to certain facts from the various affidavits filed by the parties and their annexures.

6. In accordance with Rule 3 (1) of the Rules, the strength of the Service which means the Bihar Superior Judicial Service, and the number and character of the posts are as specified in the Schedule to the Rules. Under sub-rule (2) of Rule 3 "the State Government may, from time to time, after consultation with the High Court amend the said Schedule". In March, 1959, when three posts were advertised to be filled up by direct recruitment from the Bar under clause (2) of Article 233 of the Constitution, the sanctioned strength of the Service was—

District Judges	14
Registrar, High Court	1
Secretary, Law Department	1
Total	16
Additional District Judges	18
Deputy Secretary, Law Department	1
Total	19

As mentioned in paragraph 7 of the counter-affidavit filed on behalf of the State of Bihar on 27-2-1968 two posts of Additional District Judge consequent upon the amendment of the Bengal, Agra and Assam Civil Courts Act, 1887, whereby the pecuniary jurisdiction of appeal before the District Judge had been raised from Rs. 5,000 to Rs. 9,999, were created for a period of one year in the first instance and the creation of the posts was approved by the State Government on 5-5-1959. Two temporary posts of Peripatetic District and Sessions Judge were created for a period of two years and the creation of the posts was approved by the State Government on 24-4-1959. On 25-1-1959, however, the Registrar of the High Court wrote a letter to the Chief Secretary of the Government (vide Annexure X/1 to the counter-affidavit of respondent No. 2) that he had been directed to say that a few short-term leave vacancies had occurred in the cadre of the Additional District and Sessions Judges consequent upon four of them proceeding on leave for the periods noted against their names, which varied from 5-2-1959 to 11-7-1959, and as the Sessions file in some districts was getting out of control due to paucity of officers, the Court proposed to fill in the leave vacancies by promotion of Subordinate Judges. Having carefully considered the records of service of the Subordinate Judges due for promotion, the

Court recommended the names of Sarvashri C. P. Sinha, E. Rahman, J. Narain (respondents Nos. 2 to 4) and Sharda Prasad for being promoted to act temporarily as Additional District and Sessions Judges. Since the Courts were engaged in various important administrative works and tackling heavy arrears, the then Hon'ble the Chief Justice desired to retain the services of respondent No. 2 as Deputy Registrar. Since his promotion had become due, it was recommended that he should not be made to suffer any pecuniary loss on account of the fact that he could not be spared. The Court, therefore, recommended that the status and emoluments of the post of the Deputy Registrar should be temporarily upgraded so long Shri C. P. Sinha continued to hold the post and remained eligible to officiate as an Additional District Judge. The next longer vacancy was recommended for Shri E. Rahman who was on deputation in the Bihar Legislative Assembly Department. He was also not being spared from there although he had become due for promotion to the rank of Additional District Judge. The Court, therefore, recommended that either he should be relieved or that the Government may consider the desirability of temporarily upgrading his post till June, 1959. Shri J. Narain was working as Under-Secretary in the Law Department but since the State Government had already agreed to relieve him of the said assignment, he was recommended to be promoted to act as Additional District Judge in the third longer vacancy and posted to Dumka as such. Shri Sharda Prasad was recommended to be promoted to act as Additional District Judge in the fourth vacancy to be posted as Additional Judicial Commissioner, Ranchi, where he was already working as a Subordinate Judge. It's not quite clear from the records of this case as to what happened in cases of other leave vacancies. But what is definite and clear is that Shri J. Narain officiated in a leave vacancy as Additional District Judge at Dumka from 17-6-1959 to 1-10-1959; the lower Courts were closed for the Annual Puja Vacation from 2-10-1959 to 7-11-1959, and the 8th of November, 1959 was a Sunday.

7. The next letter to which a reference is necessary to be made is Annexure X/2 to the counter-affidavit of respondent No. 2. It is dated 17-8-1959. The Registrar of the Court wrote this letter to the Chief Secretary of the Government in reply to latter's letter dated 29-5-1959 to say that there were four vacancies in the cadre of Additional District Judge — two occurring on the appointment of two Peripatetic District Judges for a period of two years and two new posts having been created for Additional District Judges. It seems in pursuance of the Government decision taken on 24-4-1959 and 5-5-1959 referred to in paragraph 7 of the counter-affidavit, a letter was written by the Government to the High Court on the 29th

May, 1959, to fill up the four vacancies. The Court suggested in their letter dated 17-8-1959 the names of four persons to be promoted to act as Additional District Judges until further orders. They were Sarvashri Achyutanand Sahay, Rash Bihari Prasad Sinha, Chandrika Prasad Sinha and Enayetur Rahman. The first two were not found fit on the earlier occasion although they were senior to the latter two. But this time, finding them fit, the Court recommended their names also for promotion. While recommending the names of Sarvashri A. N. Sahay and R. B. P. Sinha to be promoted to act as Additional District Judges in two of the vacancies, in regard to the other two vacancies, the Court's recommendation was that Shri C. P. Sinha and Shri E. Rahman be promoted to act as Additional District Judges, but for the reasons mentioned in Court's letter dated the 25th April, 1959 the posts of the Deputy Registrar of the Court and the Secretary of the Legislative Assembly held by them should be upgraded. In other words, this time the upgrading was suggested not in the leave vacancies but as against the substantive posts till they could be relieved of their special jobs. In the meantime, it was recommended, two more posts of Additional District Judges be created for that period.

8. The State Government sent their reply on 7-3-1960 to Court's letter dated 17-8-1959. Many vacancies, however, occurred during the interval on the retirement of District Judges and appointment of Additional District Judges in their places. The Registrar of the Court, therefore, wrote to the Chief Secretary of the Government on 3-3-1960 (Annexure X/5 to the counter-affidavit of respondent No. 2) even before the receipt of the Government's reply dated 7-3-1960 to their letter dated 17-8-1959, that seven vacancies had occurred on the appointment of seven Additional District Judges as District Judges and one due to retirement of one Additional District Judge between 1-12-1959 and 6-2-1960, and the ninth vacancy was caused by the appointment of Shri M. P. Verma, as he then was, as District Judge of the newly created judgship of Singhbhum, which was created on 4-2-1960. As against these nine posts, recommendations had already been made to the Government to fill five posts — three by direct recruitment from the Bar and two by promoting respondents Nos. 2 and 3, by upgrading their posts as already desired in the Court's letters dated 25-4-1959 and 17-8-1959. The Court had recommended the names of the three persons from the Bar to be appointed as Additional District Judges in their letter dated 1-10-1959. The said recommendation was in regard to the three petitioners. Out of the nine vacancies, five were thus recommended to be filled up.

In regard to the remaining four vacancies, it was stated that the Court had decided that they should also be filled up by direct re-

recruitment. It may be stated here that under Rule 6 of the Rules, of the posts in the cadre of the Service two-thirds were to be filled by promotion and one-third by direct recruitment. The decision of the Court to fill up the remaining four vacancies by direct recruitment had been communicated to the Government in the Court's letter dated 10-2-1960. Even though the vacancies occur earlier, due to practical difficulties, some of which are unavoidable, the recruitment from the Bar takes a long time — sometimes 2 to 3 years. It was, therefore, stated in the letter that the Court did not think it advisable to keep those four posts vacant and proposed to fill them by promotion of Subordinate Judges for the time being as a temporary arrangement so that the work might not suffer; when direct recruitment of officers from the bar would be finalised namely, the four in respect of which yet the advertisement and other formalities had to be gone into, four of the junior officers who might be officiating as Additional District Judges would have to revert for the direct recruits if no fresh vacancies in the cadre would occur in the meantime. The names of four Subordinate Judges thus recommended for promotion were Sarvashri J. Narain (respondent No. 4), Sharda Prasad, Durga Prasad Sinha No. 1 and Bhanu Prakash Pandey. The Court also reminded the Government in their letter dated 21-3-1960 (Annexure X/6 to the counter-affidavit of respondent No. 2) referring to the Court's letter dated 3-3-1960 that although the Court's recommendation for appointment of three Additional District Judges from the Bar were made as far back as in October, 1959 in Court's letter dated 1-10-1959, Government's orders had not been received till then; the delay would very much affect the future career of the Bar Judges, meaning thereby the three petitioners whose names had already been recommended, and not the four who were to be appointed in the last four vacancies out of nine, in the matter of their seniority under Rule 16 (e) of the Rules. The Court, therefore, recommended to the Government that the appointment of the aforesaid three Bar Judges should be made earlier than the appointment of the Service Judges, namely, the four recommended in the Court's letter dated 3-3-1960, so that the interest of the Bar Judges may not be adversely affected. It appears that eventually the notification appointing the petitioners to the three posts was issued on 21-4-1960.

9. The State Government wrote to the Court on 7-3-1960 (Annexure X/3 to the counter-affidavit of respondent No. 2) in reply to the latter's letter dated 17-8-1959. The delay caused — and sometimes unavoidably in correspondence between the High Court and the State Government — at times causes some dislocation in the matter of seniority not generally amongst those who come by promotion but vis-a-vis the direct recruits as their appointment naturally takes a long time.

The Government informed the Court in their letter that Sarvashri A. N. Sahay, and R. B. P. Sinha, Subordinate Judges, had been appointed to act as Additional District Judges against the newly created two posts consequent on the amendment of the Bengal, Agra and Assam Civil Courts Act, 1887. In regard to the Court's recommendation for promotion of Sarvashri C. P. Sinha and E. Rahman to act as Additional District Judges in the chain of appointment of two Peripatetic District and Sessions Judges, they were informed that Sarvashri K. P. Sinha and S. M. Hassan, retired District and Sessions Judges, however, were re-employed as Peripatetic District and Sessions Judges with effect from the 15th February and 1st February, 1960. There were other vacancies from earlier dates, for which recommendation of the Court was awaited. The Court was, therefore, requested to suggest the dates from which and the vacancies against which Sarvashri C. P. Sinha and E. Rahman were then proposed to be promoted to act as Additional District Judge so that steps for upgrading of the posts of the Deputy Registrar of the Court and the Secretary, Bihar Legislative Assembly Department, could be taken on receipt of the Court's reply.

It may be made clear here that two posts of Peripatetic District and Sessions Judges had been added to the cadre in May, 1959 but the posts could be filled up only in February, 1960 by re-employment of the two retired District and Sessions Judges. Although the Court, in substance and in effect, had already complied with the request made by the State Government in their letter dated 7-3-1960 when the former had written their letter on 3-3-1960, the formal reply to the letter dated 7-3-1960 was sent by the Court on 10-5-1960 (vide Annexure X/4 to the counter-affidavit of respondent No. 2). In this letter it was pointed out that nine vacancies had occurred in the posts of Additional District and Sessions Judge from 9-11-1959 to 6-2-1960, eight on the appointment of the Additional District Judges to the post of District Judges and one on the retirement of an Additional District Judge. In this letter, therefore, the Court stated that Shri C. P. Sinha and Shri E. Rahman should be appointed to act as officiating Additional District Judge against any two of the nine vacancies which had occurred in the cadre of the Additional District and Sessions Judges from a date with effect from which their posts were upgraded. The Court also reiterated their request made in their letter dated 17-8-1959 that two temporary ex-cadre posts of Additional District Judges may be sanctioned at an early date for a period until Sarvashri C. P. Sinha and E. Rahman continue to hold their respective posts, meaning thereby the posts of the Deputy Registrar of the Court and the Secretary, Legislative Assembly Department.

10. In this background, I shall now refer to the impugned order of the State Government contained in their letter dated 6-9-1960 (Annexure D to the writ application) to the Accountant-General, Bihar. The first paragraph of this letter reads as follows:—

"I am directed to say that the State Government have been pleased to upgrade the posts of Deputy Registrar, Patna High Court and Secretary, Bihar Legislative Assembly Secretariat held by Sarvashri Chandrika Prasad Sinha and Enayetur Rahman respectively in the rank and scale of pay of the Additional District and Sessions Judge with effect from the 17th June, 1959 till posts are held by them."

It is manifest that the Under-Secretary to the Government, who wrote the above letter, communicated the order of the State Government to the Accountant General that they have been pleased to upgrade the two posts held by respondents Nos 2 & 3 in the rank and scale of pay of Additional District and Sessions Judge with effect from the 17th June, 1959, till posts were held by them. I may dispose of two short points here. During the course of argument, Mr Basudeva Prasad endeavoured to show that there was no order of the State Government made in accordance with the procedure prescribed by the Rules of Executive Business. In reply Mr M. C. Chagla, learned Counsel for the State, informed us that the order had been passed by the State Government after the matter was placed before, and considered by, the Council of Ministers as required by the Rules of Executive Business. But since this point was not taken in the petition, no specific reference has been made in the counter-affidavit of the State that the order had actually been passed in accordance with the Rules of Executive Business. We did not feel inclined to pursue this matter as we felt satisfied that the question of fact not having been specifically raised by the petitioners did not require any investigation. The second point which I would like to dispose of here is that it is not correct to say that the High Court had recommended the upgrading of posts held by respondents Nos. 2 and 3 for a limited period of 3 months 14 days, i.e., from 17-6-1959 to 1-10-1959. Even assuming it was possible to take this view, on the wordings of the letter dated 25-4-1959 written by the Registrar of the Court, it is abundantly clear that the recommendation made later in the subsequent letters was for upgrading the posts till they were held by respondents 2 and 3. The Government's order contained in Annexure D and extracted above is clear enough in that regard. The question as to whether it could take effect from the 17th June, 1959 will be discussed hereinafter.

11. It is undisputed that respondent No. 4 reverted to, worked on, the post of the Subordinate Judge from 2-10-1959 until he was

appointed Additional District Judge in the substantive vacancy on 19-9-1960.

12. It would appear from the Supplementary Affidavit filed on behalf of the State of Bihar on 20-11-1968 that respondent No. 4 made a representation to the State Government on 10-4-1961 praying for fixation of his seniority just below Shri E. Rahman in the cadre of Additional District Judges and allowing him seniority with effect from 1-11-1959. Two other representations dated 21-10-1961 and 3-8-1961 were also filed by the said respondent No. 4. The matter remained pending before the High Court and the Government were informed of their opinion in their letter 20-8-1961. The Court recommended the rejection of the representations. The State Government finding themselves not in a position to agree with the opinion expressed by the Court wrote back on 5-8-1965 requesting the Court to reconsider the matter. The Court in their letter dated 18-1-1966 informed the Government that they did not see any reason to reconsider their previous view. The matter was again thoroughly examined by the Government and then eventually the order was made on 24-1-1968 in favour of respondent No. 4 by the State Government. A copy of this order is contained in Annexure B to the counter-affidavit of respondent No. 4 filed on 27-9-1968. It is better to quote the order of the State Government contained in the letter dated 24-1-1968 written by the Under-Secretary to the Registrar of the High Court —

"I am directed to refer to your letter No. 501 dated 18-1-1966 on the subject noted above and to say that after a careful consideration of the case of Shri Jitendra Narain at present District and Sessions Judge of Dhanbad, the State Government have been pleased to decide that Shri Narain shall rank immediately below Shri Enayetur Rahman and above Sarvashri Madan Mohan Pd., Rameshwar Pd. Sinha and Chandra Shekhar Prasad Singh, the direct recruits from the Bar in the cadre of the Superior Judicial Service, and for this limited purpose, he will be deemed to have been officiating as Additional District and Sessions Judge with effect from 1st November, 1959.

Sri Narain may kindly be informed accordingly."

13. In order to decide various contentious questions raised in this writ application, it is first necessary to refer to certain other provisions of the Rules. Rule 4 says—

"Every post in the cadre of the service shall be filled by a person —

x x x x x

(iii) who is appointed a member of the Bihar Superior Judicial Service under R 5."

Rule 5 provides for appointment to the Service by direct recruitment or by promotion from amongst the members of the Bihar Civil Service (Judicial Branch). Rule 15 says that a member of the Service appointed

by direct recruitment shall be on probation for a period of one year and shall not be confirmed unless he is found to be suitable in every respect for appointment to the Service; but promoted officers appointed against substantive vacancies in the cadre should forthwith be confirmed in the service. Then comes Rule 16 which may, for the sake of convenience, be called the fixation of seniority rule. It does not in term say who will fix or determine the seniority, it merely lays down certain rules for fixation or determination of seniority. Under clause (a) of Rule 16 seniority inter se of direct recruits shall be determined in accordance with the date of their substantive appointment to the Service, and under clause (b) seniority inter se of promoted officers shall also be determined in accordance with the dates of their substantive appointments to the Service. Clauses (c) and (d) relate to the fixation of seniority inter se of direct recruits when appointed at one time and seniority inter se of officers promoted from the Subordinate Judicial Service at one time. In this case there is no dispute, and could not be any, that respondents Nos. 2 and 3 had rightly ranked senior to respondent No. 4, in the post of the Superior Judicial Service. The question relates to the seniority of the petitioners, the three direct recruits, vis-a-vis respondents Nos. 2 and 3 who may be placed in one category and respondent No. 4 whose case, as I shall presently show, is different from that of the other two. The proviso to Rule 16 (e) says that "when a direct recruit and promoted officer are appointed on the same date, the promoted officer shall be senior to the direct recruit." This also is not the position here. We are concerned in this case with the interpretation of the main part of clause (e) of Rule 16 which reads thus:—

"Seniority of direct recruit vis-a-vis promoted officer shall be determined with reference to the dates from which they may have been allowed to officiate continuously, in posts in the cadre of the Service or in posts outside the cadre on identical time-scale of pay and of equal status and responsibility or in posts of higher scale of pay and of higher responsibility in or outside the cadre."

One of the contentious questions raised at the Bar in regard to the interpretation of clause (e) of Rule 16 is as to what is the meaning of the expression "may have been allowed to officiate continuously" occurring in the said clause. Argument on behalf of the State and respondent No. 4 was that a notional, continuous officiation in a post in the cadre of the service or outside it will give preference to the promoted officer in the matter of seniority over the direct recruit provided there were vacancies in which he could or might have been allowed to officiate continuously. I am not prepared to accept this argument. In my opinion, the expression aforesaid means actual and continuous

officiation and not a fictional or notional one. The expression "may have been allowed" must mean "may have been allowed as a fact"; it cannot mean that because of the vacancies being there in the posts a subsequently promoted officer could or might have been allowed to officiate continuously earlier. Such an interpretation would lead to very anomalous, unjust and discriminatory results. As I have said above, it takes a considerable time even after the occurring of a vacancy in the post of the Service in making the appointment by direct recruitment from the Bar. By the time the appointment is finalised, the vacancy against which advertisement is made has to be and is filled up so that the work of the Courts may not suffer. Many other vacancies are likely to occur — and, as a matter of fact, occur before a member of the Bar is appointed to the service. Mr. Chagla also had to concede that such a notional or fictional officiation cannot be made available to a direct recruit merely because there were vacancies against which he could be appointed earlier. Since a direct recruit before his actual appointment was not holding any post under the Government, it is impossible to take the view that he could have been allowed to officiate continuously in a post in the cadre of the Service or outside it. The position of a man in the Subordinate Judicial Service is no better. He cannot be deemed to have officiated continuously in a higher post of Additional District Judge when actually he did work as a Subordinate Judge. He could not be empowered retrospectively to act as an Additional District Judge when, as a matter of fact, he acted as a Subordinate Judge. To give seniority to a promoted officer on the basis of a fictional or notional officiation will cause undue and patent hardship to a direct recruit. If at the time of his appointment there were a number of vacancies in the posts of the Service, all promoted officers — promoted after him — can take advantage of this fictional officiation and rank above him. On this basis not only respondent No. 4 but also the other three officers whose names were recommended for promotion in the letter of the High Court dated 3-3-1960 could and should have been given seniority over the petitioners. This by itself explains the absurdity in the interpretation sought to be put on behalf of respondents 1 and 4 to clause (e) of Rule 16.

It may bear repetition to say that the petitioners applied for appointment against vacancies which occurred by 31st of January, 1959. They were appointed against three of the vacancies out of nine which had occurred from November, 1959 to February, 1960. And if they are to be pushed down by the promoted officers appointed after them on the basis of the fictional or notional officiation, which as argued on behalf of respondent Nos. 1 and 4, can be made available only to the promoted officers and not to others, it will be, to my mind, grossly unjust

and discriminatory to do so. Only under one circumstance a promoted officer can take advantage of his officiation in the post earlier than his substantive appointment and that is this. If he has been allowed to officiate in a leave vacancy and in continuation of such officiation, which also has the advantage of the note appended to the rule, namely,—

“A period of leave or the annual vacation of the Civil Courts will not be treated as an interruption for the purpose of this sub-rule”,

he is promoted to the substantive post, he will rank senior to the direct recruit appointed before the substantive appointment of the promoted officer but after he started officiating in the leave vacancy. To give more advantage than this, on the principle of a vacancy being there, to a promoted officer will be very anomalous. Respondent No. 4 officiated in a leave vacancy from 17-6-1959. If he could have been appointed to the substantive post on and from 9-11-1959, he could have ranked senior to any of the direct recruits who could have come in between the dates — 17th of June and 9th of November, 1959. But when he was appointed substantively to the post on 19th of September, 1960, it is difficult to fill up the long gap of about a year by this fictional or notional method as has been done by respondent no. 1 in his case. Mr. Chagla contended that the case of respondent No. 4 is not different from that of respondents 2 and 3.

14. The case of respondents 2 and 3, however, stands on a different footing. They were on special posts of Deputy Registrar of the High Court and Secretary of the Legislative Assembly. In the Governmental administration, taking recourse of the upgrading of posts, if it can be so done without doing violence to any other law or principle, is so common that it can almost be taken to be a settled practice or rule to do so. In case of respondents 2 and 3, the State Government were pleased to upgrade the posts which they were holding from the 17th of June, 1959 till the posts were held by them. The result of the upgrading of the posts was that they were allowed actually to officiate continuously in the upgraded posts either in the cadre of the Service or in posts outside the cadre on identical time-scale of pay and of equal status and responsibility within the meaning of Clause (e) of Rule 16 of the Rules. The upgrading of a post stands on a footing quite obviously different from allowing fictional or notional officiation to a promoted officer as in the case of respondent no. 4.

15. I shall now consider what is the effect of the upgrading of the two posts held by respondents 2 and 3. They were performing duties in special posts. Although they had become due for promotion to the Superior Judicial Service, the High Court as well as the Legislative Department felt the necessity of retaining their services. They

were, therefore, not relieved to take their appointment in due course to the Service. Recommendations were made by the High Court for upgrading the two posts as early as in April and August, 1959. Even when clear substantive vacancies occurred, the same demand for upgrading their posts was repeated in the Court's letter dated 3-3-1960. The order of the State Government, however, was not issued prior to 6-9-1960. When issued, it, in terms, upgraded the posts held by respondents 2 and 3 in the rank and scale of pay of Additional District and Sessions Judge. Under sub-rule (2) of Rule 3 the State Government have the power, from time to time, after consultation with the High Court, to amend the Schedule appended to the Rules, fixing the strength of the Service and the number and character of posts. To my mind, the effect of the upgrading of the posts was to amend the Schedule appended to the Rules and include in it temporarily with effect from the 17th June, 1959 the posts of the Deputy Registrar and the Secretary of the Legislative Assembly till those posts were held by Respondents 2 and 3. That the Schedule could be amended retrospectively will be borne out by the decision of the Supreme Court in *B. S. Vadera v. Union of India*, AIR 1969 SC 118. In that case, the Indian Railway Establishment Code had been issued by the President in exercise of the powers vested in him by the proviso to Article 309 of the Constitution. Rule 157 of the Code conferred full powers on the Railway Board to make rules of a general application to non-gazetted railway servants under their control. In exercise of the said power, the scheme (annexure 4 to the writ application before the Supreme Court) was actually framed on February 5, 1957 and the amended scheme (annexure 7) was framed on March 30, 1963. Both of them were made retrospectively effective from December 1, 1954, the date of the initial constitution of the Service under consideration there. Considering the question whether the Railway Board had, while acting under Rule 157, power to make a rule—in that case the schemes—giving effect from an anterior date, the Court by a unanimous judgment held that the Board had such power, because in absence of an Act of an appropriate Legislature under the main part of Article 309 the rule-making authority under the proviso has power to make a rule both prospectively and retrospectively. Mr. Basudeva Prasad argued that the effect of the upgrading of the posts held by respondents 2 and 3 was to amend the Schedule appended to the Rules. If it was so, as I am inclined to think, it was, it could very well be done retrospectively.

16. Mr. Basudeva Prasad also contended that even though the Rules made under the proviso to Article 309 of the Constitution could be amended retrospectively, as held by the Supreme Court in *B. S. Vadera's case*,

AIR 1969 SC 118 approving the Full Bench decision of the Allahabad High Court in *Ram Autar Pandey v. State of U. P.*, AIR 1962 All 328, the Government has no power to make changes in the service conditions of their personnel with retrospective effect by mere executive instructions, as held by the Punjab High Court in *Suresh Kumar v. Union of India*, AIR 1969 Punj and Har 257. The power to amend the rule retrospectively was noticed in paragraph 19 of that judgment also not only with reference to the Full Bench decision of the Allahabad High Court but also the Full Bench decisions of the Kerala High Court in *C. K. Madhvan Nair v. Registrar, High Court of Kerala*, AIR 1968 Ker 17 and *V. Hari Haran Pillai v. State of Kerala*, AIR 1968 Ker 42. In *Suresh Kumar's case*, AIR 1969 Punj and Har 257 however, the seniority list of the lower division clerks prepared and approved earlier according to Government executive instructions was changed according to new instructions issued subsequently for fixing seniority amongst lower division clerks. As a result of this, the appellants before the Court were reverted and ranked lower in the scale. In such a situation, it was held on the facts of that case that—

“Rights which have already accrued to a Government servant and the benefits which he might already have enjoyed under or by virtue of a pre-existing executive instruction or administrative direction cannot be taken away with retrospective effect by another executive instruction or a mere administrative direction.”

The position in the instant case is quite different. The posts held by respondents nos. 2 and 3 could be upgraded, as, for the reasons already stated, they were. It was not a question of changing the seniority of the petitioners by executive instruction or mere administrative direction. According to Rule 16 (e) of the Rules the said two respondents having officiated continuously in the upgraded posts had to rank senior to the petitioners. The unreported decision of the Supreme Court in the *Income Tax Officer v. M. C. Ponnose*, Civil Appeals Nos. 942 and 943 of 1966, D/- 28-7-1969 = (AIR 1970 SC 385) a copy of which was given to us, can also be of no avail to the petitioners as against respondents 2 and 3. Distinguishing *B. S. Vadera's case*, it was held that the notification dated August 14, 1963 could not by a retrospective operation invest the Tahsildar with the powers of a Tax Recovery Officer from April 1, 1962 under Section 2 (44) of the Income-tax Act, 1961 read with sub-rule (2) of Rule 7 of the Income-tax (Certificate Proceedings) Rules 1962. There was no question of investing respondents 2 and 3 with any new or fresh power by the upgrading of the posts. In case of respondent no. 4, however, the unreported decision of the Supreme Court can be pressed in aid of the petitioners. For

the purpose of seniority only he could not be deemed to have officiated in the post of an Additional District Judge when actually he did not officiate. The powers and the jurisdiction of the Additional District and Sessions Judge being higher than those of a Subordinate Judge and Assistant Sessions Judge could not obviously be conferred upon respondent no. 4 with retrospective effect.

17. Learned Counsel for the petitioners, however, urged that the Schedule could not be amended without publication of a notification in the official Gazette nor could it stand amended unless the order of the State Government fulfilled the requirement of Article 166 of the Constitution. He also submitted that without a communication of the order to the persons affected, it was not effective. I have no difficulty in rejecting all these arguments. Rule 3 (2) which empowers the State Government to amend the Schedule only lays down that they have to do it *after consultation with the High Court* which undoubtedly in this case was made, rather it was on the insistence of the High Court that the posts were upgraded. It does not require that the amendment of the Schedule has to be published in the Gazette. Nor any other rule was brought to our notice making it incumbent upon the State Government to publish the amendment of the Schedule in a Gazette. Ordinarily and generally when the sanctioned strength of the Service will be increased or decreased, publication in the official Gazette may be made. But on the special facts of a particular case if, for a particular officer, in the exigency of the situation a particular post has got to be upgraded, the effect of which is to temporarily add that post to the sanctioned strength of the Service, publication in the Gazette is not necessary. Nor the order of upgrading the post was necessary to be communicated to the petitioners as they cannot be said to be the persons affected by the order, in the sense it was so held by Mudholkar, J., in the case of *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395 delivering the judgment on behalf of the Court. Nor, in my opinion, it is correct to say, as was argued by the learned Counsel for the petitioners, on the basis of the said authority, that the order has to be expressed in the name of the Governor as required by Cl. (1) of Article 166, otherwise it will be an invalid order. Relying upon earlier decisions of the Court in *D. M. Pangurkar v. State of Bombay*, AIR 1952 SC 181, *State of Bombay v. Purushottam Jog Naik*, AIR 1952 SC 317 and *Ghaio Mall and Sons v. State of Delhi*, AIR 1959 SC 65 as also on reference to *Bachhittar Singh's case*, AIR 1963 SC 395 it has been pointed out in *R. Chitralekha v. State of Mysore*, AIR 1964 SC 1823 in the majority judgment of the Court delivered by Subba Rao, J., as he then was, that

“it is, therefore, settled law that provisions of Article 166 of the Constitution are only

directory and not mandatory in character and, if they are not complied with it can be established as a question of fact that the impugned order was issued in fact by the State or the Governor."

In the instant case such a fact having not been challenged was not necessary to be investigated. I may also add that the order was not only communicated to the Accountant General, Bihar, but also copies of the letter dated 6-9-1960 (annexure D to the writ application), as that annexure itself shows, were forwarded to the Registrar, High Court, with reference to his letter No 8177 dated the 17th August, 1959, i. e., annexure X/2 to the counter-affidavit of respondents no. 2, as well as to the other departments concerned. It was so done, as annexure D shows, "by the order of the Governor of Bihar". In my opinion, therefore, reading annexure D as a whole, it is possible to take the view that requirement of Article 166 had been substantially complied with. The order contained in annexure D by itself was not fixing any seniority to the prejudice of the petitioners. The order, therefore, was not necessary to be communicated to them. On the basis of the order and in pursuance of it, when seniority list (annexure E) was prepared, it must have been duly published in the Civil list and this must be deemed to have been communicated to the petitioners. Every order of upgrading of a post or appointment of an officer to the Service either by direct recruitment or by promotion need not be communicated to other officers concerned either appointed before or after.

18. Mr. Basudeva Prasad, in support of his submission that the order of upgrading the posts held by respondents 2 and 3 was necessary to be published in the Gazette, placed reliance upon the cases of Johnson v. Sargant, (1918) 1 KB 101; Shaloor v. Emperor, AIR 1944 Nag 40 and Babulal v. King Emperor, AIR 1915 Nag 218 which were all followed in Harla v. State of Rajasthan, AIR 1951 SC 467. The point decided in all these cases is very different and based upon a principle which has no resemblance to the question at issue in this case, Bose, J., delivering the judgment of the Court, observed in Harla's case, AIR 1951 SC 467 at p 468 (1) —

"In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published."

To equate the amendment of the Schedule with a penal law is not justified either on principle or on the language of the Rules.

19. If I am right in my view that the result of the upgradation of the two posts held by respondents 2 and 3 was to temporarily add those posts in the Schedule appended to the Rules, it is manifest that the said respondents were allowed to officiate continuously in the upgraded posts of the officers appointed to the Superior Judicial Service because they were actually working in those posts from long before the 17th of June, 1959. No fresh notification appointing them to the Service was necessary as was argued on behalf of the petitioners. Learned Counsel on their behalf during the course of argument at one time strenuously urged that respondents 2 and 3 were never appointed to the Service. It was difficult — rather impossible to accept such an argument when, as a matter of fact, after reversion to the general line both the respondents have held the posts of District and Sessions Judge for a number of years. If the view I have expressed above in regard to the amendment of the Schedule appended to the Rules be taken to be doubtful or not correct, continuous officiation of respondents 2 and 3 can also be supported for the purpose of clause (c) of Rule 16 of the Rules "in posts outside the cadre on identical time-scale of pay and of equal status and responsibility." The effect of the upgradation of the two posts was that the posts remaining outside the cadre were manned by respondents 2 and 3 and on identical time-scale of pay and of equal rank or status and consequently of equal responsibility. The term 'rank' or 'status' will be found used in the correspondence of the High Court resulting eventually in the order of the State Government contained in Annexure D to the writ application. Learned Counsel for the petitioners drew our attention to the statement of respondent no. 2 in paragraph 8 of his counter-affidavit wherein he said—

"The publication of this upgrading order of Government in the Gazette was not necessary under any rule or law. Since the deponent and opposite party nos. 2 were not to exercise any new power or to do any work in these upgraded posts which they had not been exercising or doing from before the 17th June, 1959, there was no question of their fresh appointments to these upgraded posts or its publication in the Gazette."

He submitted that the statement aforesaid shows that the posts were not of equal status and responsibility, for the purpose of pay the mere making them of identical time-scale was not sufficient to confer seniority on respondents 2 and 3 above the petitioners as the use of the word 'and' shows that the posts were also required to be of equal status and responsibility. The very fact of upgrading the posts in the rank and scale of pay of the Additional District and Sessions Judge made the posts as those of identical time-scale of pay and of equal status and responsibility. The statement of respondent

no. 2 in paragraph 8 of his counter-affidavit merely refers to the nature of the work which respondents 2 and 3 were doing before upgrading of the posts. While doing the same work they were found fit for being appointed as Additional District and Sessions Judge. They could be allowed to serve on the post by raising its status. The effect of the upgrading, therefore, was to allow them to officiate continuously in posts of higher grade which on their upgrading assumed the status and responsibility of that of the post of an Additional District Judge.

20. One question, however, deserves consideration in connection with the alternative view which I have expressed above with reference to the latter part of Cl. (e) of R. 16 of the Rules and that is this. Could respondents 2 and 3 be allowed, as they were, to officiate continuously in equivalent posts outside the cadre from a date, i. e., 17th of June, 1959 if there were no vacancies in the cadre posts? There seems to be some confusion in this regard as to when a post in the cadre will be deemed to be vacant. Can a post of an Additional District and Sessions Judge be held to be vacant on the retirement of a District and Sessions Judge? Arguments were advanced at the Bar even on this footing as also on the other basis that the post of an Additional District and Sessions Judge will be vacant only when an officer of that grade in that post is appointed to act as District and Sessions Judge on the retirement of such an officer. Personally speaking, I consider the latter view to be more sound and reasonable. Apart from the strength of Service, the two kinds of posts, namely, of District and Sessions Judge cannot be of the same grade for all purposes. It is evident that the post of an Additional District and Sessions Judge, although not subordinate to, is of a grade lower than, that of a District and Sessions Judge. It is in that context that the word 'promotion' occurring in Article 233 of the Constitution will be intelligible. In the same cadre advancement of an officer from the post of an Additional District Judge to that of a District Judge will also be a promotion. So viewed, in my opinion, the vacancy in the cadre for appointment to the post of an Additional District Judge does not occur merely on the retirement of a District Judge, it occurs only when on such retirement an Additional District Judge is promoted and made to act as a District Judge. The vacancy in the post of a District Judge, to my mind, cannot be equated with a vacancy in the post of an Additional District Judge. It would thus be noticed that the first vacancy out of the nine vacancies which occurred in November, 1959 to February, 1960 started to occur on 9-11-1959 when Mr. M. P. Verma, as he then was, was allowed to officiate as a District Judge, as correctly stated in Court's letter dated 10-5-1960 (annexure X/4 to the counter-affidavit of respondent no. 2). Similar is the statement in

Court's letter dated 3/3/1960 (annexure X/5) with only this difference that the first vacancy is said to have occurred on 1-12-1959 in that letter on appointment of Shri Jugal Kishore Prasad as a District Judge with effect from that date, while the ninth and the last one was stated to have been caused on the appointment of Mr. M. P. Verma as District Judge of newly created judgeship of Singhbhum. It appears, however, that as a matter of fact before Mr. M. P. Verma was transferred as District Judge of the newly created judgeship of Singhbhum to take over charge there on 4-2-1960, he was appointed as District Judge of some other district (of Monghyr as I was informed) with effect from 9-11-1959, and that is the reason that the last item of the ninth vacancy mentioned in annexure X/5 has become the first item of the same nine vacancies mentioned in annexure X/4. The Court, it seems, have always proceeded—and if I may say so—rightly in the matter of treating the vacancy in the post of Additional District Judges only when actually such a vacancy has occurred on the appointment of an officer working in that Post as District Judge. The view of the State Government as evidenced in their impugned order dated 24-1-1968 contained in annexure B to the counter-affidavit of respondent no. 4 that the vacancy occurred on 1-11-1959 on the retirement of Mr. Anant Singh, as he then was, from the post of a District Judge does not seem to me to be correct. If it were possible to take such a view then it could be said in favour of respondents 2 and 3 that on the sanction of the two posts of Peripatetic District and Sessions Judge in May, 1959 which posts remained vacant all throughout until they were filled up in February, 1960 by two retired District Judges, two posts in the cadre were vacant and when they were allowed to officiate continuously in equivalent posts outside the cadre on and from the 17th June, 1959, they were allowed to do so at a time when two cadre posts were vacant. But I do not feel persuaded to subscribe to such a view. In my opinion no post of Additional District Judge can be said to be vacant in the cadre which could be filled by respondents 2 and 3 on 17-6-1959 as the two additional posts which were sanctioned in view of the amendment of the Bengal, Agra and Assam Civil Courts Act, 1887 were allowed to be filled up by two other officers, namely, Sarvashri A. N. Sahay and R. B. P. Sinha. The other posts which fell vacant in the grade of Additional District Judge in the cadre fell vacant only from 9-11-1959 onwards. Nine such posts fell vacant from that date upto 6-2-1960. And, that seems to be the reason that the Court finally, in their letter dated 3-3-1960, as reiterated in their letter dated 10-5-1960, suggested to fill up two out of the nine posts by the upgrading of the two special posts held by respondents 2 and 3, as recommended earlier in the two

Court's letter dated 25-4-1959 and 17-8-1959 and three by the appointment of direct recruits as recommended in Court's letter dated 1-10-1959. Even if it be assumed that the upgrading of the posts from June 17, 1959 was not quite regular, there is no difficulty in taking the view in favour of respondents 2 and 3 that the upgrading of the special posts held by them was regular and perfectly justified from 9-11-1959 in the case of respondent no. 2 and 1-12-1959 in the case of respondent no. 3, as the other three posts which fell vacant on 1-12-1959, 11-12-1959 and 16-12-1959 will be deemed to have been filled up by appointment of the three petitioners on 21-4-1960. Even on taking a technical view of the matter, therefore, it would be manifest that in any event respondents 2 and 3 would be senior to the petitioners.

21. The case of respondent no. 4, however, stands on a different footing. His name along with other three officers was recommended for appointment in the substantive vacancies which occurred between 11-1-1960 and 6-2-1960 for the first time in the Court's letter dated 3-3-1960. Even that recommendation was conditional, as, on the basis of two-third and one-third quota, the Court, on accounting, had decided that the said four posts were eligible to be filled up by direct recruits but since that would take time, the four vacancies were recommended to be filled up for the time being from Subordinate Judicial Service. As a matter of fact the direct recruits to those four posts, as usual, came much later. Respondent no. 4 was appointed substantively to the post of Additional District Judge on 19-9-1969, and in no view of the matter, he could be given a fictional seniority by the State Government from 1-11-1959 as done by them in their impugned order dated 24-1-1968. There could be no question of upgrading the post of a Subordinate Judge to that of an Additional District Judge. Under the Bengal, Agra and Assam Civil Courts Act, 1887, the powers and the pecuniary jurisdiction of the two courts are evidently different. Upgrading of a post of a Subordinate Judge or allowing respondent no. 4 to officiate continuously in that post deeming it to be a post of an Additional District Judge was not possible for obvious reasons. I fail to understand then how it was possible for the State Government to say in their letter dated 24-1-1968 (annexure B to the counter-affidavit of respondent no. 4) that the State Government had been pleased to decide that respondent no. 4 would rank below respondents 2 and 3 but above the petitioners and "for this limited purpose, he will be deemed to have been officiating as Additional District and Sessions Judge with effect from 1st November, 1959". For the reasons already given, such a deeming officiation for the purpose of determination of seniority within the meaning of Clause (e) of Rule 16

of the Rules was neither legitimate nor permissible under the Rules. Viewed from a practical and equitable aspect, one may appreciate the grievance of respondent no. 4—as I do—that having joined the Judicial Service on the same day on which respondents nos. 2 and 3 joined and even though vacancies did occur between November, 1959 and 1960 to one of which he could be appointed, as ultimately was done in September, 1960, by appointment of the three direct recruits, he has to part company in the matter of seniority from respondents 2 and 3 and give way to the petitioners. The sympathy for respondent no. 4 is watered down when the same, for the reasons as adverted to by me above, is extended to the petitioners. They had applied to be appointed at a time when even respondents 2 and 3 were not eligible to be promoted in any substantive vacancy of the Superior Judicial Service, yet their actual appointment came a year later and they had to lose seniority to many including respondents 2 and 3 for the reasons already stated. The said two respondents being in special posts could legitimately be given seniority over the petitioners by the upgrading of those posts from a back date.

It is a matter of sheer chance which one may characterise as misfortune, that respondent no. 4 could not be given the same advantage as at the time when his promotion became due to the substantive post, he was not working in any special post. Whenever direct recruits are appointed, they always interpose for the purpose of seniority between two promoted officers whose seniority before their promotion has been in juxtaposition, merely by the fact of the direct recruits being appointed between the appointments of the said two promoted officers. After all, in service such chances or occasions are unavoidable and one has to reconcile to such a situation as occurred in the case of respondent No. 4. However, sympathetic I may feel for him, I have not been able to persuade myself to hold that the decision of the State Government in regard to his seniority over the petitioners is legal or valid. On the facts and in the circumstances of the case, I have got to hold that the order of the State Government dated 24-1-1968 fixing the seniority of respondent no. 4 over the petitioners is not only illegal but also ultra vires as I shall show hereinafter.

22. In the view I have expressed on merits in regard to the case of respondents 2 and 3 as against the petitioners, it is not necessary to go into the question as to whether mere determination of seniority one way or the other violates Article 16 of the Constitution. Nor is it essential, in regard to the impugned order determining the seniority of respondent no. 4 for the purposes of the writ application under Article 226 of the Constitution, to find any violation of fundamental right.

23. I have no difficulty in rejecting the ingenious argument of Mr. Basudeva Prasad that since the matter of promotion of a Subordinate Judge is included in the power and control of the High Court under Article 235 of the Constitution, his promotion to the higher rank of Additional District Judge is within the exclusive control of the High Court and the Governor cannot make appointment by promotion to the post of Additional District Judge under Article 233 of the Constitution. It is well settled by several decisions of the Supreme Court that on a harmonious construction of Articles 233 and 235 appointment of persons to be and the posting—meaning the first posting on such appointment and promotion of District Judges which expression includes Additional District Judges in any State is within the power of the Governor who has to exercise that power in consultation with the High Court. Apart from the three matters aforesaid, the entire control over district courts or courts subordinate thereto vests in the High Court. Clause (1) read with Clause (2) of Art. 233 clearly suggests that appointment to the Superior Judicial Service can be from two sources, namely, Subordinate Judicial Service, as held by the Supreme Court in *Chandra Mohan v. State of Uttar Pradesh*, AIR 1966 SC 1987, and the Bar as envisaged by the second clause. When S. K. Das, J. speaking for the Court in *Rameshwar Dayal v. State of Punjab*, AIR 1961 SC 816 said—

“Article 233 is a self-contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Cl. (1) the Governor can appoint such a person as a District Judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Clause (2) and all that is required is that he should be an advocate or pleader of seven years’ standing,”

and when Subba Rao, C. J., said in *Chandra Mohan's case*, AIR 1966 SC 1987—

“There are two sources of recruitment namely (i) service of the Union or of the State and (ii) members of the Bar.”, under Article 233 of the Constitution, nobody seems to have thought of suggesting that appointment under Article 233 could be from one source only, namely the Bar and the promoted officers could be taken only by the High Court in exercise of their power under Article 235. This argument is too obviously wrong to merit any detailed discussion. He built up the whole argument on the footing of one sentence occurring in column 2 at page 1708 in the decision of the Supreme Court in the High Court, *Calcutta v. Amal Kumar Roy*, AIR 1962 SC 1701, wherein the words are:

“It is, therefore, clear that after the coming into force of the Constitution, the High Court is the autho-

rity which has the power of promotion in respect of persons belonging to the State Judicial Service, holding any post inferior to that of a District Judge.”

The word ‘promotion’ simpliciter in the same cadre has also got a meaning in the sense of conferment of more powers or promotion to the next grade or the like. Promotion to a higher rank strictly speaking is an appointment it is appointment by promotion.

24. Learned Counsel for the petitioners, however, was on a firm ground when he submitted with reference to the case of respondent no. 4 that the power to determine seniority vests in the High Court under Article 235, Government had no such power. Mr. Chagla combated this point strenuously.

25. In the State of West Bengal v. Nripendra Nath Bagchi, AIR 1966 SC 447 Hidayatullah, J., as he then was held that “the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges”. Mr. Chagla submitted that determination of seniority of an officer is a term of contract of service or is a condition of service and hence it is outside ‘control’ envisaged by Article 235 of the Constitution because the conditions of service are to be determined by the Governor in the case of District Judge and in the case of others subordinate to him by the Governor in accordance with rules made by him in that behalf after consultation with the State Public Service Commission, and with the High Court. It is true that the fixation of seniority rule being a part of the Rules governs the conditions of service of the Superior Judicial Officers. So far Mr. Chagla is correct. But who is to fix or determine the seniority in accordance with the Rules? That power obviously is not covered under Article 233 but is inherent in the power of control envisaged by Article 235. If ‘control’ could include disciplinary control as held in *Nripendra Nath Bagchi's case*, AIR 1966 SC 447 by the Supreme Court after rejecting a similar argument, it is not correct to say that the control vesting in the High Court under Article 235 of the Constitution will not have within its sweep or embrace the power to fix or determine seniority. The High Court, however, will have to do so in accordance with the Rules framed by the Governor under the proviso to Article 309 of the Constitution.

26. In *State of Assam v. Ranga Muhammad*, AIR 1967 SC 903 Hidayatullah, J., as he then was, had again the occasion to consider the ambit of the power of the High Court under Article 235 of the Constitution vis-a-vis the power of the Governor under Article 233. Giving a restricted meaning to the word ‘posting’ occurring in Article 233,

it was held that it could not include 'transfer' the word means "the assignment of an appointee or promotee to a position in the cadre of District Judges". The power of transfer, even though it can be said to be related to the contract or condition of service, was held to vest in the High Court and not in the Government. Learned Counsel on the basis of the decision of the Supreme Court in *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 617, also submitted that the strength of the ratio of the decisions of Hidayatullah, J., in the two cases referred to above has been diluted later by that Court. In my opinion if I may say so with respect nothing of the kind has been done by Hegde J. in the Orissa case. That the power of the Governor under Art 233 is in regard to three matters only — appointment, posting and promotion of District Judges, and the control not only over the subordinate judiciary but also upon members of the Superior Judicial Service extends over other matters is firmly established by the two decisions of the Supreme Court. But the said power, according to the decision of the Supreme Court in Orissa case, could not be exercised so as to encroach upon, or interfere with the power of the Government in their exclusive domain. In exercise of the power of transfer of a superior judicial officer, the High Court could not foist any officer on the Government to work in the Secretariat.

27. Learned Counsel for the State has cited a Full Bench decision of Kerala High Court in *N. Srinivasan v. State of Kerala*, AIR 1968 Ker 158 and submitted that determination of seniority comes within the power of the Government as it is a condition of service of the officer concerned. Raman Navar, J., giving the leading judgment on behalf of the Bench, said at p. 161 (Col. 2), to which our attention was drawn by the learned Counsel, that "the power to regulate such conditions conferred by Article 309 is altogether untrammelled by anything in Article 233 or 234". Undoubtedly it would be so. In that case the question was of fixing the age of superannuation and in that connection it was further said that "the tenure of a civil servant is undoubtedly a condition of his service". To fix the age of superannuation, therefore, would be within the power of the Governor.

28. Learned Counsel for the State pointed out that the State Legislature had plenary powers to enact laws under items 3 and 41 of List II of the Seventh Schedule appended to the Constitution, the former being in matters relating to administration of justice, constitution and organisation of courts except the Supreme Court and the High Court and the latter for State Public Services. He, therefore, submitted that under Article 162 of the Constitution the executive power of the State Government being co-extensive with the legislative power, will include the

power to determine the seniority of a judicial officer. The argument so baldly put, if accepted, would make the provisions of Article 233 nugatory. All the powers of control over all kinds of courts and officers presiding over them shall be the executive power of the State, High Court will have no power. But it is to be pointed out that Article 162 is subject to the other provisions of the Constitution and is, therefore, subject to the power of the High Court vested in them under Article 235.

29. Mr. Chagla further submitted that any matter which entails financial expenditure or liability must come within the power of the Government and since determination of seniority involves such a matter, it cannot but be within the power of the State Government. The financial aspect of the matter is important when appointments are made either by promotion from the Subordinate Judicial Service or by direct recruitment. Extra financial burden is cast upon the State when new posts are added to the existing cadre either permanently or temporarily or when posts held by judicial officers are upgraded. But once a decision is taken in regard to the matter of appointment, addition to the strength of the cadre or upgrading of a post, which undoubtedly has to be taken by the Government, their power is exhausted. The fixation or determination of seniority of the officers thereafter does not involve any question of finance and does not entail any financial expenditure. Determination of seniority according to the Rules governing the service conditions is a matter which comes in the general control of the courts and the officers.

30. The next contention put forward on behalf of the State is that the word 'posting' in Article 233 includes within its ambit, and means, fixation of the place of the person posted in the cadre. I am unable to accept this argument as sound. As already stated, 'posting' means assignment of job and in common parlance it means giving of a post to a person appointed and the place of first posting, it cannot mean a place in the graduation list which has got to be determined in accordance with the Rules. In the light of the several decisions of the Supreme Court, I have no hesitation in coming to the conclusion that it is within the exclusive power of the High Court on their administrative side under Article 235 of the Constitution to determine the seniority of a judicial officer including a person belonging to the Superior Judicial Service. It is conceded at the Bar that respondent no. 4 had no right of appeal from the decision of the High Court under the law regulating the conditions of his service, even assuming that a right of appeal to the State Government could be granted from the decision of the High Court taken on their administrative side, although I must hasten to say that in the set up of our present Constitution it seems

doubtful whether the State Government can be considered to be an authority superior to the High Court in matters where the latter have got exclusive power. The order of the State Government dated 24-1-1968 contained in annexure B to the counter-affidavit of respondent no. 4 is ultra vires also as the State Government had no power to decide the seniority as against the decision of the High Court, which decision was communicated to the State Government twice when the High Court recommended for rejection of the representation of respondent no. 4. It is, however, obvious that on this ground also the petitioners will not be entitled to any relief as against respondents nos. 2 and 3. It would appear from the letter of the Registrar of the High Court dated 20-8-1964 to the Chief Secretary to the Government of Bihar, a copy of which is annexure X to the counter-affidavit of respondent no. 2 that the High Court had communicated their decision and view while forwarding the representation of the petitioners to the Government that there was no ground made out for placing them above respondents nos. 2 and 3 in the gradation list.

31. Lastly, Mr. Chagla endeavoured to bring the case of respondent no. 4 within an omnibus rule which he characterised as a 'hardship rule' framed by the Governor by issuing a notification dated 28th of November, 1956 under the proviso to Article 309 of the Constitution. The said rule reads as follows:

"Where the State Government are satisfied that the operation of any rule regulating the conditions of service of State Government servants, or any class of such Government servants, causes undue hardship in any particular case, they may by order dispense with or relax the requirements of that rule to such an extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner."

I am of the opinion that if the power to determine seniority vests in the High Court under Article 235 of the Constitution, it is not within the power of the State Government to take recourse to the rule aforesaid and upset the decision of the High Court. What the Government cannot do directly, they cannot do indirectly. Further, it seems to me that it is not open to the State Government in exercise of their power under the above rule to dispense with or relax the requirements of Rule 16 (c) of the Rules so as to cause prejudice and affect the civil rights of other officers which they acquired under that rule. I may also add that the facts which I have stated above with reference to the cases of the parties can never lead to the conclusion that they caused undue hardship in the particular case of respondent no. 4 so as to justify dealing with his case only in a manner different from others. Such a hardship as was caused to

respondent no. 4 cannot be said to be undue. It just occurs in many cases as it did occur in the case even of the petitioners as also of the other three officers who were recommended for promotion with respondent no. 4 in the letter of the High Court dated 3-3-1960. It is just a hardship which comes in the very nature of things involved in the matter of service.

32. For the reasons stated above, I hold that the order of the State Government dated 6-9-1960 contained in annexure D and the seniority list, a copy of which is annexure E to the writ application, cannot be quashed. The petitioners are entitled to no relief as against respondents nos. 2 and 3. They are however, entitled to relief against respondent No. 4. The order of the State Government, respondent no. 1 contained in their letter dated 24-1-1968, a copy of which is annexure B to the counter-affidavit of respondent no. 4 is quashed by grant of a writ of certiorari, as it related to the determination of the seniority of respondent no. 4 vis-a-vis the petitioners. A writ of mandamus would issue against the State Government, respondent no. 1 directing them not to give effect to the said order dated 24-1-1968. The application is, accordingly, allowed to the extent indicated above but in the circumstances I shall make no order as to cost.

MISRA, C. J.:— 33. I agree. I may, however, add that the practice followed that on retirement of a District Judge a vacancy occurs in the cadre of Superior Judicial Service and that it may be filled up by recruitment in any of the modes provided in R. 5 of the Bihar Superior Judicial Service Rules, 1946, is correct. There is no difference between the post of an Additional District Judge and the District Judge except in the time scale of pay as provided in Rule 7. Barring this difference, the cadre is the same as is provided in Rule 2 which says — "In these rules, unless there is anything repugnant in the subject or context, 'cadre' means the cadre of the Bihar Superior Judicial Service." and Rule 4 provides for the manner in which the post shall be filled up and Rule 5 states further that "Appointments to the Bihar Superior Judicial Service, which shall, in the first instance, ordinarily be to the post of Additional District and Sessions Judge, shall be made by the Governor in consultation with the High Court—". Thus, though an Additional District Judge becomes a District Judge only when the High Court is satisfied about his fitness for such appointment and the Government accept their recommendation, yet since the cadre is one, viz., Bihar Superior Judicial Service, as soon as a District Judge retires, a vacancy must be held to occur in the cadre.

34. Allied to this question is another consideration which is that when a post not borne on the cadre of Service is upgraded in the interest of an officer who would be

promoted to the cadre but who is serving under the Government on a different post, upgradation is the method adopted so that the officer may continue on the post outside the cadre without having to suffer any loss in emoluments or otherwise. This does not necessarily mean that such upgradation amounts to addition of that post to a cadre and thus amendment of the Schedule in terms of Rule 3. This is done as a matter of departmental exigency and the Government have ample power to take recourse to this method by creating an ex-cadre post in which category alone such upgraded post can be fitted. In that view of the matter, it will not be necessary to take recourse to any formality by way of a gazette notification etc. My learned brother, however, has held that even if it were treated as temporary addition to the cadre strength, no formalities of a gazette notification etc. would be necessary. It is a proposition in which I concur:

G. N. PRASAD, J.:— 35. I agree, for the reasons set out at length by my learned brother Untwalia, J., that respondent No. 4 has no lawful claim to seniority over the petitioners who, in their turn, have no lawful claim to seniority over respondents nos. 2 and 3. I, however, agree with my Lord, the Chief Justice, that the upgradation of the posts of the Deputy Registrar of the Patna High Court and the Secretary of the Bihar Legislative Assembly made in terms of the Government Order dated the 6th September, 1960 (Annexure 'D' to the writ application) did not have the effect of amendment of the Schedule envisaged in Rule 3 of the Bihar Superior Judicial Service Rules, 1946. It had only the effect of rendering those two posts fit for a short duration to be manned by officers holding the rank and status of Additional District and Sessions Judge. But I am of the opinion that a vacancy in the rank of District and Sessions Judge does not ipso facto create a vacancy

in the rank of Additional District and Sessions Judge. I would refer in this connection to Rule 5 which provides, inter alia, that appointments to the Bihar Superior Judicial Service shall, in the first instance, ordinarily be to the post of Additional District and Sessions Judge. The use of the word "ordinarily" in Rule 5 shows that appointment of a person directly to the post of District and Sessions Judge is not ruled out, and if such an appointment is made on any special occasion, there would be no vacancy in the cadre of Additional District and Sessions Judge. If, however, an appointment of a District and Sessions Judge is made by promotion of an Additional District and Sessions Judge, then that would cause a vacancy in the cadre of the Additional District and Sessions Judges. In other words, there is no automatic vacancy in the cadre of the Additional District and Sessions Judges in consequence of a vacancy in the cadre of District and Sessions Judges. It is true, as my Lord has said, that the cadre is one, viz., the cadre of the Bihar Superior Judicial Service, as Rule 2 (a) also provides. But for all practical purposes, the cadre is divisible into two, one of District and Sessions Judges and other officers of equivalent rank and the other of Additional District and Sessions Judges. It will be noticed that in two communications of the High Court to the Government, namely, the letter dated the 25th April, 1959 (Annexure 'X-1' to the counter-affidavit of respondent No. 2) and the letter dated the 17th August, 1959 (Annexure 'X-2' to the said counter-affidavit), mention was made of vacancies "in the cadre of Additional District and Sessions Judges."

36. With these observations I agree to the order as proposed by Untwalia, J.

Order accordingly.

END

that the denial of the tenancy in the written statement cannot be taken advantage of in that suit but can be taken advantage of only in a subsequent suit to be filed by the landlord, does not appeal to us. It will lead to unnecessary multiplicity of legal proceedings if the landlord is obliged to file a second suit for ejectment of the tenant on the ground of forfeiture entailed by his denial of his character as a tenant in the written statement and not allowed to avail of that plea in the suit in which the written statement has been filed especially when it has been pleaded in the plaint that the defendant had denied his character as a tenant of the plaintiff orally before the institution of the suit as was pleaded in the two suits out of which the present appeals have arisen.

7. The relevant portion of Section 111(g) of the Transfer of Property Act reads as under:—

"a lease of immovable property would be determined by forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself."

According to this section it is not necessary that the renunciation of the character as lessee should be in writing before the institution of the suit. It is correct that no cause of action will accrue to the landlord to eject the tenant on the ground of forfeiture of tenancy unless the forfeiture had taken place prior to the institution of the suit. That renunciation can be either in writing or verbal as has been mentioned in Paragraph 1391 at page 666 of Volume 23 of Halsbury's Laws of England, Third Edition. The material portion of that paragraph reads as follows—

"There is implied in every lease a condition that the tenant shall not do anything that may prejudice the title of the landlord; and that if this is done, the landlord may re-enter for breach of this implied condition. Thus it is a cause of forfeiture if the tenant denies the title of the landlord by alleging in writing or, in the case of a tenancy from year to year, either in writing or verbally that the title to the land is in himself or another; or if he assists a stranger to set up an adverse title, as where he acknowledges the freehold title to be in him or delivers the premises to him in order to enable him to set up a title. In the case of a tenancy from year to year, the effect of such denial of title is that the tenancy may be forthwith determined by the landlord without notice to quit."

8. The matter can be looked at from another angle. When the tenant denies his character as the tenant of the landlord in his written statement, he can be taken to be putting an end to the tenancy, thus giving right to the landlord to claim

possession from him. This principle is expressed thus in Platt on Leases:—

"The holding being from year to year subject to the mutual will of landlord and tenant to determine it on giving the usual 6 months' notice, evidence of a disclaimer is evidence of an election to put an end to the tenancy and supersede the necessity for such notice Hence verbal or written denials of a tenancy have rendered a notice to quit unnecessary, but it does not appear that they have effected a forfeiture of the term."

The denial of the relationship of landlord and tenant by the tenant in his written statement to a suit for ejectment determines a tenancy forthwith, thus giving the right to the landlord to the possession of the leased property, when the lease is not for a fixed period but from year to year or at will as in the present cases. A year to year tenancy or a tenancy at will gets determined by such a denial or renunciation of title. It was asserted in the plaints that the defendants had denied the title of Smt. Malaro and had also refused to make any payment of rent to her or to the plaintiff. This assertion was not denied in the written statements. On the other hand, the defendants asserted that Smt. Malaro was not the owner and they were in possession in their own right and whatever they have been paying to her was merely by way of maintenance and not by way of rent etc. From this assertion in the written statements it is clear that they had denied the title of Smt. Malaro and the plaintiff as their landlord before the institution of the suit and had set up an adverse title in themselves in clear and unequivocal terms. In view of these pleadings of the parties, the defendants had clearly forfeited their tenancy which entitled the plaintiff to obtain possession of the lands from them by means of the suits which he filed. The judgment of the learned Single Judge, is, therefore, correct and we have not been persuaded by the learned counsel for the appellants to take a different view. It is not disputed by the learned counsel for the appellants that if Section 111(g) of the Transfer of Property Act were applicable to the State of Punjab, the denial of the character as tenants by the defendants in their written statements would have entailed forfeiture entitling the plaintiff-respondent to the decrees of possession against the defendants as were prayed for by him.

9. For the reasons given above, there is no merit in these appeals which are dismissed with costs.

MEHAR SINGH, C. J.: 10. I agree.
Appeals dismissed.

AIR 1970 PUNJAB & HARYANA 514
(V 57 C 81)

A. D. KOSHAL, J.

Dhanpal Singh, Convict-Petitioner v.
The State, Respondent.

Criminal Revn. No. 1037 of 1968, D/-
8-12-1969 from Order of 2nd Addl. S. J.
Karnal, D/-8-10-1968.

Penal Code (1860), S. 21, Explanation 2
— Public servant under suspension —
Does not cease to be public servant.

Explanation 2 to Section 21 embraces not only public servants properly so-called but also persons in the employment of the Government who carried defective appointments (1872) 8 Beng LR (App) 58, Disting. (Para 3)

Cases Referred: Chronological Paras
(1872) 8 Beng LR (App) 58 = 17

WR (Cr) 12, Queen v. Dinanath
Gangooly 3

N C. Jain, for Petitioner; H. N. Mehtani,
Asst. Advocate-General (Haryana), for
Respondent.

JUDGMENT:— The petitioner was convicted by a Judicial Magistrate at Karnal of an offence under Section 409 of the Indian Penal Code and was sentenced to rigorous imprisonment for a year and a fine of Rs. 50/- or, in default of payment of fine, to further rigorous imprisonment for one month. His appeal having been dismissed by Shri S. R. Seth, Additional Sessions Judge, Karnal, on the 8th of October, 1968, he has come up in revision to this Court.

2. The facts of this case are now admitted on all hands and are these. The petitioner was attached as a peon to the Tehsil Office at Karnal but was suspended from service. During the period of suspension and between the dates 19th of February, 1965, and 9th of March, 1965, he realised a sum of Rs. 592.47 from five persons named Qabaz, Jit, Thal Singh, Tola Ram and Dhani Ram, all residents of village Pundrak in Tehsil Karnal, from whom various amounts were due to the Government on account of loans received by them earlier for the purchase of fertilizers. In respect of the amounts (totaling Rs. 592.47) the petitioner issued receipts to the loanees abovementioned and the same are Exhibits P. W. 8/F. B. D. C. and E respectively. The petitioner, however, did not deposit the money into the treasury and the embezzlement was detected when the notices were issued to the said loanees and they produced the receipts obtained by them from the petitioner before the Tehsildar, Karnal, whereafter the petitioner paid up the amount of Rs. 592.47 to the Government.

3. Apart from the question of sentence the only point raised by Shri N. C. Jain,

learned counsel for the petitioner, is that the offence involved does not fall within the ambit of Section 409 of the Indian Penal Code inasmuch as an offence of that type must be committed by a public servant which the petitioner was not during the relevant period by reason of his suspension from service. Reliance is placed by him on *The Queen v. Dinanath Gangooly*, (1872) 8 Beng LR (App) 58 in which *Kemp and Jackson, JJ.* quashed the conviction recorded against a police officer under suspension of an offence covered by S. 29 of the Police Act (5 of 1861) on the ground that he had ceased to be a police officer for the purposes of the Act by reason of his suspension at the relevant point of time. That case, however, is of no help to Shri Jain as it proceeded on an interpretation of Section 8 of the Police Act according to which the certificate appointing a person to the police force ceases to have effect whenever the person named therein is suspended or dismissed or otherwise removed from employment. It was in view of the clear provisions of that section that it was held that the offender could not be legally convicted under Section 29 of the Police Act. In the present case we are not at all concerned with any of the provisions of the Police Act.

The relevant provision is contained in Section 21 of the Indian Penal Code which lays down the definition of a public servant. It is conceded by Shri Jain that the petitioner, earlier to his suspension, was a public servant. He contends that it was his suspension alone which deprived him of that status. Section 21, however, does not say that suspension from office would have any such effect. On the other hand, Explanation 2 appended to the section and reading as follows:

"Wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation"

would embrace not only public servants properly so-called but also persons in the employment of the Government who carried defective appointments. The term was, therefore, meant to be used in a wide sense and I am of the opinion that a public servant under suspension would not cease to be a "public servant" within the meaning of Section 21 of the Code. No infirmity can under the circumstances be said to attach to the conviction of the petitioner.

4. On the question of sentence I am inclined to show leniency in view of the fact that the petitioner paid up the embezzled amount to the Government although it was subsequent to the detection of the commission of the offence by him. He has already undergone about 2

months' rigorous imprisonment. Accordingly I reduce the sentence to imprisonment already undergone and a fine of Rs. 500/-. The sentence in default of payment of fine shall be rigorous imprisonment for six months.

Order accordingly.

AIR 1970 PUNJAB & HARYANA 515
(V 57 C 82)

MAN MOHAN SINGH GUJRAL, J.

Baldev Raj, Petitioner v. Pushpa Rani,
Respondent.

Criminal Revn. No. 175-R of 1968, D/-16-12-1969 against Order of 2nd Addl. S. J. Ludhiana, D/-22-10-1968.

Criminal P. C. (1898), S. 488 (4) — Maintenance of wife — Refusal—Grounds — Decree against wife for judicial separation — She cannot claim maintenance having no reasonable ground to live apart. 1964 (1) Cri LJ 242 (Mad), Diss. from.

Where a decree for judicial separation under Section 10, Hindu Marriage Act has been passed against the wife it would imply that the wife has no reasonable ground for not living with the husband. In such a case sub-section (4) of S. 488 would come into operation and the wife would not be entitled to maintenance. 1964 (1) Cr LJ 242 (Mad), Diss. from: AIR 1965 Guj 247, Foll. (Para 5)

Cases Referred: Chronological Paras

(1966) AIR 1966 All 133 (V 53) =
1966 Cri LJ 247, Ravendra Kaur
v. Achant Swarup 6

(1965) AIR 1965 Guj 247 (V 52) =
1965 (2) Cri LJ 497 (2), Dahyalal
Amathalal Bhagat v. Bai Madhu-
kanta 6

(1964) 1964 (1) Cri LJ 242 = 1963-
2 Mad LJ 82, Mailappa Chettiar
v. Sivagami Achi 6

(1964) Cri. Revn. No. 937 of 1963,
D/-16-3-1964 (Punj), Jetha Singh
v. Mst. Gian Kaur 4

Bhupinder Singh Bindra, for Petitioner;
V. P. Sarda, for Respondent.

ORDER:— This is a reference by the Second Additional Sessions Judge, Ludhiana, dated 22nd October, 1968, whereby the order passed by the Judicial Magistrate First Class, Ludhiana, dated 19th August, 1968, was recommended to be set aside.

2. The facts giving rise to this reference are that Pushpa Rani made an application against her husband Baldev Raj Kumar under Section 488 of the Criminal P. C. claiming maintenance for herself and her child. Having obtained a decree for judicial separation against his wife Baldev Raj Kumar made an application in the proceedings under Section 488 of the Criminal P. C. initiated against him by his

wife Pushpa Rani praying that the proceedings against him be dropped in view of the decree for judicial separation obtained by him from a competent Civil Court. This application of the husband was dismissed by the impugned order. Being aggrieved Baldev Raj Kumar filed revision petition before the Sessions Court on the basis of which the present reference has been made to this Court recommending the quashing of the order of the learned Magistrate dated 19th August, 1968, disallowing the application of the husband in so far as the proceedings relating to the grant of maintenance to the wife are concerned.

3. In order to examine the effect of the decree for judicial separation obtained by the petitioner, a reference will have to be made to sub-section (4) of S. 488 and sub-section (2) of S. 489 of the Criminal P. C. which are in the following terms:

"488(4)—No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

* * * * *

"489(2)—Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

4. A reading of the above provisions would show that Section 489 (2) empowers the Magistrate to cancel or vary an order for maintenance in consequence of a decision of a Civil Court. This provision would imply that if there is inconsistency between the decision of the Criminal Court and that of the Civil Court, the decision of the Civil Court would prevail. Under Section 489 (2) all that the Magistrate has to see is as to whether any change in the order is called for in consequence of the decision of a competent Civil Court and if a change is called for he shall carry out that change either by cancelling the order or by varying it in accordance with the decision of the Civil Court. The Legislature seems to have given more importance to the decision of the Civil Court while embodying this provision. In Jetha Singh v. Mst. Gian Kaur, Criminal Revn. No. 937 of 1963 decided by Bedi, J., on 16-3-1964 (Punj) it was observed that if a ground exists on which the petitioner could get the maintenance order cancelled there was no reason why the order under Section 488 of the Criminal P. C. should be made if the same ground exists.

5. Under Section 10 of the Hindu Marriage Act, the husband is entitled to a decree for judicial separation on the

ground that the wife has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition under Section 10 of the Act. The expression 'desertion' has been defined to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage. From this it necessarily follows that if a decree for judicial separation has been passed against the wife it would imply that the wife has no reasonable ground for not living with the husband. In such a case sub-section (4) of S. 488 of the Criminal P. C. would come into operation and the wife would not be entitled to maintenance.

6. On behalf of the respondent reliance was placed on Mailappa Chettiar v. Sivagami Achi, 1964 (1) Cri LJ 242 (Mad) in which it was held that the mere fact that the Civil Court had given an inconsistent finding is by itself not a sufficient ground to cancel the order of maintenance made by the Criminal Court. The Madras case was considered by Raju, J in Dahyalal Amathalal Bhagat v. Bai Madhukanta, AIR 1965 Guj 247, and it was observed as under:—

"With great respect, for the reasons already given, having regard to the wording of Section 10 (1) (a) and the Explanation to Section 10 (1) of the Hindu Marriage Act and having regard to the wording of sub-section (4) of S. 488, Criminal P. C., it is very difficult to agree with the learned Single Judge of the Madras High Court. Criminal proceedings under Section 488, Criminal P. C., are somewhat summary. The Legislature has, therefore, given more importance to the Civil Court decisions. If there is inconsistency between the decision of the Criminal Court and the decision of the Civil Court, in such a matter the decision of the latter prevails, although, ordinarily, the decision of the Civil Court is irrelevant in a criminal proceeding."

I am in respectful agreement with the view taken by Raju, J., in Dahyalal Amathalal Bhagat's case, AIR 1965 Guj 247. This view also flows from the unreported ruling of Bedi, J. in Jetha Singh's case, Cri. Revn. No. 937 of 1963, D/-16-3-1964 (Pun). In Ravendra Kaur v. Achant Swarup, AIR 1966 All 133, the view taken by the Allahabad High Court was followed in preference to the Madras view in Mailappa Chettiar's case, 1964 (1) Cri LJ 242 (Mad) and it was observed as under:

"Learned counsel for the applicant relied on a single Judge decision of the Madras High Court in the case of (1963) 2 Mad LJ 82 = (1964) 1 Cri LJ 242, in which it was held that the mere fact that the Civil Court had given an inconsistent

finding is by itself no sufficient ground to cancel the order of maintenance made by the Criminal Court. With respect I differ from that view and accept the view taken by this Court in the case referred to above."

7. For the foregoing reasons, I accept this reference and set aside the order of the Judicial Magistrate dated 19th August, 1968, and dismiss the application of the wife for the grant of maintenance to her. The application of the respondent claiming maintenance for the minor child shall, however, proceed.

Reference allowed.

AIR 1970 PUNJAB & HARYANA 516
(V 57 C 83)

MEHAR SINGH, C. J. AND
B. R. TULI, J.

Sh. Bal Mukand, Plaintiff-Appellant v. Joint Hindu Family Firm known as Munna Lal Ramji Lal and others, Defendants-Respondents.

Letters Patent Appeal No. 295 of 1965, D/- 24-12-1969, from judgment of Gurdev Singh J. in S. A. O. No. 53 of 1963, D/- 7-10-1964.

(A) Negotiable Instruments Act (1881), S. 4, Illustration (b) — Promissory note — Essentials of. AIR 1938 All 619, Dis-sented from.

Before a document can be treated as a promissory note it should be promissory note both in form and in intent. If indebtedness is acknowledged in a document in a defined sum of money payable on demand that is enough to make the document a promissory note and the document need not necessarily say that the debtor promises to repay the amount. Merely because the document says that payment is to be made when demanded the undertaking to repay the amount does not become conditional. The absence of the words 'I promise to pay' makes no difference in the tenor of the instrument provided it fulfils other conditions of a promissory note. (Para 4)

Where the document is an instrument in writing, it contains an unconditional undertaking to pay because the payment is to be made under it on demand, it is signed by the maker, and it says that a certain defined sum is to be paid all the requirements of Section 4 are fulfilled and the document squarely comes within the scope of illustration (b) to that section. Moreover, when the party who has advanced money on basis of the document has described it as promissory note in the plaint and has based its claim on that basis, intention to treat the document as promissory note becomes clear.

CN/DN/B52/70/DVT/C

S. A. O. 53/63, D/- 7-10-1964 (Pun) Affirmed; AIR 1938 All 619, Dissented from. (Paras 4, 5)

(B) Civil P. C. (1908), S. 100 — Second appeal — Intention behind executing document — It is question of fact.

(Para 5)

Cases Referred: Chronological Paras

(1961) AIR 1961 Mad 347 (V 48) =

ILR (1961) Mad 218, Muthu Goun-

der v. Perumayammal

(1955) AIR 1955 Sau 74 (V 42) =

8 Sau LR 63, Shah Chimanlal

Jagjivandas v. Khambhla Savji

Bechar

(1953) AIR 1953 Cal 758 (V 40) =

57 Cal WN 744, Ambalal Puru-

sottamdas and Co. v. Jawaharlal

Purusottam Dave

(1938) AIR 1938 PC 121 (V 25) =

1938 All LJ 288, Karamchand v.

Firm Mian Mir Ahmad

(1938) AIR 1938 All 619 (V 25) =

1938 All LJ 907, Firm Ratanji

Bhagwanji & Co. v. Prem

Shanker

(1936) AIR 1936 PC 171 (V 23) =

63 Ind App 279, Mohammad

Akbar Khan v. Attar Singh

S. S. Mahajan, for Appellant; S. P.

Goyal, for Respondents.

MEHAR SINGH, C. J.: The plaintiff sued the defendants to recover Rs. 1,400/- as principal, with Rs. 300/- as interest, a total of Rs. 1,700/-, on the basis of what he himself described in his plaint as a promissory note of Poh Badi 4,2015 Bk., corresponding to December 30, 1958. The document is a separate piece of paper and bears the stamp of 20 Paise. If it is a promissory note, the stamp should have been of 25 Paise, and, if it is an acknowledgment, it should have been of 10 Paise.

2. The language of the document is — "Age rupya chuda sau (ank 1400/-) rokri liya jia ka biaj dar 12 ane sainkra dena mange tab dena." The ending words 'mange tab dena' in English translation mean 'payment to be made when demanded'. An objection being raised on the side of the defendants as to the admissibility of this document in evidence on the ground that it being a promissory note does not bear proper stamp and hence is not admissible in evidence, it prevailed with the learned trial Judge on the ground that the document has in it promise by the defendants to pay the amount stated in it on the demand of the plaintiff. So the learned trial Judge dismissed the claim of the plaintiff by his judgment and decree of March 27, 1963. In appeal, the learned District Judge was of the opinion that the words 'mange tab dena' in the document did not import any promise to pay and were merely a recital of liability of the defendants to pay. He

sought support for his view from Firm Ratanji Bhagwanji & Co. v. Prem Shanker, AIR 1938 All 619, in which this is what the learned Judge observed at page 620—

"The document of acknowledgment, dated 30th November 1932, is in these terms:

I have taken from you Rs. 1000 on 19th January, 1932, and Rs. 100 on 3rd February, 1932, total Rs. 1100. Whenever you ask for it I have to pay it together with interest.

(The actual words are: jab mango tab biyaj sahih deneka hai). Below this is affixed a one anna stamp and on the stamp appears the signature of Jata Shanker on behalf of the firm. Although in its judgment the learned Munsif held that this document is a promissory note, the endorsement on the back of it in the handwriting of the learned Munsif himself is as follows:

"This is an acknowledgment and need not be impounded'. This endorsement is dated 14th December, 1935, the date on which the judgment in the case was pronounced. The endorsement was made in consequence of a report by the office that the document was a promissory note and should have borne a stamp of four annas, but as it bore a stamp of only one anna it was liable to be impounded. The lower appellate Court does not appear to have considered whether this document is a promissory note or a mere acknowledgment. In my opinion it is not a promissory note because it does not contain an unconditional undertaking to pay. It only acknowledges that the two items of money mentioned therein have been borrowed and that the executant has to repay them on demand. There is no promise to pay, but only an admission of liability to pay. I translate the words deneka hai as 'I have to pay or I am liable to pay' and not as 'I promise to pay'."

So the learned Judge accepted the appeal of the plaintiff and remanded the case back to the trial Court for disposal of it in accordance with law after admitting the document in question in evidence. In second appeal by the defendants, the learned Single Judge has by his judgment and decree of October 7, 1964, reversed the order of the first appellate Court, restoring the decree of the trial Court, and thus dismissing the suit of the plaintiff, being of the opinion that the words as referred to above in the document mean promise to pay on demand. The learned Single Judge has considered not only Prem Shanker's case, AIR 1938 All 619 but also a few other cases to which reference will presently be made. This is a plaintiff's appeal under clause 10 of the Letters Patent

from the judgment and decree of the learned Single Judge.

3. So the only question for consideration is whether the document in question is or is not a promissory note, or whether it is an acknowledgment? In Section 4 of the Negotiable Instruments Act, 1881 (Act 26 of 1881), the expression 'promissory note' is defined in this manner—"A 'promissory note' is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument". Illustration (b) to this section says—"I acknowledge myself to be indebted to B in Rs. 1,000 to be paid on demand, for value received." It is apparent that if the acknowledgment of indebtedness is in a defined sum of money payable on demand that is enough and the document need not necessarily say that the debtor promises to repay the amount. Here the document is an instrument in writing, it contains an unconditional undertaking to pay because the payment is to be made under it by the defendants to the plaintiff on demand, which may have proceeded immediately the next moment this document came into existence, it is signed by the maker, and it says clearly that a certain defined sum was to be paid to the plaintiff by the defendants under this instrument. It fulfils all the requirements of Section 4 of Act 26 of 1881, and squarely comes within the scope of Illustration (b) to that section.

4. The learned counsel for the plaintiff contends that the undertaking to repay the amount in this case by the defendants was not an unconditional undertaking but was a conditional undertaking because the document says that they are to make the payment when demanded. He seeks support from *Muthu Gounder v. Perumayammal*, AIR 1961 Mad 347, but in that case the document provided payment after two years, and, on facts, the case is not quite parallel. However, it is on this observation of the learned Judge in that case upon which the learned counsel places reliance—"Now, in the present case, the unconditional promise to pay, which would otherwise exist if the promisor had merely agreed to pay on demand, is qualified and made into a conditional one by making it payable after a period of two years; or conversely the unconditional promise which would exist even if the money is made payable at the end of two years is made conditional by the stipulation for a demand thereafter." It will be seen that this observation of the learned Judge deals with the condition of two years before the expiry of which the payment was not to be made, and the learned Judge merely points out

that even after that it had to be made by a demand. On facts, therefore, the learned Judge did not find that the document there was unconditional undertaking to pay a certain sum of money. So this case does not advance the argument on the side of the plaintiff.

The learned counsel then falls back on *Prem Shanker's case*, AIR 1933 All 619, which undoubtedly supports the argument on his side. That case was, however, considered by a Division Bench, consisting of Shah, C. J. and Baxi, J., of the Saurashtra High Court in *Shah Chimanlal Jagjivandas v. Khambhla Savji Bechar*, AIR 1955 Sau 74, and the learned Judges did not accept the ratio of that case observing—"In that case the document was practically in identical terms with the present document and the material words were 'jab mango tab biyai sahit deneka hai'. The words 'deneka hai' were translated by the learned Judge as 'I have to pay' or 'I am liable to pay' and not as 'I promise to pay', and he declined to treat it as a promissory note on the ground that there was no promise to pay but only an admission of liability to pay. But illustration 2 to Section 4(a), Negotiable Instruments Act, 1881, which defines a promissory note, shows that an acknowledgment of indebtedness for a certain sum of money coupled with the words 'to be paid on demand' is a promissory note and in *Mohammad Akbar Khan's case*, AIR 1936 PC 171, their Lordships recognized that the illustration showed that the words 'I promise' or 'I undertake' are unnecessary. With great deference to the learned Judge of the Allahabad High Court, therefore, the absence of the words 'I promise to pay' makes no difference in the tenor of the instrument, and an acknowledgment of liability to pay a specific sum of money on demand is sufficient for holding the document to be a promissory note provided it fulfils other conditions of a promissory note", and earlier the learned Judges after referring to some cases including two cases decided by the Privy Council AIR 1936 PC 171, and *Karam Chand v. Firm Mian Mir Ahmad*, AIR 1938 PC 121 observed that "These authorities clearly establish that before a document can be treated as a promissory note it should be promissory note both in form and in intent." I respectfully agree with the learned Judges in this last mentioned case. In the present case the document answers to the form of a promissory note as in Section 4 and illustration (b) to it in Act 26 of 1881. It is a document by itself and is as such negotiable within the meaning and scope of Section 13 of the same Act, and so the observations of the learned Judge in *Ambalal Purusottamdas and Co. v. Jawaharlal Purusottam Dave*, AIR 1953 Cal 758, have no

real bearing on the facts of the present case because in that case the entry was in the account-book of the party.

5. It has already been shown that the form of the document in this case conforms to the requirements of Section 4 and of illustration (b) to it of Act 26 of 1881. On the question of intention of the parties, however, curiously enough neither the trial Court nor the Court of first appeal has said one single word, and even in the judgment of the learned Single Judge there is nothing on this. Intention is always a question of fact and as it is the right of the Court of first appeal to be the final Court of fact, whose decision in such matters is not open to question in second appeal in view of Section 100 of the Code of Civil Procedure, ordinarily such a question would be left to such a Court for disposal.

In the circumstances of the present case, however, no Court has attended to this aspect and it is not consistent with the justice of the case so far as the facts and circumstances of the present case are concerned to remit the matter now to the Court of first appeal merely for giving decision on the intention of the parties whether or not they intended the document in question to be a promissory note. The reason is that in the plaint itself the plaintiff has described this document as a promissory note and made a claim against the defendants on the basis of it as a promissory note. The learned counsel for the plaintiff urges that a wrong description of this type by a plaintiff is not conclusive as against him, but then when the plaintiff appeared in the witness-box, he never took this stand that he had wrongly or by mistake described this document as a promissory note in his plaint. It is apparent and obvious evidence of the intention of the parties that they intended this document to be a promissory note and not only did the plaintiff so intend but he also came to base his claim on it clearly saying that it is a promissory note and he is basing his claim on that promissory note. It is in these circumstances that it will not be in the interest of justice to remit this case back to the Court of first appeal for decision of this question of fact in regard to the intention of the parties with regard to this document. In the facts of the present case it must be held that the parties intended the document in question to be a promissory note.

6. On the approach as above, this appeal of the plaintiff is dismissed with costs affirming the judgment and decree of the learned Single Judge.

BAL RAJ TULI, J.: 7. I agree.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 519
(V 57 C 84)

P. C. PANDIT, J.

Kirpal Singh and others, Appellants v. Surjan Singh and others, Respondents.

Second Appeal No. 1155 of 1965, D/- 19-12-1969, from decree of Sub-J., Hoshiarpur, D/-27-7-1965.

(A) Limitation Act (1908), Art. 10 — Suit for pre-emption — Part of property sold included share in Shamilat Deh Patti — Property not capable of physical possession within the meaning of Article — Limitation for filing suit will commence from the date of registration of the sale-deed and not from the date of sale. 1889 Pun Re 65 & AIR 1918 Lah 383 (2), Rel. on. (Para 8)

(B) Civil P. C. (1908), O. 41, R. 33, S. 115 — Application under Order 41, Rule 33 filed before appellate Court — Dismissal of — Appeal against, not maintainable — Relief is by way of revision petition. (Para 13)

(C) Civil P. C. (1908), O. 41, R. 33 — Power of Court of appeal — Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objection — Two suits for pre-emption one filed by S. alleging to be vendor's paternal uncle's son and other filed by J. alleging to be vendor's son — Both suits consolidated by trial Court — Dismissal of both suits — Appeal against, preferred by S. — J. who had not instituted appeal, impleaded as respondent by S. — J. filing application under O. 41, R. 33 — Held J's application is liable to be rejected — The rights and interests of J. and S. were quite different and distinct and it was, therefore, that they had to file separate suits for getting relief — Since both the suits had been consolidated by the trial Court, S. had to implead J. as a respondent in the appeal instituted by him — In the application under O. 41, R. 33, filed by J. in the appeal, he could not be granted the relief asked for by him, because the result of that would have been that his suit, which had been dismissed by the trial Court and which decision had become final, would have been decreed and he would have got a decree for possession of the land by pre-emption even in preference to S. — Undoubtedly J. could not take the benefit of the provisions of Order 41, Rule 33, in a different suit filed by S. against the dismissal of which he had gone up in appeal. (Para 13)

Cases Referred: Chronological Paras
(1918) AIR 1918 Lah 383 (2) (V 5) =
1918 Pun Re 68, Lehana Singh v.
Bhagat Singh
(1889) 1889 Pun Re 65, Maluk Singh
v. Muhammad

B. S. Jawanda, for Appellants; R. L. Aggarwal for A. C. Hoshiarpuri, for Respondent No. 1.

JUDGMENT: This order will dispose of two connected Regular Second Appeals Nos. 1155 and 1212 of 1965.

2. On 2nd August, 1961, by means of a deed, Exhibit D. 2, Dhera Singh sold agricultural land measuring 22 kanals 6 marlas situate in village Moranwali, District Hoshiarpur, along with share in the Shamilat Deh Patti and one-third share in the well known as Nurpurwala with Persian wheel for Rs. 10,000/-, in favour of Birkha Singh and his three brothers Kirpal Singh, Harjit Singh and Sansar Singh, sons of Harnam Singh. The sale-deed was registered on 8th November, 1962. This sale led to two suits for pre-emption, one filed by Surjan Singh on 18th August, 1962, on the ground that he was the father's brother's son of the vendor and the other by Jagat Singh on 21st September, 1963, alleging that he was the son of the vendor. Both the suits were consolidated by the trial Court.

3. The vendees contested the suits on a number of pleas, but in the present appeal we are only concerned with one of them, namely, that the suits had been filed beyond limitation. The case of the defendants was that the sale-deed was executed on 2nd August, 1961, and the possession of the property was also delivered to the vendees on the same day, with the result that the suits should have been filed within one year from that date and that not having been done, the suits should have been dismissed on the ground of limitation. This plea of the defendant-vendees prevailed with the trial Judge and both the suits were dismissed.

4. Against the decision of the trial Court, only Surjan Singh went in appeal before the learned Senior Subordinate Judge. Jagat Singh did not institute any appeal. He was, however, made a respondent in the appeal of Surjan Singh. He put in an application under Order 41, Rule 33, Code of Civil Procedure, praying that he was entitled to the possession of the land in dispute by pre-emption as his suit was within limitation and although, he had not filed an appeal against the decision of the trial Court within limitation due to illness, he was entitled to have an order passed in his favour even in the appeal filed by Surjan Singh, because the trial Court had consolidated the two suits and tried them together.

5. The contention of Surjan Singh before the lower appellate Court was that the trial Judge had erroneously held his suit to be barred by time. Some of the properties sold, according to him, were not capable of delivery of physical possession and, therefore, the limitation for filing a suit for pre-emption commenced

from the date of the registration of the sale-deed, i.e., 8th November, 1962, under Article 10 of the Limitation Act. He had filed the suit on 18th August, 1962, and the same was within time. The learned Senior Subordinate Judge came to the conclusion that the entire property sold was not capable of delivery of physical possession, because it comprised six Khasra numbers in their entirety and one-half share in three other Khasra numbers together with share in Shamilat Deh Patti and one-third share in the well known as Nurpurwala with Persian wheel. Out of the suit property, only six Khasra numbers were capable of delivery of actual possession and regarding the rest, physical possession was not possible. That being so, under Article 10 of the Limitation Act, where the subject-matter of sale did not admit of physical possession, the limitation for filing a suit for pre-emption commenced from the date when the instrument of sale was registered. He was further of the view that the mere fact that Surjan Singh had stated that actual possession was delivered to the vendees on the date of sale would not make the entire property sold as being capable of delivery of physical possession and the finding of the trial Court that the time for filing the suit began to run from 2nd August, 1961, i.e., the date of sale, was erroneous in law. According to the learned Senior Subordinate Judge, both the suits of Surjan Singh and Jagat Singh, having been filed within one year of the registration of the sale-deed, were within limitation.

6. As regards the application of Jagat Singh under Order 41, Rule 33, Code of Civil Procedure, the same, according to the learned Senior Subordinate Judge, was without any merit. Jagat Singh had not filed an appeal against the decision of the trial Court by which his suit for pre-emption had been dismissed. The interests of Surjan Singh and Jagat Singh were distinct and independent and separate suits for pre-emption had been filed by them. Since Jagat Singh did not institute an appeal against the dismissal of his suit by the trial Court, he cannot be given the benefit of the provisions of Order 41, Rule 33, Code of Civil Procedure, in the appeal filed by Surjan Singh. As a result, the learned Senior Subordinate Judge accepted the appeal of Surjan Singh and decreed his suit on payment of Rs. 9,000/-. Against this decision, two appeals have been filed in this Court — one by the vendees and it is Regular Second Appeal No. 1155 of 1965 and the other by Jagat Singh, the other pre-emptor, which is Regular Second Appeal No. 1212 of 1965.

7. As regards the appeal filed by the vendees, the argument raised by their learned counsel was that it was mention-

ed in the sale-deed that possession of the property sold had been delivered to the vendees. It was also admitted by Surjan Singh, pre-emptor, himself that the land sold was in possession of the vendees from the date of sale. Similarly, Harnam Singh, the father of the vendees, who had transacted the deal on behalf of his sons, had admitted in cross-examination that the possession of the land sold was delivered to him on the date of sale and that no part thereof had remained in possession of the vendor. Under these circumstances, according to the learned counsel, the suit for pre-emption should have been brought within one year from the time when the purchasers took, under the sale sought to be impeached, physical possession of the whole of the property sold. In other words, the suit should have been filed within one year from 2nd August, 1961, when the vendees took physical possession of the entire property sold.

8. There is no manner of doubt that the property sold included share in Shamilat Deh Patti as well. That being so, the whole of the property sold was not capable of physical possession within the meaning of Article 10 of the Limitation Act and therefore, the pre-emption suit should have been filed within one year from the date of the registration of the sale-deed under that very Article.

9. It was held by a Division Bench of the Punjab Chief Court in *Maluk Singh v. Muhammad*, 65 Pun Re. 1889—

"In a suit for pre-emption, held (following the previous rulings of the Court) that where the sale in question includes a share in the Shamilat, even though the greater part of the property sold may consist of a separate holding, the whole subject-matter of the sale is not capable of physical possession within the meaning of Act XV, Schedule II, of the Limitation Act, and the period of limitation in such a case is one year from the date of registration of the deed of sale."

10. This ruling was followed in *Lehna Singh v. Bhagat Singh*, 68 Pun Re 1918 = (AIR 1918 Lah 383 (2)). No authority taking a contrary view was brought to my notice by the learned counsel for the appellants. It was, however, urged by him that there was in fact no Shamilat Patti or Shamilat Deh in the village, where the suit land was situate, in August 1961, when the sale-deed was executed, because by that time the Punjab Village Common Lands Regulation Act, 1953, had come into force, whereunder all the rights, title and interest in the Shamilat Deh had vested in the Panchayat, having jurisdiction over the village. No such point, however, was taken by the vendees either in the written statement or in the Courts below. This point was not even raised in the grounds of appeal in this Court. In

the sale-deed, it was mentioned that the vendor was selling a share in the Shamilat Patti as well and this sale-deed was accepted by the vendees themselves. Under these circumstances, the vendees cannot be permitted to raise this point for the first time in this second appeal, especially when it might involve the determination of questions of fact as well.

11. In view of what I have said above, I would hold that the learned Senior Subordinate Judge had rightly held that the suit of Surjan Singh had been filed well within limitation. The appeal, consequently, fails and is dismissed. The parties are, however, left to bear their own costs in this Court as well.

12. Now coming to the other appeal filed by Jagat Singh, in the first place, it is not understood as to how that appeal lies. Jagat Singh had, as already mentioned above, filed an application under Order 41, Rule 33, Code of Civil Procedure, before the learned Senior Subordinate Judge and the same was dismissed by him by his order dated 27th July, 1965. There was no decree passed by the learned Judge against him. It is against a decree that a second appeal could have been filed by Jagat Singh. His suit had been dismissed by the trial Court. He did not go up in appeal against the dismissal of his suit by the trial Judge. It was only if he had filed an appeal and the same had been rejected by the learned Senior Subordinate Judge that he could file a second appeal against the decree passed by the lower appellate Court. If his application under Order 41, Rule 33, Code of Civil Procedure, had been rejected by the learned Senior Subordinate Judge, he could file a revision petition against that order, but no second appeal is competent against that order. The appeal, therefore, deserves to be dismissed on that ground alone.

13. This apart, if Jagat Singh's suit had been dismissed by the trial Court and he did not go up in appeal against that decision, the same became final. In the other suit of Surjan Singh, which was also dismissed by the trial Judge, he had gone up in appeal before the learned Senior Subordinate Judge. Since both the suits, namely, one filed by Surjan Singh and the other by Jagat Singh, had been consolidated by the trial Court, Surjan Singh had to implead Jagat Singh as a respondent in the appeal instituted by him. In the application under Order 41, Rule 33, Code of Civil Procedure, filed by Jagat Singh in that appeal, he could not be granted the relief asked for by him, because the result of that would have been that his suit, which had been dismissed by the trial Court and which decision had become final, would have been decreed and he would have got a

decree for possession of the land by pre-emption even in preference to Surjan Singh. Undoubtedly, Jagat Singh could not take the benefit of the provisions of Order 41, Rule 33, Code of Civil Procedure in a different suit filed by Surjan Singh against the dismissal of which he had gone up in appeal. Learned counsel appearing for Jagat Singh could not refer to any decided case in which under similar circumstances, Order 41, Rule 33, Code of Civil Procedure, had been applied. The rights and interests of Jagat Singh and Surjan Singh were quite different and distinct and it was, therefore, that they had to file separate suits for getting relief. If Jagat Singh got satisfied with the dismissal of the suit by the trial Court and did not go up in appeal, he could not get his suit decreed by making an application under Order 41, Rule 33, Code of Civil Procedure, in the other suit filed by Surjan Singh. His application had, therefore, been correctly rejected by the learned Senior Subordinate Judge.

14. The result is that this appeal also fails and is dismissed. The parties are, however, left to bear their own costs in this Court.

Appeals dismissed.

AIR 1970 PUNJAB & HARYANA 522
(V 57 C 85)

MEHAR SINGH, C. J. AND
R. S. NARULA, J.

Nagin Chand, Plaintiff-Appellant v. Shadi Lal and others, Defendants-Respondents

Letters Patent Appeal No. 273 of 1964, D/- 19-1-1970, from decree of S. S. Dulat J., in S. A. No. 725 of 1962, D/- 6-9-1963.

Partnership Act (1932), S. 55 — Sale of goodwill after dissolution — Right to quota of controlled raw material is no part of goodwill. Second Appeal No. 725 of 1962, D/- 6-9-1963 (Pun), Reversed.

Where on dissolution of a partnership firm, the assets and goodwill of the firm are allotted to one partner and the other partners are allowed to conduct same kind of business at that place and subsequent to dissolution of firm the raw material required by such business is controlled and its distribution regulated by issue of order by Government, it cannot be said that by virtue of retaining the goodwill of the firm the partner retaining it can get the entire quota allotted in the name of dissolved firm to the exclusion of other partners. Second Appeal No. 725 of 1962, D/- 6-9-1963 (Pun), Reversed. (Para 4)

Cases Referred: Chronological Paras
(1957) AIR 1957 Bom 111 (V 44) =
59 Bom LR 209, New Gujarat

CN/CN/B60/70/RGC/C

Cotton Mills Ltd. v. Labour Appellate Tribunal

(1957) AIR 1957 Cal 280 (V 44) =
99 Cal LJ 11, Dulaldas Mullick
v. Ganesh Das Damani
(1901) 1901 AC 217 = 70 LJB 677,
Comms. of Inland Revenue v.
Muller & Co.'s Margarine Ltd.

H. L. Sarin, Senior Advocate with M/s. A. L. Bahl, H. S. Awasthi, for Appellant; N. K. Sodhi, for Respondents.

MEHAR SINGH, C. J.: This will dispose of two appeals Nos. 273 and 274 of 1964, under Cl. 10 of the Letters Patent, the first by Nagin Chand and the second by Ramesh Chand, to which the main opposite party is their third brother Shadi Lal respondent, from the judgment and decree, dated September 6, 1963, of a learned Single Judge accepting two appeals by the respondent from the appellate decrees of the first appellate Court, which had reversed the decree of the trial Court and decreed the two suits, one by each one of the two appellants, against the respondent. So the learned Single Judge dismissed the suits of the appellants.

2. The two appellants and Shadi Lal respondent are three brothers. They were having a partnership hosiery business in Ludhiana, with the name and style of their partnership as Jain Bodh Hosiery. On March 31, 1959, the three brothers dissolved the partnership. The appellants went out of the partnership leaving the business of Jain Bodh Hosiery with Shadi Lal respondent. The dissolution deed is Exhibit D 1 of that date. Clauses 2 and 3 of the same read — "2. That entire business assets of the firm along with the goodwill and liabilities have been taken over by the parties of the First part and parties of the Second and Third parts shall have no concern absolutely with the affairs of 'Messrs. Jain Bodh Hosiery' hereinafter. 3. Income-tax and Sales-tax and other taxes cases of the firm have not yet been settled and there might be some other liabilities unexpected at this time. If any liability will arise all the partners (retiring as well as continuing) will pay according to the share." The first party was Shadi Lal respondent, the remaining two parties to this document were the two appellants. It has been admitted at this stage in these appeals that after the dissolution of the partnership between the three brothers, the two appellants went into the very same business, but independently. So that on and from the date of dissolution of the partnership on March 31, 1959, the three brothers started hosiery business, but separately. Shadi Lal respondent continuing it in the name of the original firm and each one of the two appellants taking a new name of his business. However, all the three conti-

nued in hosiery business. Sometime after the dissolution of the partnership between the three brothers, there came a control over the raw material that they were using in their hosiery business. The Central Government having made, under the provisions of the Essential Commodities Act, 1955 (Act 10 of 1955), the Woollen Yarn (Production and Distribution) Control Order, 1960, the Textile Commissioner framed a scheme for distribution of wool yarn by fixing quotas, the basis for distribution with regard to the same having been adopted at the time with reference to the actual consumption of yarn by various manufacturers during the years 1956-57, 1957-58 and 1958-59. It will be seen that the basis for allotment of quota of yarn, a controlled commodity, by that time came to be the actual consumption of such wool yarn by the manufacturers during the three years preceding the dissolution of the firm of three brothers. The Textile Commissioner, according to the scheme of distribution, having passed on the distribution of wool yarn to the Hosiery Industry Federation, each one of the two appellants instituted a separate suit against the Federation, Shadi Lal respondent and the other appellant, for permanent injunction restraining the Federation to allot and Shadi Lal respondent to accept quota of wool yarn beyond one-third share of this respondent, because, according to the two appellants, either has been entitled to half of the remaining two-third share of the wool yarn quota. The two main matters for consideration before the learned trial Judge were whether either appellant was entitled to one-third share of the quota of wool yarn, and whether Civil Court had jurisdiction in the suits of the type, out of which these appeals have arisen. The learned Judge dismissed the claims of the appellants, but, on appeals by the appellants, the learned Judge in the first appellate Court reversed the decrees of the trial Court and granted a decree as claimed by each one of the appellants, finding the two main matters of controversy, as above, in favour of that particular appellant. It was Shadi Lal respondent who was in second appeal in this Court and a learned Single Judge by his judgment and decrees of September 6, 1963, reversed the decrees of the first appellate Court, restoring those of the trial Court, thus dismissing the suit of each one of the appellants. The learned Single Judge proceeded on the basis that "it is not possible to frame a comprehensive definition of 'goodwill' as its actual content would continue changing with the change in the business methods and activities, but one thing is not in my opinion in doubt and that is that the goodwill of a business house includes every advantage that accrues to the business

house in the future on account of its business activity in the past. Such an advantage was deliberately agreed to be made over by the two plaintiffs-respondents to Shadi Lal appellant at the time of the dissolution. The allocation of yarn quota was certainly an advantage that accrued to the firm after the dissolution of the previous partnership and it accrued on account of the previous business activity of the firm. It is thus an advantage included in the goodwill of the firm of which Shadi Lal appellant was the owner after the 31st March 1959." As stated, it is the appellant in each appeal who has come in appeal under clause 10 of the Letters Patent from the judgment and decree of the learned Single Judge dismissing his suit.

3. It is clear from what has already been stated that the facts are not in dispute. The three brothers dissolved their hosiery business partnership on March 31, 1959. Each one of the three brothers then entered into the very same hosiery business, but independently. Shadi Lal respondent, under the terms of the dissolution deed, continued his business in the name of the old firm, Jain Bodh Hosiery, and each one of the appellants took a new name to his hosiery business. After the dissolution of the partnership and sometime in 1960 on account of statutory control over distribution of wool yarn, according to the scheme of such distribution, allotment of quotas of yarn, raw material for hosiery business, was made on the basis of manufacturers' consumption in the three years preceding the year of the dissolution of the partnership of the three brothers. The quota of yarn having come to be controlled by the year 1960 according to law, raw material for hosiery business was obviously not available to businessmen of this type in the open market. They had, therefore, to obtain quota under the relevant scheme from the proper authority or the proper body, such as the Federation in this case, who had been given the facility of distributing such quota. The basis for the allotment of quota, as stated, was the actual use of the raw material by the manufacturers in three years preceding the date of the dissolution of the three brothers' partnership. Each one of the three brothers could, on the basis of manufacture of hosiery goods during the three years preceding the year of dissolution of their partnership, lay claim to one-third of the quota that was his share of the business of the partnership, the dissolution of the partnership in this respect having no effect whatsoever. If this was not so, the dissolution in the wake of this new unexpected development about the control of wool yarn would have thrown two out of three former partners, the two appellants, out of busi-

ness, a contingency never in the contemplation of the parties when they came to execute the dissolution deed, Exhibit D. 1, on March 31, 1959. Obviously, in the circumstances, the whole of the quota could not possibly have been claimed by Shadi Lal respondent alone merely on the basis of having the right to use the name of the old firm for the purposes of his business. So naturally argument turned to the meaning and scope of the word 'goodwill' before the learned Single Judge, and it is with reference to the same, as has already been shown, that the learned Judge has come to the conclusion that the quota that was available to firm Jain Bodh Hosiery was available to it as a part of its goodwill, which having, under the dissolution deed, passed to Shadi Lal respondent alone, the appellants have no claim to any share in it.

4. In Volume 29 of Halsbury's Laws of England, Third Edition, page 360, paragraph 715, this is the meaning given to goodwill — "The goodwill of a business is the whole advantage of the reputation and connection formed with customers together with the circumstances, whether of habit or otherwise, which tend to make such connection permanent. It represents in connection with any business or business product the value of the attraction to customers which the name and reputation possesses." In Volume 28 of the same treatise, at page 580, paragraphs 1139 and 1140, this is what is stated with regard to goodwill — "The goodwill of the business carried on by a partnership forms part of the assets to be realised upon distribution. If the goodwill is not sold, each partner may use the name of the firm, if by doing so he does not hold out the other partners as being still partners with him. If a partner agrees to retire and his partners buy his share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the style of the firm, and where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business, unless the right to use the firm name is expressly assigned. Where the goodwill becomes on dissolution the property of one of the partners (either by purchase in the ordinary way or pursuant to a provision in the articles), the outgoing partner or partners may not carry on a similar business in the name of the old firm An agreement that on dissolution the partnership assets shall be taken by one partner includes goodwill, and it must be valued on the footing that the outgoing partner is entitled to carry

on a similar business." In *Commrs. of Inland Revenue v. Muller & Co's Margarine, Ltd.*, (1901) AC 217 at page 223, Lord Macnaghten, delivering his speech in the House of Lords observed — "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good-name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different business in the same trade. One element may preponderate here and another element there." In *New Gujarat Cotton Mills Ltd. v. Labour Appellate Tribunal*, AIR 1957 Bom 111, Shah J., delivering the judgment of the Division Bench, observed at page 115 — "..... the goodwill of a business is inclusive of positive advantages such as carrying on the commercial undertaking at a particular place and in a particular name, and also its business connections, its business prestige, and several other intangible advantages which a business may acquire." In *Dulaldas Mullick v. Ganesh Das Damani*, AIR 1957 Cal 280, P. B. Mukharji J., delivering the judgment of the Division Bench, observed that "Goodwill represents business reputation which is a complex of personal reputation, local reputation and objective reputation of the products of the business. Which one of these elements will predominate will depend on the facts and circumstances of each case. Except where the reputation of a business and where the product of the business more than its proprietor have won widespread popularity and universal approval and except in the case of well-known patents and manufacturing processes in which event the personal and objective reputations predominate, it is the local reputation or the attribute of locality which forms the largest content of goodwill in almost every other business. Specially is the attribute of locality the most important consideration in the business of an ordinary trader or a dealer." While there is emphasis in these statements on what is goodwill, on the name, the place of business, reputation, connection of a business, and the attractive force to bring in custom, none of the authorities referred to has even hinted in the least that procurement of raw material for running and maintaining a manufacturing business is

a part of its goodwill. It is a basic requirement for the existence of such a business. When it has been procured and run through a manufacturing process, the products will attract custom because of the reputation of the business as from its name and as from its situation in a particular locality. I find it rather difficult to agree with the learned Single Judge that procuring raw material for a manufacturing business is an advantage which is part of the goodwill of such business. Normally, if there was no statutory control, raw material in the shape of wool yarn would have been available to all the three parties in the open market, and it is because this raw material has become a controlled commodity that each one of the three parties have had to resort to the allotment of quota of wool yarn for its hosiery manufacturing business. The allotment of quota of wool yarn was not because of the name of the old firm or because of the situation of that firm in a particular locality, nor because of anything connected with its reputation as a business house specially attracting custom. The basis of its allotment has been the consumption of wool yarn for manufacture during the three years preceding the date of dissolution of the partnership of the parties. It is the consumption of wool yarn for this particular purpose which has entitled a party to share in the raw material for manufacture, in this case wool yarn, which, as has been stated, but for statutory control would have been available in the open market. The availability of the raw material in the open market could not possibly be said to be part of the goodwill of the original partnership firm, and it is difficult to accept that it has become part of the same simply by reason of statutory control and its distribution according to a statutory scheme. So it is not an advantage or benefit which is born of the goodwill of the partnership under the name of Jain Bodh Hosiery. If this were so, a matter to which reference has already been made, it would mean that the two appellants would immediately go out of business on the coming into force of the Woollen Yarn (Procurement and Distribution) Control Order of 1960. Actually the sole object of that order was to ensure fair distribution, among manufacturers of woollen products, by giving them ratably raw material as wool yarn so that they may be able to continue their manufacturing business. For the matter of distribution some method had to be evolved and obviously the basis made was the three years' consumption of raw material, those three years happening to be the three years preceding the date of dissolution of the partnership between the parties in these cases. So that it is evident that the claim to raw material as

wool yarn under the statutory scheme as quota for continuing their hosiery business in the case of each appellant cannot be said to have been lost because any such claim is inconsistent with the goodwill of the original partnership remaining with Shadi Lal respondent under the dissolution deed, Exhibit D. 1. It has to be particularly noted that this dissolution deed does not debar the appellants from doing the very same business of hosiery manufacture in their own capacity and, as stated, the admitted fact is that ever since the dissolution of the partnership they have been independently under the new names of their firms carrying on the very same business. Mere transfer of the goodwill of the original partnership to Shadi Lal respondent could not be read as having debarred them from entering into and continuing the very same business. This is apart from the fact that Shadi Lal respondent has never questioned the right of the appellants to entering into and running the very same business. So an opportunity to procure raw material in the shape of wool yarn by the appellants was, in my opinion, not part of the goodwill of the partnership Jain Bodh Hosiery, which goodwill was left with Shadi Lal respondent in consequence of dissolution of that partnership firm.

5. In the approach as above, the appeals of the appellants are accepted and, reversing the decrees of the learned Single Judge, the decrees of the first appellate Court are restored, so that the claims of the appellants stand decreed in the terms of the decrees of the first appellate Court, but, in the peculiar circumstances of these appeals, there is no order in regard to costs.

R. S. NARULA, J.: 6. I agree.

Appeals allowed.

AIR 1970 PUNJAB & HARYANA 525
(V 57 C 86)

MEHAR SINGH, C. J. AND
R. S. NARULA, J.

Virsa Singh and others, Appellants v. The State of Punjab and others, Respondents.

Letters Patent Appeal No. 523 of 1969, D/-21-1-1970 from judgment of Shamsher Bahadur, J. in Civil Writ No. 2917 of 1965, D/-23-10-1969.

(A) Displaced Persons (Compensation and Rehabilitation) Rules (1955), R. 102, Cls. (a) to (d) & Proviso—Excess land allotted to B — Order of cancellation of excess land by Assistant Registrar-cum-Managing Officer, Rehabilitation Department — Notice to show cause against cancellation of excess land allotment issued

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to B who was by then dead — Appellants, heirs of B not served with notice nor appeared before Managing Officer — Order nullity — Appearance by appellants before appellate and revisional authorities incapable of validating order. C. W. No. 2917 of 1965, D/- 23-10-1969 (P. & H.), Reversed.

Managing Officer finding excess land being allotted to B issued notice to B under Rule 102 to show cause against cancellation of allotment of excess area. B was then dead. The notice was neither served on the appellants nor did they appear before Managing Officer. Order cancelling the allotment was passed, on appeal.

Held, (i) Proviso to R. 102 being mandatory order of cancellation without compliance of the proviso is without jurisdiction; (ii) hearing afforded to the appellants at appellate and revisional stages was no substitute for the hearing before the Managing Officer before passing the order under Rule 102, (iii) the original order of Managing Officer was a nullity which could not be validated by the hearing afforded to the appellants at appellate and revisional stages C W No. 2917 of 1965, D/- 23-10-1969 (P & H.), Reversed (AIR 1942 FC 3, Followed) (Para 4-6)

(B) Constitution of India, Art. 226 — New plea — Omission to raise jurisdictional point before departmental authority — No bar to urging that point in writ proceedings.

On the admitted facts of this case it is difficult to hold that a patently invalid order should be sustained merely because a fatal defect therein was not pleaded by the appellants in departmental proceedings. AIR 1961 SC 647 & AIR 1959 SC 559, Foll. (Para 7)

Cases Referred: Chronological Paras

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| (1969) ILR (1969) 1 Punj & Haryana | |
| 554, Ram Singh v. Chief Settlement Commr. (Rural) Punjab | 0 |
| (1961) AIR 1961 SC 647 (V 48) = | |
| (1961) 3 SCR 297, Alembic Chemical Works Co. Ltd. v. The Workmen | 7 |
| (1959) AIR 1959 SC 559 (V 46) = | |
| 1959 Supp (1) SCR 769, Badri Prasad v. Nagarmal | 7 |
| (1942) AIR 1942 FC 3 (V 29) = | |
| 1941 FCR 37, Suraj Narain Anand v. North-West Frontier Province | 5 |

B. S. Jawanda and B. S. Wasu, for Appellants; Sukhdev Khanna for Advocate-General (Punjab) (for Nos. 1 to 4) and P. S. Mann (for Nos. 5 and 6), for Respondents.

R. S. NARULA, J.: 3 Standard Acres and 13½ Units of agricultural land was allotted to Buta Singh, a displaced person, in village Begumpur, Hadbast No. 129 (sic), tahsil Phillaur, district Jullundur, accord-

ing to his entitlement. Shri S. D. Katyal, Assistant Registrar-cum-Managing Officer, Rehabilitation Deptt., Punjab, found that the valuation of the area actually allotted to Buta Singh against his abovementioned entitlement came to 6-8 Standard Acres against 3-13½ Standard Acres worked out by the field staff. This mistake was found to have occurred because of some action of the Consolidation Department and not on account of any error on the part of the Rehabilitation Department. Shri S. D. Katyal thought that the allottee had received allotment in excess of his entitlement to the extent of 2-10½ Standard Acres. A show-cause notice is therefore, stated to have been issued to Buta Singh who had admittedly died before the issue of the notice. The notice issued to Buta Singh is stated to have been received by his son Milkha Singh. Whether Milkha Singh actually received the notice or not, the fact remains that even he did not appear in response to the notice, which was addressed to his dead father. Admittedly no notice was ever issued to any of the appellants and none was served on appellants Nos. 1 and 2, the other sons of Buta Singh. By an ex parte order, dated March 29, 1963 (copy Annexure 'A' to the writ petition), the Managing Officer cancelled the allotment of Buta Singh to the extent of 2-10½ Standard Acres in the abovementioned village. It may be remembered that the order was passed in ignorance of the factum of death of Buta Singh and had been passed against a dead person. When the appellants came to know of the order, they preferred an appeal against the same which was rejected by the order of Shri Gurdial Singh, Assistant Settlement Commissioner with powers of Settlement Commissioner, dated December 16, 1964.

A further petition for revision of that order filed by the appellants was dealt with by Shri J. M. Tandon, Chief Settlement Commissioner, Punjab, Jullundur, on September 1, 1965. The area which had been retrieved from the appellants in pursuance of the order of the Managing Officer having been found by the Chief Settlement Commissioner to be more than what could be taken away from them under the impugned order, the case was remanded to the Naib Tahsildar (Sales)-cum-Managing Officer, Nakodar, with a direction to find out the quantum of land which was to be retrieved in implementation of the cancellation order. Respondents Nos. 5 and 6 who had in the meantime bid for the retrieved area at an auction were given the option to treat the entire auction in their favour as cancelled or to retain the balance of the area along with the proportionate price of the land which had to be restored in the name of Buta Singh. It was in the abovementioned circumstances that the three sons of Buta

Singh, the appellants before us, filed Civil Writ 2917 of 1965, in this Court,

2. The first contention advanced on behalf of the appellants before the learned Single Judge at the hearing of the writ petition was to the effect that the cancellation of the allotment without giving the allottee a reasonable opportunity of being heard, as provided in Rule 102 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955, was illegal and all the impugned orders were, therefore liable to be set aside. It was not disputed at any stage that the notice of the proposed cancellation was issued to a dead person, that the same was not served on appellants Nos. 1 and 2, and that no notice was issued to any of the appellants and none of them appeared before the Managing Officer. The contention of the appellants was rejected by the learned Single Judge on two grounds, viz. :—

(i) that there was no merit in the contention of the appellants as they had been heard at the appellate and the revisional stages; and

(ii) that the point of non-service of notice had not been raised by the appellants before the departmental authorities.

3. The only other argument addressed to the learned Single Judge on behalf of the appellants was that even if the impugned orders of cancellation were upheld, the petitioners were entitled to purchase the excess area and the department was bound to give them an option to do so. The learned Judge held that this matter had to be dealt with according to the rules and instructions of the department and all that could be done by this Court was to direct the authorities concerned to consider the application of the writ petitioners for purchase of their land after keeping in view the rights of the auction-purchasers. It is against the judgment of the learned Single Judge dismissing the writ petition of the appellants on the abovesaid two grounds that the present appeal has been filed by the unsuccessful writ petitioners under Cl. 10 of the Letters Patent of this Court.

4-6. Mr. Baldev Singh Jawanda, learned Advocate for the appellants, submitted that both the grounds on which the main contention of the appellants on the merits of the controversy was rejected by the learned Single Judge are erroneous in law. The cancellation of the allotment was admittedly made under Rule 102. The order could be deemed to have been passed only under Cl. (d) of that rule. It is only R. 102 which authorised the Managing Officer to cancel the allotment in the circumstances enumerated in Cls. (a) to (d) of that rule. The exercise of jurisdiction under that rule is, however, subject to the statutory

proviso to that rule which is in the following terms:—

“Provided that no action shall be taken under this rule unless the allottee or the lessee, as the case may be, has been given a reasonable opportunity of being heard.”

The requirements of the proviso are mandatory. Any order passed under Rule 102 without satisfying the requirements of the proviso would be without jurisdiction. The first contention of Mr. Jawanda, the learned counsel for the appellants, is that the hearing afforded to the appellants at the appellate and revisional stages was no substitute for the hearing required to be afforded by the Managing Officer before passing an order under Rule 102. Counsel is no doubt supported in this submission by an authoritative pronouncement of their Lordships of the Federal Court in *Suraj Narain Anand v. North-West Frontier Province*, AIR 1942 FC 3. In that case it was held as follows:—

“In theory as well as in practice, there is a well-marked difference between a decision given by an officer who acts in the consciousness that he is primarily responsible for the investigation and decision of the case and the act of one who is expected only to satisfy himself that another officer who had the primary responsibility has properly dealt with the case. The distinction seems to us one of substance and is not merely formal or technical.”

6. With the greatest respect to the learned Single Judge, we are unable to agree in the face of the abovementioned pronouncement of the Federal Court that the mandatory requirements of the proviso to Rule 102 could be said to have been satisfied by the hearing afforded to the appellants at the appellate and revisional stages. Moreover, in my opinion, the original order of the Managing Officer which had been passed against a dead person was, in the nature of things, a nullity; and a nullity could not be made valid by its being upheld by the appellate or revisional authorities.

7. We also find great force in the second submission of the learned counsel for the appellants. He has argued that the non-raising of a fundamental and jurisdictional point of this nature before the departmental authorities is not an absolute bar to the matter being urged for the first time in writ proceedings. A point of law not raised before the Industrial Tribunal was allowed to be raised by their Lordships of the Supreme Court in an appeal by special leave against the award of the Tribunal in *Alembic Chemical Works Co. Ltd. v. The Workmen*, AIR 1961 SC 647, on the ground that it arose on admitted facts. In *Badri Prasad v. Nagarmal*, AIR 1939 SC 559, their Lordships of the

Supreme Court held that no Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset. Each case depends on its own facts in this respect. On the admitted facts of this case, we are unable to hold that a patently invalid order should be allowed to hold the field merely because a fatal defect therein was not pleaded by the appellants in the departmental proceedings.

8. Both the grounds on which relief was refused to the appellants by the learned Single Judge having thus been found by us to be not sustainable on the facts of this case, the impugned order of the Managing Officer, dated March 29, 1963 (Annexure 'A'), and the orders of the appellate and revisional authorities upholding the same have to be set aside as being violative of the statutory proviso to R. 102 and we accordingly quash the same.

9. In the view we have taken of the main point canvassed before us on behalf of the appellants, it is really not necessary to go into the second point relating to the right claimed by the appellants to purchase any area which may ultimately be found to be with them in excess of their entitlement. In fairness to the learned counsel for the appellants, it may be noticed that he wanted to argue on the basis of a Single Bench judgment of this Court in *Ram Singh v. The Chief Settlement Commr. (Rural) Punjab*, ILR (1963) 1 Punj and Haryana 554, that his clients have a legal right to acquire such land by purchase. As observed by the learned Single Judge these matters have to be raised before the appropriate departmental authorities to whom the appellants shall have to apply for permission to purchase the excess area, if any, which may ultimately be found to be with them.

10. For the foregoing reasons this appeal is allowed though without any order as to costs; the orders of the Managing Officer, the appellate authority and the Chief Settlement Commissioner, are set aside, and it is left open to the appropriate Managing Officer to take up, if necessary, the question of determination and cancellation of any area allotted to the appellants in excess of their entitlement after giving due notice and adequate opportunity to the appellants to show cause against the proposed action in accordance with law.

MEHAR SINGH, C. J.: 11. I agree.

Appeal allowed.

AIR 1970 PUNJAB & HARYANA 528
(V 57 C 87)

D. K. MAHAJAN AND
S. S. SANDHAWALIA, JJ.

Sant Sadhu Singh and others, Petitioners v. The State of Punjab and another, Respondents.

Civil Writ No. 2820 of 1969, D/-29-1-1970.

(A) Constitution of India, Art. 246 — Subject matter of laws made by State Legislature — Punjab Co-operative Societies (Amendment) Ordinance (1969) — Punjab Co-operative Societies (Amendment) Act (1969) — Act and Ordinance are not a colourable exercise of power.

(Para 2)

(B) Constitution of India, Art. 31-A — Saving of laws for acquisition of estates etc. — Punjab Co-operative Societies (Amendment) Ordinance (1969) — Punjab Co-operative Societies (Amendment) Act (1969) — Ordinance and Act are not violative of Arts. 14 and 19, as being protected by Art. 31-A.

(Para 2)

(C) Constitution of India, Art. 246 — Subject-matter of laws made by State Legislature — State Legislature has jurisdiction to regulate functioning of co-operative Societies engaged in business of banking by virtue of Entry No. 32 of List 2 of Sch. 7 — Entries 43 and 45 of List 1 of Sch. 7 not attracted.

(Para 13)

(D) Constitution of India, Sch. 7, List 1, Entry 43 — Incorporation etc. — Co-operative Societies doing banking business are taken out of Entry 43 of List 1 and deliberately put in Entry 32 of List 2 — State Legislature is competent to regulate functioning of such Co-operative Societies.

(Para 13)

(E) Constitution of India, Sch. 7, List 2, Entry 32 — Incorporation etc. — Co-operative Societies doing banking business are taken out of Entry 43 of List 1 and deliberately put in Entry 32 of List 2 — State Legislature is competent to regulate functioning of such Co-operative Societies.

(Para 17)

(F) Civil P. C. (1908), Pre. — Interpretation of Statutes — Harmonious construction — Legislative entries are to be harmoniously construed. AIR 1962 SC 1044, Rel. on.

(Para 13)

(G) Constitution of India, Sch. 7, List 1, Entry 43 — Incorporation etc. — On harmonious construction, business of banking falls within Entry No. 45 whereas corporations and matters relating to them fall within Entry No. 43 — Co-operative Societies are excluded from its purview.

(Para 13)

(H) Constitution of India, Sch. 7, List 1, Entry 45 — Banking — On harmonious construction, business of banking falls within Entry No. 45, whereas Corporations and matters relating to them fall within

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Entry No. 43 — Co-operative Societies are excluded from its purview. (Para 13)

(I) Civil P. C. (1908), Pre. — Interpretation of Statutes — Legislative entries — Words used therein must receive widest interpretation. AIR 1963 SC 703 & AIR 1965 SC 1387 & AIR 1941 FC 16, Rel. on. (Para 11)

(J) Co-operative Societies — Punjab Co-operative Societies (Amendment) Ordinance (1969), Pre. — Punjab Co-operative Societies (Amendment) Act (1969), Pre. — Ordinance and Act are constitutionally valid. (Paras 2, 13)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1387 (V 52) =
 (1965) 2 SCR 355, Banarasi Dass
 v. Wealth Tax Officer, Special
 Circle, Meerut 11
- (1963) AIR 1963 SC 703 (V 50) =
 1963 Supp (1) SCR 112, Gujarat
 University, Ahmedabad v. Krishna
 Rangnath Mudholkar 10
- (1962) AIR 1962 SC 458 (V 49) =
 1962 Supp (1) SCR 156, Board of
 Trustees Ayurvedic and Unani
 Tibia College Delhi v. State of
 Delhi 7
- (1962) AIR 1962 SC 1044 (V 49) =
 (1964) 1 SCR 19, Calcutta Gas Co.
 (Proprietary) Ltd. v. State of West
 Bengal 12
- (1945) AIR 1945 FC 7 (V 32) =
 ILR (1945) Kar FC 25, Bank of
 Commerce Ltd., Khulna v. Nripendra
 Nath Datta 8
- (1941) AIR 1941 FC 16 (V 28) =
 1940 FCR 110, United Provinces
 v. Mst. Atiqa Begum 11

Kuldip Singh with R. S. Moongia, for
 Petitioners; Mela Ram Sharma, Deputy
 Advocate-General, I (Punjab) with Mohin-
 der Pal Singh, Gill, Asst. Advocate-Gen-
 eral (Punjab), for Respondents.

D. K. MAHAJAN, J.:— This order will
 dispose of Civil Writ Petitions No. 2820.
 2858, 3090 and 3091 of 1969. The peti-
 tioners are mainly Directors of the Co-
 operative Banks and have filed the pre-
 sent petitions under Articles 226 and 227
 of the Constitution of India, to challenge
 the vires of Punjab Co-operative Societies
 (Amendment) Ordinance, 1969 (Ordinance
 No. 10 of 1969) which Ordinance has later
 on been made Law (Punjab Co-operative
 Societies (Amendment) Act, 1969) (Pun-
 jab Act 25 of 1969). Sections Nos. 4, 7,
 10 and 11 of the Ordinance and now Sec-
 tions Nos. 4, 6, 9 and 10 of the Act, are
 being challenged in these petitions. The
 main grounds of attack which were argu-
 ed before us are:—

- (1) That the Punjab Legislature is not
 competent to make Law pertaining
 to Banking Corporations. Co-opera-
 tive Societies doing banking busi-
 ness are Banking Corporations

and, therefore, the Amending Ordinance and the Amending Act, which have replaced it, are ultra vires the Constitution so far as the Banking Co-operative Societies are concerned.

- (2) That the exercise of the power by the State Legislature in enacting the Amending Act and the promulgation of the Ordinance by the Governor are a colourable exercise of power so far as the Banking Co-operative Societies are concerned.
- (3) That the Ordinance as well as the Amending Act are violative of Articles 14 and 19 of the Constitution of India.

2. It may be mentioned that only the first ground of attack was really pressed. The two grounds of attack have been merely stated to be rejected. We have been unable to see how the Act or the Ordinance are a colourable exercise of power, whereas the complete answer to the 3rd ground of attack is furnished by Art. 31-A of the Constitution of India. Therefore, we only propose to deal with the facts of Civil Writ Petition No. 2820 of 1969 in order to bring out the controversy pertaining to the first ground. It is conceded that whatever our decision is in this petition it will conclude the other three petitions. We have not thought it necessary to advert to the facts of the remaining three petitions.

3. In Civil Writ No. 2820 of 1969, the petitioners are the Directors of Central Co-operative Bank Ltd., Ropar — herein-after called the Bank. This Bank was registered under the Punjab Co-operative Societies Act, 1961. Petitioners Nos. 1, 2, 4 & 5, namely, Sant Sadhu Singh, S. Jagir Singh, S. Gurdev Singh & S. Sarwan Singh respectively, were elected Directors of the Bank in an election held on the 9th of May, 1969. They were elected unopposed. Petitioner No. 3, Dr. Roy Bikram Chand, was elected unopposed on the 13th of August, 1968, whereas petitioner No. 6, S. Karam Singh, was elected as a Director of the Bank on the 27th of September, 1968. According to the bye-laws of the Bank the Board of Directors is elected for a period of three years and 1/3rd of the Directors retire annually in rotation. The Bank was established in the year 1927 with a nominal capital. Its present working capital is over two crores. The Punjab Government have also subscribed to the share capital of the Bank to the extent of about 20 lacs. It has also nominated three Directors as members of the Board of Directors under Section 26 of the Punjab Co-operative Societies Act, 1961. It is claimed that by reason of the Ordinance and the Amending Act, the rights and powers of the share-holders in managing the co-operative Banks have been consi-

derably curtailed and the Registrar of the Co-operative Societies has taken over completely the control of the Societies. It is also averred that the reason for the Ordinance and the Amending Act is to deprive the control which was with the Congress Party and make it over to the Akali Party.

4. Reverting to the main ground of attack, namely, that the Punjab Legislature has no power to enact a Law pertaining to Co-operative Societies doing Banking business, it is not disputed that the Ordinance as well as the Amending Act are fully within the competence of the State Legislature so far as the other co-operative Societies (i.e. Societies not engaged in Banking business) are concerned. In order to appreciate the contentions that have been advanced by the learned counsel for the petitioners, it will be proper to refer to Schedule VII, List I, Entries Nos 43, 44 and 45, List II, Entry No 32. These entries are reproduced below for facility of reference.

"List I

Entry No 43 Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies

No 44 Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

No 45 Banking.

"List II

Entry No 32 Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations, co-operative societies"

5. On the basis of these entries the argument of the learned counsel for the petitioners is that entry No 43 clearly confers the power of regulation of Corporations including Corporations doing banking business in the Central Parliament and only those Co-operative Societies are excluded from entry No 43 which are not doing the business of banking. This fact, according to the learned counsel, finds further support if entry No 32, List II is taken into consideration. That entry only brings those Corporations within the purview of the legislative power of the State Legislature which are not specified in List I. As Banking Corporations are specified in List I, Entry No 43, any legislation pertaining to banking, necessarily falls within the ambit of List I, regarding which only the Central Parliament can legislate. It is also urged that in view of entry No 45 List I any legislation which affects banking would have to be undertaken by the Central Parliament and it will not be within the competence of State

Legislature to legislate about matters pertaining to banking.

6. So far as the State counsel is concerned, his contention is that no matter what business the Co-operative Societies are doing including the banking business, they were specifically taken out from entry No. 43, List I and are put in List II, Entry No 32. Therefore, the State Legislature has full powers to legislate about Co-operative Societies irrespective of the fact whether they are doing banking business or not.

7. It is common ground that Co-operative Societies are Corporations. This has been conceded by the learned counsel representing both the parties in view of Supreme Court decision in Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v State of Delhi (New Delhi Administration), AIR 1962 SC 458, that a Co-operative Society is a Corporation and we have, therefore, proceeded on that basis.

8. Before proceeding to deal with the respective contentions of the learned counsel for the parties, it may be mentioned that any legislation regarding the banking business as such can only be undertaken under entry No. 45, List I, whereas regulation of Corporations doing Business of Banking falls under entry No 43. But Co-operative Societies are excluded from this entry and have been put in entry No. 32, List II, Schedule VII. This is also evident from the Banking Companies Act, as amended up to date, and the Reserve Bank of India Act. The Co-operative Societies doing banking business are put on par so far as entry No 45, List I is concerned, with other banking institutions. While construing entry No. 45, the Federal Court of India in Bank of Commerce, Ltd., Khulna v. Nripendra Nath Datta, AIR 1945 FC 7, observed as follows:—

"On a reasonable construction, the entry must be limited to laws which affect the conduct of the business of banks qua banks."

Their Lordships were considering entry No. 38, List I of the Government of India Act, 1935, which is in these terms:—

"Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State."

9. This entry more or less corresponds to entry No. 45 in List I, Schedule VII of the Constitution of India. The entry corresponding to entries Nos. 43 and 44 in List I, Schedule VII of the Constitution of India is entry No. 33 in List I of the Government of India Act, 1935. Entry No. 33 is in the following terms:—

"Corporations, that is to say, the Incorporation, regulation and winding-up of

trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations whether trading or not, with objects not confined to one unit."

10. Their Lordships of the Supreme Court in *Guirarat University, Ahmedabad v. Krishna Rangnath Mudholkar*, 1963 Supp (1) SCR 112 at page 141 = (AIR 1963 SC 703 at page 716), in the matter of construction of entries in Schedule VII observed:—

"Item No. 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditional by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject."

11. In *Banarasi Dass v. The Wealth Tax Officer, Special Circle, Meerut*, AIR 1965 SC 1387, their Lordships of the Supreme Court, relying on *United Provinces v. Mst. Atiqa Begum*, AIR 1941 FC 16, observed that the relevant words used in the entries of the Seventh Schedule must receive the widest interpretation. It was also observed:—

"Another rule of construction which is also well established is that it may not be reasonable to import any limitation in interpreting a particular Entry in the List by comparing the said Entry or contrasting it with any other Entry in that very List. While the Court is determining the scope of the area covered by a particular Entry, the Court must interpret the relevant words in the Entry in a natural way and give the said words the widest interpretation. What the Entries purport to do is to describe the area of legislative competence of the different legislative bodies, and so, it would be unreasonable to approach the task of interpretation in a narrow or restrictive manner."

12. In *Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal*, AIR 1962 SC 1044, their Lordships, while reiterating the earlier propositions, observed:—

"But some of the entries in the different lists or in the same list may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of the Court to reconcile the entries and bring about harmony between them. The underlying principle in such cases is that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Constitution and operating in the same field, when by reading the former in a

more restricted sense effect can be given to the latter in its ordinary and natural meaning. Thus, every attempt should be made to harmonize the apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory."

13. Keeping in view these principles, the meaning and scope of entry No. 43 has to be ascertained. The contention of the learned counsel for the petitioners is that the various provisions in the Ordinance, which has been replaced by the Amending Act, impinge on the business of banking inasmuch as the entire control of the management is more or less vested with the Registrar and the right of the shareholders to elect their representatives has been taken away. This is so. It is evident that entry No. 43 and entry No. 45 relate to different heads of legislation. Whereas entry No. 45 gives the power to the Central Legislature to legislate qua banking business, entry No. 43, on the other hand, gives power to the Central Legislature to legislate regarding corporations. It is immaterial whether those Corporations were doing the banking business or not. In other words, Central Legislature is competent to legislate with regard to Corporations engaged in the business of banking, in view of entry No. 43, List I. But so far as the Co-operative Societies are concerned, they were taken out of the ambit of entry No. 43 and put in entry No. 32, List II. The word 'regulation' in entry No. 43 is of a wide import and would include how a Co-operative Society is to work. In other words, it will include the constitution of a Co-operative Society and any matter relating to its constitution would naturally be the subject-matter of legislation by the State Legislature.

In a broad sense, the controlling of the working of a Society doing banking business will in some measure concern the business of banking and thus may bring it within the ambit of entry No. 45, List I. Thus there would be some overlapping. But in order to give a harmonious construction to both the entries, Nos. 43 and 44, it must be held that only business of banking as such falls within the ambit of entry No. 45; whereas the incorporation of the Corporations and other matters relating to them fall within the ambit of entry No. 43. Therefore, the constitution of the Societies and their working would have fallen within the ambit of entry No. 43 but for the fact that Co-operative Societies are excluded from its purview. The very fact that in entry No. 43, Corporations engaged in the business of banking are specifically mentioned, it clearly follows that Co-operative Societies doing that business were taken out of entry

No. 43, List I. and deliberately put in entry No. 32, List II. In view of the clear wording of the two entries, I am unable to agree with the contention of the learned counsel for the petitioners, that the State Legislature has no jurisdiction to regulate the functioning of the Co-operative Societies engaged in the business of Banking.

14. For the reasons recorded above, these petitions fail and are dismissed. There will be no order as to costs.

S. S. SANDHAWALIA, J.:— 15. I agree.

Petitions dismissed.

AIR 1970 PUNJAB & HARYANA 532 (V 57 C 88)

FULL BENCH

HARBANS SINGH, JINDRA LAL AND
A D KOSHAL, JJ

State, Appellant v. Chand Singh Mit Singh, and another, Respondents

Criminal Appeal No 943 of 1966, D/- 19-3-1970. Decided by Full Bench on order of reference made by Jindra Lal and A. D. Koshal, JJ., D/- 30-1-1969

Penal Code (1950), S. 397 — "Uses deadly weapon"—There must be overt act in relation with weapon involving more than mere wearing or carrying it, even though such wearing or carrying may be for the purpose of overawing others. (Per majority, Jindra Lal, J. Contra). Criminal Appeal No. 1087 of 1966, D/- 3-6-1968 (Punji) & AIR 1932 Oudh 103, Approved; AIR 1952 Vind Pra 42, Rel. on; (1912) 13 Cri LJ 267 (Low Bur); AIR 1933 Lah 35 & AIR 1926 Sind 150, Dissented from; AIR 1932 Oudh 103 & AIR 1941 Mad 718 & AIR 1956 Bom 353 & AIR 1934 Lah 522, Distinguished. (Para 9)

Cases Referred: Chronological Paras

(1963) Criminal Appeal No. 1087 of

1966, D/- 3-6-1968 (Punji), State v.

Puran Singh 1, 2, 4, 6, 8

(1964) 66 Pun LR 173, Shiv Narain v. State 8

(1956) AIR 1956 Bom 353 (V 43) =

1956 Cri LJ 700, Govind Dipaji

More v. State 1, 8, 14

(1952) AIR 1952 Vin Pra 42 (V 39)

= 1952 Cri LJ 986, Kartar Singh

v. State of Vindhya Pradesh 6

(1941) AIR 1941 Mad 703 (V 28) =

42 Cri LJ 824, In re Somanna 1

(1941) AIR 1941 Mad 718 (V 28) =

42 Cri LJ 863, Public Prosecutor

v. Nagappan Servai 8

(1938) AIR 1938 Mad 477 (V 25) =

39 Cri LJ 323, In re Thevar

Servai 8

(1934) AIR 1934 Lah 522 (V 21) =

35 Pun LR 555 = 36 Cri LJ 253,

Inder Singh v. Emperor 1, 8

FN/CN/C751/70/RGD/B

(1933) AIR 1933 Lah 35 (V 20) =

34 Cri LJ 45, Nagar Singh v. Em-

peror 1, 8

(1932) AIR 1932 Oudh 103 (V 19) =

33 Cri LJ 926, Chandra Nath v.

Emperor 1, 5, 8

(1926) AIR 1926 Sind 150 (V 13) =

27 Cri LJ 334, Nazar Shah v.

Emperor 1, 8

(1912) 13 Cri LJ 267 = 6 Low Bur

41, Nga I v. Emperor 7, 8, 14

D. D. Jain, for Advocate-General, Pun-

jab, for Appellant; Amar Dutt as Amicus

Curiae, for Respondents.

KOSHAL, J.:— Section 397 of the Indian Penal Code reads:

"If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

The question referred to the Full Bench involves the interpretation of the word "uses" occurring in the section and has arisen thus. Chand Singh, Nazir Singh and Gurdev Singh were jointly tried by Shri Banwari Lal Singal, Additional Sessions Judge, Bhatinda, for an offence under Section 397 of the Indian Penal Code. The case for the prosecution was that on the 22nd of February, 1965, they waylaid certain residents of village Kalian Sukha in Police Station Nathana while armed with a pistol, a gandasa and a gandhali respectively and after Chand Singh accused had given a threat to the victims that he would shoot them if they made any noise, the victims were robbed. No allegation was, however, made that any of the accused levelled or brandished his weapon at the victims or otherwise handled it, apart from having it on his person during the course of the robbery. The learned Additional Sessions Judge found the case against Gurdev Singh to be doubtful and acquitted him. In respect of the two other accused he held:

"In this case there is no evidence that Modan Singh, Gurdial Kaur or Hamir Kaur were given any injuries by the accused. There is no evidence either that the accused used the deadly weapons at the time of the occurrence nor there is evidence that they attempted to cause death or grievous hurt to the aforesaid witnesses. In this case the accused put the witnesses Modan Singh, Gurdial Kaur and Hamir Kaur in fear of causing injuries to them when they removed their ornaments. The accused committed extortion by putting the aforesaid persons in fear of death and hurt and wrongfully restrained Modan Singh. In these circumstances I am of the view that both the accused Chand Singh and Nazir Singh are proved

guilty under Section 392, Indian Penal Code. I consequently convict both the accused under this section."

Being dissatisfied with the acquittal of Chand Singh and Nazir Singh under Section 397 of the Indian Penal Code, the State preferred to this Court Criminal Appeal No. 943 of 1966 which came up for hearing before a Division Bench consisting of my learned brother Jindra Lal, J. and myself. On the authority of *Nagar Singh v. Emperor*, AIR 1933 Lah 35, *Chandra Nath v. Emperor*, AIR 1932 Oudh 103, *Inder Singh v. Emperor*, AIR 1934 Lah 522 = 35 Pun LR 555, *In re Somanna*, AIR 1941 Mad 708 and *Govind Dipaji More v. State*, AIR 1956 Bom 353, it was contended before the Division Bench that the words "uses any deadly weapon" occurring in Section 397 of the Code should be construed in a wide sense so as to include not merely acts of cutting, stabbing and shooting, etc. as the case may be, but also of carrying a deadly weapon for the purpose of overawing the person robbed so that if the offender merely armed himself with a deadly weapon during the course of a robbery and did not perform any further act in respect of it, his case would be covered by the provisions of Sec. 397. All the cases above mentioned with the exception of AIR 1933 Lah 35 as well as *Nazar Shah v. Emperor*, AIR 1926 Sind 150, were, however, distinguished by me as a member of another Division Bench consisting of Sodhi J. and myself in *State v. Puran Singh* Criminal Appeal No. 1087 of 1966, D/-3-6-1968 (Punj) with the following observations:—

"We are afraid, however, that none of these authorities supports the case of the State inasmuch as in every one of them the weapon in question was actually handled by the culprit concerned in such a manner as to cause an apprehension in the mind of the victim that he would be subjected to its actual operation if he did not submit to the demand of the offender. In the Sind authority an actual blow with the handle of the weapon was inflicted on the victim. In each of the Bombay & Madras cases, the victim was relieved of property 'at the point of knife'. In the case from Lahore a gun was the weapon in question and was fired in the air, obviously to scare the victim and to make the threat given by the offender fully effective. In the Oudh case the victim was robbed at the point of a revolver. The facts of the instant case are materially different in so far as there is no allegation that the gun and the gandasa, with which Puran Singh and Ajmer Singh were respectively armed, were so much as moved from the position which they occupied with respect to the bodies of their holders. If either of these weapons had been pointed or brandished at any of the victims, such act of the offen-

der may have been construed as a user of the weapon but we have not been shown any authority laying down that mere possession of a weapon during robbery amounts to its user within the meaning of Section 397 of the Indian Penal Code. Nor can we otherwise agree with the contention put forward on behalf of the State as, in the absence of a special definition, the word 'uses' occurring in Section 397 of the Indian Penal Code must be given its ordinary dictionary meaning which, admittedly, would not embrace mere possession."

It was further observed by me then:—

"This view gains support also from the language of Section 398 of the Indian Penal Code in which the word 'possession' has been employed in relation to an attempt to commit robbery. That section states:—

"If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years."

"It is obvious that the Legislature intended to differentiate between mere possession and actual user of a weapon during the course of a robbery. Had it been otherwise, as is contended by the learned counsel for the State, the word 'possession' would have occurred in Section 397 as it occurs in the next succeeding section. We have no hesitation, therefore, in repelling the contention raised on behalf of the State."

(It may be pointed out here that in these observations the mention at two places of the word "possession" is obviously due to a slip, a reference having really been intended at both the places to the word "armed").

The State appeal in Criminal Appeal No. 1087 of 1966, D/-3-6-1968 (Punj) was, therefore, dismissed.

Although Criminal Appeal No. 1087 of 1966, D/-3-6-1968 (Punj) was the only Division Bench authority of this Court brought to our notice at the hearing of Criminal Appeal No. 943 of 1966, we were of the opinion that in view of the importance of the question it should be finally decided by a larger Bench and that is how it was referred to a Full Bench.

2. Arguments have been addressed to us at length by Shri D. D. Jain, on behalf of the State and Shri Amar Datt appearing amicus curiae for the respondents. After giving my most anxious consideration to the same, I have come to the conclusion that the view expressed by me in Criminal Appeal No. 1087 of 1966, D/-3-6-1968 (Punj) (*supra*) is correct.

3. For a proper discussion of the subject, the provisions of Sections 392, 393, 394 and 398 may also be set out here in extenso:

"392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine, and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years."

"393 Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine"

"394 If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person and any other person jointly concerned in committing or attempting to commit such robbery shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine"

"398 If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years"

It would be seen that Section 392 prescribes the punishment for simple robbery and Section 393 for a simple attempt to commit robbery, Section 394 deals with slightly aggravated forms of the offences mentioned in Sections 392 and 393 while Sections 397 and 398 cover cases of still more aggravated forms of robbery and an attempt to commit it respectively and prescribe a minimum punishment of rigorous imprisonment for seven years. On behalf of the State, it is pointed out that if the word "uses" as occurring in Section 397 is not given a very wide meaning so as to include the act of being armed for the purpose of overawing, the anomaly would follow that while in the case of a mere attempt to commit a robbery, the fact that the offender is armed with a deadly weapon would attract the minimum punishment provided for in Section 398, the case of a completed offence of robbery by the same offender would fall only within the ambit of the general Sec. 392 which deals with simple robbery, and not under Section 397. The anomaly would no doubt be there but it appears to me that on a proper construction of Sec. 397 the wider meaning cannot be given to the word "uses".

4. In Criminal Appeal No 1087 of 1966, D/-3-6-1968 (Punji) (supra) I had occasion to point out that in the absence of a special definition, the word "uses" occurring in Section 397 must be given its ordinary dictionary meaning which, admittedly, would not embrace mere possession. However, a display of an arm calculated to overawe others would be something more than mere possession and may well be covered by the ordinary dictionary meaning of the word "use". Webster's Third

New International Dictionary gives, inter alia, the following meanings of the verb "use":

"* * * * to put into action or service: have recourse to or enjoyment of: Employ * * * * to carry out a purpose or action by means of: make instrumental to an end or process: apply to advantage: turn to account. Utilize * * * *"

According to Corpus Juris Secundum (Volume XCI-pp. 518-519) the verb "to use" is variously defined as:

"to employ, to employ for any purpose; to employ for the attainment of some purpose or end; to avail one's self of; to convert to one's service; to put to one's use or benefit, to employ for the accomplishment of a purpose to derive service from; to use so as to derive service therefrom; to put into service or make use of; to put to a purpose; to turn to account."

It cannot thus be said that when an offender wears arms so as to overawe others, he does not, in a wide sense of the word, "use" them. The word has, however, to be construed in reference to the context in which it appears so that the language employed in the succeeding Section 398 becomes important. That section employs the term "armed" which again must be given its dictionary meaning in the absence of a special definition. According to Webster's Third New International Dictionary, "armed" means, inter alia, furnished with weapons of offence or defence. If this meaning is adopted for the interpretation of Section 398, an offender, who has on his person, whether displayed or concealed, a deadly weapon, at the time of attempting to commit robbery or dacoity would be liable to punishment under the section. It may be debatable whether the section at all applies to a case of concealed arms but there can be no doubt that a display of an arm by an offender attempting to commit robbery would fall within the ambit of the section. And if the interpretation put on the word "uses" occurring in Sec. 397 is to be as wide as has been contended on behalf of the State, then the question would arise as to why the Legislature adopted two different words in two sections occurring in the same Chapter of the Code and following one another, to signify the same thing. The fact that the Legislature employed the word "uses" in Section 397 and the word "armed" in Section 398 indicates unmistakably that the intention was to differentiate between the case of a person who merely carries a weapon and of one who makes a further use of it. Had it been otherwise, the word "armed" would have been employed in S 397 as it was in Section 398.

5. For the construction that I have put on the word "uses", support is available in AIR 1932 Oudh 103, cited by Shri Jain

himself and I may quote at length therefrom:

"This construction no doubt leads to this anomaly that whereas the legislature has prescribed a minimum punishment of seven years in cases of an attempt to commit robbery by an offender who is armed with a deadly weapon, yet there is no such minimum punishment prescribed when the offence has been completed by the same offender. In the latter case where the offender is armed with a deadly weapon but has not used it, he can be dealt with only under Section 392 and it is possible for him to get off with a smaller punishment than if he had stopped short of an attempt to commit the offence. I can only make note of this anomaly. It is for the legislature to remove it. But the fact that such an anomaly arises cannot justify my interpreting Section 398 against the clear language of the section so as to make it applicable to a case in which an offence of robbery or dacoity is an accomplished fact. However, I am of the opinion that as in cases where the offender is armed with a deadly weapon, the legislature has prescribed the minimum sentence of seven years for an offence of an attempt to commit robbery, it would not be proper to inflict a lesser punishment if the offender is found guilty of robbery. Section 392 provides that in cases of simple robbery the punishment may be for a term which may extend to ten years. It no doubt allows the Court discretion as regards the minimum punishment to be awarded but when the offence is attended with circumstances which would make the attempt to commit it punishable with the minimum sentence of seven years, it would not be a proper exercise of discretion to award a lesser sentence when the offence has been accomplished."

6. A similar view was taken in *Kartar Singh v. State of Vindhya Pradesh*, AIR 1952 Vind Pra 42:

"The mere fact of carrying a fire-arm or other deadly weapon will not attract Section 397, I. P. C. That section does not say 'carries or is armed with' but says 'uses any deadly weapon, or causes grievous hurt or attempts to cause death or grievous hurt to any person'. The distinction between 'using' and 'to be armed' is a material distinction and has been observed in the wording of Sections 397 and 398, I. P. C. The latter section covers attempts only to commit dacoity or robbery when 'being armed' is by itself sufficient. But if it is a case of committing robbery or dacoity the weapon has to be used or it should be an overt act, which amounts to attempting to cause death, or a grievous hurt, or of actually causing grievous hurt."

I may make it clear here that I do not at all suggest that the weapon with which

an offender is armed during a robbery or dacoity must be used for actually cutting, stabbing or shooting before he can be said to have "used" it. On the other hand, I am of the opinion that the word "uses" should be given the widest possible meaning subject to the limitation that it is not equated with the word "armed". In this connection I pointed out in *Criminal Appeal No. 1087 of 1966, D/-3-6-1968 (Punj)* (supra):

"If either of these weapons had been pointed or brandished at any of the victims, such act of the offender may have been construed as a user of the weapon * * * * *"

I would repeat this opinion here and say that if the offender levels, points or brandishes the weapon at his victim or does any other overt act in relation to it which act involves something more than mere wearing or carrying of the weapon, he would be deemed to have "used" the weapon within the meaning of S. 397.

7. I may now deal with the authorities relied upon for the State. In *Nga I v. Emperor*, (1912) 13 Cri LJ 267 (Low Bur), the appellant took a gaung baung from the complainant by overawing him with a dagger with which, however no stabbing was done and which was merely raised threateningly so as to compel the complainant to part with his property. Thus although the act of the appellant involved something more than mere carrying of the weapon for the purpose of overawing the person robbed, it was held that such a carrying would be covered by the term "uses" occurring in Section 397. At the time of admitting the appeal, Twomey, J. observed thus:

"It may be argued that to 'use' a stabbing weapon is to stab some person with it, to 'use' a cutting weapon is to cut some person with it, and to 'use' a gun is to shoot at some person with it. According to this narrow interpretation, brandishing a dagger or levelling a gun at a man might be regarded as merely threatening to use or preparing to use it, not as actually using it. But it is not clear that the word 'uses' in Section 397 should be interpreted with such strictness. The very next Sec. 398 imposes a minimum punishment of seven years' imprisonment on persons convicted of merely carrying a deadly weapon when attempting to rob. It seems probable that the Legislature intended to impose the same minimum where the robbery is actually completed. I am inclined to think, therefore, that the word 'uses' in Section 397 should be construed in a wide sense so as to include not merely cutting, stabbing, shooting (as the case may be) but also carrying the weapon for the purpose of overawing the person robbed.

It is no doubt at first sight remarkable that wider language is employed in Sec-

tion 397 ('uses any deadly weapon') than in Section 398 ('is armed with any deadly weapon'). The explanation is apparently that in attempted robberies, it is often difficult to prove any 'use' of the deadly weapon except the mere fact that the accused carried it, whereas in a case of completed robbery it generally happens that the accused not only carries the deadly weapon but also overawes the person robbed or even stabs, cuts or shoots at him.

The wider view of Section 397 is supported by a passage in Maxwell's Interpretation of Statutes, 4th Edition, page 419:— 'If a man walks with a gun with intent to kill game, he 'uses' the gun for that purpose without firing, within the statute which makes using a gun with that intent penal.' English and American authorities are given for this interpretation."

The case was later decided by the learned Judge as follows:

"If the accused had merely attempted to take the complainant's property by overawing him with a dagger but (owing to infirmity of purpose on his own part or resistance on the part of the complainant) had not carried out his design, he would undoubtedly be liable to the minimum punishment provided in Sec. 398. The Legislature cannot have intended that if the criminal goes a step farther and actually accomplishes his purpose, he should thereby establish a claim to more lenient treatment. It cannot have been intended that a criminal should be urged to complete his criminal purpose by the reflection that if he stops short at an attempt, he must get seven years, while if he completes the offence he may get off with imprisonment for two or three years."

I have already conceded that the interpretation adopted by me leads to an anomaly but then I cannot agree with the view that the meaning of the word "use" can be so stretched as to cover a case of mere carrying of arms nor do I think that Twomey, J. meant to place any such interpretation on the word. In view of the facts before him, I think he merely meant to say that the case with which he was dealing would be covered by Section 397 even though the dagger had not been employed for actual cutting or stabbing. I may further state with all respect to him that I do not see eye to eye with him in the explanation given by him for the employment of different language in the two sections, 397 and 398. Even if it be accepted that in cases of attempted robbery it is often difficult to prove any use of the deadly weapon except the mere fact that the accused carried it while in cases of completed robbery it generally happens that the deadly weapon is not only carried but is employed to overawe

the person robbed, it would be no reason for the employment by the Legislature of different words in the two sections, if the meaning conveyed is the same. I may also point out that the language employed in Section 397 ("uses any deadly weapon") is not wider as was assumed by Twomey J. but narrower than the one employed in Section 398 ("is armed with any deadly weapon").

The citation from Maxwell on Interpretation of Statutes (which is relied upon before us independently of [1912] 13 Cri LJ 267 (Low Bur), and is repeated at page 270 of the 11th edition of the treatise also does not appear to advance the cause of the State as the case mentioned therein was not one under Section 397 of the Indian Penal Code which has to be interpreted in a special sense in view of the language employed in the succeeding section. Had the word "armed" not been employed in Section 398, I would have had no difficulty in falling in line with Twomey, J.

Another reason why I do not find myself in agreement with Twomey, J. is that even if the widest possible meaning is given to the word "uses", the anomaly does not disappear; for, if a person attempts robbery while concealing a deadly weapon on his person, he would be liable to the minimum punishment prescribed in Section 398 even though if he completed the robbery, his case would stand covered not by Section 398 but by Section 392 unless the word "armed" is construed in a narrow sense as meaning "armed ostentatiously".

8. (1912) 13 Cri LJ 267 (Low Bur) appears to be the basic authority in support of the contention of Shri Jain and AIR 1926 Sind 150, merely follows it. It may be stated, however, as was pointed out by me in Criminal Appeal No. 1087 of 1966, D/- 3-6-1968 (Punjab) that in the Sind case there was an actual blow with the handle of the axe given by the offender to the victim of the robbery and it was in that view of the matter that the case was held to fall under Section 397.

AIR 1932 Oudh 103, takes the same view of the matter as mine, although it does lay down that it would be putting much too narrow an interpretation upon the words "uses any deadly weapon" occurring in Section 397 to say that a person does not use a revolver unless he fires it and that the words are wide enough to include a case in which the person levels his revolver against another person in order to overawe him. The case is no authority for the proposition that merely because the offender is armed at the time of committing a robbery, he would be guilty of an offence under Section 397.

The same remarks apply to Public Prosecutor v. Nagappan Servai, AIR 1941 Mad 718, in which the weapon in question was a knife with which hurt was caused to the victim, to AIR 1956 Bom 353, wherein the victim was deprived of cash at the point of a knife and to AIR 1934 Lah 522, in which the gun in question was fired in the air to scare the victim. Incidentally I may mention that the authority last cited appears to support the view taken by me although it holds that Section 397 covers the case of a person who "displays a deadly weapon to frighten his victims or their neighbours or who makes use of any deadly weapon for other similar purposes". One of the offenders in that case was armed with a kirpan. About him Jai Lal, J. who decided the case observed:

"The case of Nazir Singh, however, does not appear to be covered by Section 397, Indian Penal Code, as it has not been established that he made any use of the kirpan."

Obviously by using the expression "displays a deadly weapon to frighten his victims", the learned Judge meant that the offender should perform some overt act in relation to the weapon carried by him, apart from the act of being merely armed with it.

In AIR 1933 Lah 35, Agha Haidar, J. relying on AIR 1926 Sind 150 (supra) held that a robber who was armed only with a chhavi at the time of the robbery would undoubtedly inspire his victim with fear and paralyse the latter's power of resistance and that his case would fall within the ambit of Section 397. The judgment is a short one and I would respectfully differ from it for the reasons already stated.

In *In re Theval Servai*, AIR 1938 Mad 477, the appellants were armed with aruvals and in holding their case to fall within the provisions of Section 397 Horwill, J. held:

"* * * It is true that no injuries were caused by the aruvals; but it does not seem that the accused were merely in possession of aruvals. They held them in such a manner that P. W. 2, who was compelled to give up the jewels, was fully aware that the accused were armed with these aruvals. If robbers so exhibit dangerous weapons as to intend that by their exhibition of them, the persons robbed or sought to be robbed are likely to be further intimidated and that the commission of robbery might be facilitated the robbers can be punished under Section 397, although they did not actually inflict blows with these weapons. The application of Section 397 by the learned Assistant Sessions Judge was therefore correct."

It would appear, though it is not clear from the judgment, that the accused were

not merely ostensibly armed with aruvals but made some further use of them in order to frighten their victims. If, however, that was not the case, I would respectfully differ from the view taken by Horwill, J. for the reasons given above.

The only other authority relied upon by Shri Jain is *Shiv Narain v. State*, (1964) 66 Pun LR 173, wherein Dua J. observed as follows:—

"My attention has in this connection been drawn to the language used in Section 398, Indian Penal Code, where the expression used is 'armed with any deadly weapon' as against the expression 'uses any deadly weapon' as used in Section 397. Prima facie the argument appears to be attractive. There are, however, decided cases where it has been held that the expression 'uses a deadly weapon' includes the carrying of a weapon for the purpose of overawing the person robbed. The argument urged on behalf of the appellants even otherwise is unsubstantial on the present record, as, in the case in hand, the guns have been used and this evidence has not been criticised before me."

It is clear that no definite opinion on the interpretation of Section 397 was expressed by Dua J. whose observations, even otherwise, are obiter.

9. In view of what I have said, I would answer the question referred to the Full Bench thus:

The phrase "uses any deadly weapon" occurring in Section 397 of the Indian Penal Code means performs in relation to the deadly weapon an overt act involving something more than merely wearing or carrying it, even though such wearing or carrying may be for the purpose of overawing others.

10. Before parting with this judgment I must express my appreciation of the assistance given to us by Shri Amar Datt, learned counsel for the respondents. He not only argued the point involved from various angles but did so ably and with lucidity.

HARBANS SINGH, J.: 11. I agree.

JINDRA LAL, J.: 12. I have had the benefit of perusing the answer proposed to be given in this reference by my learned brother, Koshal J., with whom my learned brother, Harbans Singh, J., has agreed. I regret my inability to agree to that answer and give my reasons for the same.

13. The question referred to the Full Bench involves the interpretation of the words "the offender uses any deadly weapon" occurring in Section 397, Indian Penal Code, which is in the following terms:—

"If, at the time of committing robbery or dacoity, the offender uses any deadly

weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

14. I have no difficulty in coming to the conclusion that in the present case the accused had used their deadly weapons for the commission of the crime. My learned brother, Koshal J. has set out in his answer the meaning given to the word 'use' in Webster's Third New International Dictionary as under:—

to put into action or service have recourse to or enjoyment of: employ

to carry out a purpose or action by means of make instrumental to an end or process apply to advantage turn to account utilize

Koshal J has also noticed the definition of the words "to use" in Corpus Juris Secundum (Volume XCI-pp 518-519) as under—

"to employ, to employ for any purpose; to employ for the attainment of some purpose or end, to avail one's self of; to convert to one's service, to put to one's use or benefit, to employ for the accomplishment of a purpose, to derive service from, to use so as to derive service therefrom, to put into service or make use of, to put to a purpose, to turn to account."

In my view, therefore, the word "uses" in the context must mean making use of for the commission of an offence under Section 397, Indian Penal Code. I would follow with respect the meaning given to the word "uses" in Section 397, Indian Penal Code, by a Division Bench of the Bombay High Court in AIR 1956 Bom 353. A perusal of that judgment shows that the accused entered a shop with an open knife in his hand and at the point of the knife he demanded a sum of Rs 40 from one Umedmal. Umedmal denied that he had any money but the accused showed the knife to Umedmal with one hand and with the other hand picked up a currency note of Rs 5 from the Galla and went away after giving a threat to Umedmal and his companion Mangilal. On these facts it was held that an offence under Section 397, Indian Penal Code, had been made out. Their Lordships observed as under:—

"The word 'uses' in Section 397 is not intended to mean that the knife must be actually used for stabbing any person. If it is used for the purpose of producing such an impression upon the mind of a person that he will be compelled to part with his property, that will amount to using the weapon within the meaning of Section 397."

It is obvious that any other meaning given to the word "uses" in Section 397,

Indian Penal Code, would lead to an anomaly specially with respect to what is contained in Section 398. To my mind, if a person is induced with the help of a deadly weapon to part with the property, the accused certainly ought to be punished under Section 397, Indian Penal Code. One can think of a large number of cases where the weapon is not moved from its original position and not even handled but the requisite fear is induced in the mind of a victim with the result that he parts with his property.

Supposing an open knife is kept on a nearby table or a loaded pistol is kept nearby and the accused makes it quite plain to his victim that if necessary he will make 'use' of the weapon, then certainly the accused has used the weapon as contemplated in Section 397, Indian Penal Code. I am aware of the authorities which are against this view and which have been set out in the answer proposed to be given by my learned brothers. There are, however, observations to the contrary in some authorities in addition to the one cited by me above. In (1912) 13 Cri LJ 267 (Low Bur), it was held as under:—

"The words 'uses a deadly weapon' in Section 397, Indian Penal Code, include the carrying of a weapon for the purpose of overawing the person robbed."

Section 398 provides a minimum punishment for those who attempt to commit robbery 'armed with a deadly weapon' and the Legislature cannot have intended that a criminal should be urged to complete his purpose by the reflection that if he stops short at an attempt, the minimum imprisonment that can be inflicted on him under Section 398 is seven years, while if he completes the offence, he will not come within the provisions of Section 397, but may be sentenced to two or three years' imprisonment under Section 392."

In that case of course the weapon was raised threateningly to compel the complainant to part with his property. But the conclusion that I have come to is that there need be no movement of the deadly weapon, because movement of a weapon only indicates to the victim the intention of the accused. This can be achieved without moving the weapon at all and can even be done by a gesture. I can well imagine a person who has a pistol in a holster on his shoulder looking at the holster in a meaningful manner and asking the victim for his gold watch. If the victim parts with the gold watch in such circumstances I do not see any reason why it cannot be said that the accused has 'used' a deadly weapon for the achievement of his purpose. The legislature has deliberately used different words in Sections 397 and 398, Indian

Penal Code, and Courts must try to harmonise the intent of the legislature and to reconcile the two sections. This can only be done if a wider meaning is given to the word "uses" than the one contended for by the learned counsel for the respondents.

The canon of statutory interpretation certainly is that ordinarily the Courts must give the dictionary meaning to the words used in a Statute unless by necessary implication that meaning cannot be given. In the present case, the dictionary meaning supports, in my view, the intent of the legislature which must have intended the word "uses" in Section 397, Indian Penal Code, to have a much wider scope than the word "armed" in Section 398. It appears to me that to fall within the ambit of Section 398, Indian Penal Code, an accused must be armed himself. He cannot be held guilty if his companion is armed or because an arm is lying nearby. The word 'uses' in Section 397, Indian Penal Code, has a wider import — the accused need not be armed himself and it is enough that he has made use of a deadly weapon. This is the only way in which Sections 397 and 398, Indian Penal Code, can be reconciled and harmonised. Maxwell on The Interpretation of Statutes, Eleventh Edition, at p. 193 says—

"Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words."

Again at page 221, it is stated—

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, or by rejecting them altogether, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning."

15. It may be noted that the effort of the Courts should be to reconcile and harmonise the different provisions of the statute rather than to read it in such a way as to lead to absurdity.

16. Giving a restricted meaning to the word "uses" in Section 397, Indian Penal

Code, does lead to an absurdity which cannot, in this case, be imputed to the legislature.

17. The anomaly would disappear if the word "uses" is given its proper meaning as indicated by me, i.e., that the necessary fear has been induced in the mind of the victim. Supposing an attempt is made at robbery while a person has kept a pistol near him, it may possibly be contended that he was not armed with the pistol but that could not detract from what I have stated above. All the authorities relevant to the point have been set out and discussed by my learned brother, Koshal J., and I need not refer to them again. The question is of first impression and as to what the legislature intended by the use of the word "use" in the Section under consideration. In my view, the proper dictionary meaning should be given to the word and given such meaning the word "uses" is of very wide connotation and cannot be legitimately restricted to its narrow meaning, i.e., the making actual physical use of it. I would, therefore, answer the question by saying that the word "uses" in Section 397, Indian Penal Code, is not intended to mean that the deadly weapon must be actually used for injuring a victim, if it is used for the purpose of producing such an impression upon the mind of the victim that he will be compelled to part with his property, that will amount to using the weapon within the meaning of Section 397, Indian Penal Code.

BY THE COURT— 18. The reply of the Full Bench will be as proposed by Mr. Justice Koshal in paragraph 9 of his judgment. The case will now go back to the D. B. for further action.

Answer accordingly.

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(V 57 C 89)

BAL RAJ TULI, J.

Bhagwana. Petitioner v. The Divisional Canal Officer and others, Respondents.

Civil Writ No. 589 of 1965, D/- 28-7-1969.

(A) Constitution of India, Art. 226 — Joinder of parties — Persons really interested need be joined — Not others — Allegation that certain right-holders whose fields would be irrigated by disputed water-course not joined as parties — No record before Court to verify the fact — Petition cannot be dismissed.

(Para 6)

(B) Constitution of India, Art. 226 — Claim for dismissal of petition on ground of suppression of facts — Prior suit on

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similar grounds filed by petitioner against one of the respondents in petition and others asking for a different relief — Non-mention of suit in petition does not amount to suppression. (Para 7)

(C) Northern India Canal and Drainage Act (1873), Section 30-A(2) (as in force in Punjab in 1964) — Scheme under — Scheme not complying with all requirements of the section — Is liable to be quashed (Paras 10, 12)

(D) Northern India Canal and Drainage Act (1873), Section 30-B(1) (as in force in Punjab in 1964) — Publication of scheme and 30 days' time for filing objection — Provision is mandatory — Non-compliance of the provision by Sub-Divisional Canal Officer resulted in denial of right of hearing to the petitioner — Defect cannot be cured by hearing given by Divisional Canal Officer. (Para 11)

Cases Referred: Chronological Paras (1965) 67 Pun LR 212 = ILR (1965)

1 Punj 564, Kishan Singh v. State of Punjab 4

B. S. Gupta, for Petitioner; S. Sarup for Advocate-General (Haryana) (for Nos. 1 & 2) and H. R. Aggarwal (for Nos. 3 to 5), for Respondents.

JUDGMENT: The petitioner, Bhagwana, and respondent 3, Jagde, are landowners in village Jandli Kalan, tehsil Fatehabad, district Hissar, while respondents 4 and 5, Roop Chand, and Chhabil Dass, are residents of village Khazuri-Jati. Both the villages adjoin each other. The lands of the petitioner and respondents 3 to 5, along with some others, are irrigated through an outlet R. D. 41250 (T. L-Tail Left), Khazuri Distributary of the Fatehabad Branch System. Respondents 3 to 5 irrigate their lands through a watercourse running along the line between rectangles Nos. 186 and 200, 201 and 200, 203 and 204 and 203 and 219, marked as L M B C on the copy of the Chak-plan attached to the petition as Annexure 'A'. This watercourse L M B C is working since the time Khazuri Distributary came into operation. The lands of the petitioner situate in Rectangles Nos. 199 and 205 are irrigated from a watercourse running along the eastern line of Rectangle No. 199 and Killa Nos. 5 and 6 of Rectangle No. 205 marked as L A.

2. On May 14, 1964 respondents 3 to 5 gave an application to the Sub-Divisional Canal Officer, respondent 2, praying, (i) that the existing watercourse L A be extended to the point marked A on the Chak-plan (Annexure 'A') along the eastern line of Killa Nos. 15, 16 and 25 of Rectangle No. 205, and (ii) that the abandoned watercourse A B be sanctioned so that it may join upto point C. Respondents 3 to 5 are the only persons interested in this matter but they secured the signatures of a number of other

persons on the application. On receipt of this application the Sub-Divisional Canal Officer, respondent 2, referred the application to the Zildedar, Bhuna, for a report after investigation. The Zildedar, Bhuna, on September 18, 1964, recorded the statement of Jagde Lambardar, respondent 3. In support of the application and also obtained the signatures of Pandit Roop Chand, respondent 4, thereon. There is said to be a statement purporting to have been made by the petitioner on October 29, 1964 on the file of the case to the effect that the petitioner is not agreeable to the suggestion of extending the existing watercourse along Killa Nos. 15, 16 and 25 of Rectangle No. 205. Underneath this statement it has been noted that the petitioner refused to sign his statement. The petitioner alleges that he never knew about the investigation being made by the Zildedar nor did he appear before him nor did he make any such statement. His grievance is that the Zildedar made the record to favour respondents 3 to 5. On November 8, 1964, the Zildedar, Bhuna, sent his report to the Sub-Divisional Canal Officer, recommending the extension of the existing watercourse as prayed for by respondents 3 to 5 in their application dated May 14, 1964. On receipt of the above report, the Sub-Divisional Canal Officer, on December 1, 1964, issued notices purporting to be under Section 30-A of the Northern India Canal and Drainage Act, 1873 (hereinafter called the Act), fixing December 22, 1964, as the date for hearing of the objections before him as Suniana Rest House. The petitioner states that although he was the most vitally affected person by the proposed action of the Sub-Divisional Canal Officer, no notice was ever sent to or served upon him nor were the mandatory provisions of law complied with. On December 22, 1964, the Sub-Divisional Canal Officer announced his decision sanctioning the watercourse L A and B C under Sections 30-A to 30-F of the Act subject to confirmation and modification by the Divisional Canal Officer, Tohana, respondent 1, as requested by respondents 3 to 5. A copy of the order is Annexure 'B' to the writ petition.

3. Thereafter, the Sub-Divisional Canal Officer submitted the papers of the case to the Divisional Canal Officer, Tohana, respondent 1, for his approval under Section 30-B (2) of the Act. The petitioner came to know about this matter from a person of his village and since he was adversely affected by the proposed recommendation of the Sub-Divisional Canal Officer, he approached the Divisional Canal Officer by way of appeal (although there is no provision of law providing for an appeal) in the hope that he would get justice from the Divisional Canal Officer who was to sanction that scheme proposed

by the Sub-Divisional Canal Officer. The Divisional Canal Officer sanctioned the scheme by his order dated February 7, 1965 and a copy of this order is Annexure 'C' to the writ petition. The petitioner then filed the present writ petition in this Court on March 4, 1965, which was admitted the following day.

4. He has challenged the entire proceedings culminating in the order dated February 7, 1965, passed by the Divisional Canal Officer, respondent 1, as being void, illegal and without jurisdiction for the following reasons:—

"(i) That in a recent authority reported in (1965) 67 Pun LR 212, it has been held by this Hon'ble High Court that before any action under Section 30-A of the Act can be taken, regular procedure prescribed in Sections 30-A(2) and 30-B to 30-D read with the relevant rules framed by the State Government must be followed.

In the present case where action has been admittedly taken under Section 30-A of the Act, the above mentioned mandatory provisions of law have been completely ignored.

(ii) That no draft scheme at all was prepared by the Sub-Divisional Canal Officer, although it was incumbent upon him to do so as required by the provisions of Section 30-A(1).

(iii) That even if the notice dated 1-12-1964 issued by respondent 2, in itself be taken as a draft scheme prepared by him, it failed to comply with the essential mandatory requirements of Sec. 30-A(2) of the Act which reads:

'Every scheme prepared under sub-section (1) shall, amongst other matters, set out the estimated cost thereof, the alignment of the proposed watercourse or re-alignment of the existing watercourse, as the case may be, the site of the outlet, the particulars of the share-holders to be benefited and other persons who may be affected thereby, and a sketch plan of the area proposed to be covered by the scheme.'

The aforesaid notice does not mention at all (i) the estimated cost of the proposed scheme, (ii) the alignment of the proposed watercourse, (iii) the particulars of the share-holders to be benefited and persons affected thereby and (iv) a sketch plan of the area proposed to be covered by the scheme.

These details were not mentioned in the notice deliberately by the Sub-Divisional Canal Officer, respondent 2, with a view to push through the scheme to benefit respondents 3 to 5 illegally.

(iv) That clause (1) of Section 30-B of the Act provides that—

'Every scheme shall, as soon as may be, after its preparation be published in such form and manner as may be prescribed by rules made in this behalf inviting objections and suggestions with respect

thereof within 30 days of the publication';

and definite modes of publication of the scheme have been provided by Rule 2 of the Rules made to carry out the provisions of Sections 30-A to 30-G of the Act.

None of these requirements was followed; so much so that only about 15 days' time was given to invite objections with regard to the matter in hand whereas it was mandatory for the Sub-Divisional Canal Officer to give clear 30 days from the date of publication for that. This will be apparent from a bare look at the file. Notice dated 1-12-1964 issued by respondent 2 speaks for itself.

(v) That it has been judicially held time and again that the provisions like Sections 30-A to 30-F and the rules made to carry out those provisions are mandatory in character and an exact compliance of them all is absolutely necessary to give jurisdiction and authority to the canal authorities to pass orders under Section 30-A of the Act.

(vi) That the levels of the land through which the watercourse LAA' passes are 8.6, 8.8 and 9.0 upto the point A and thereafter the level is 12.7 upto A'. This means that the level of the land through which AA' passes is about 4 feet high as compared to the land through which LA passes. On the other hand the existing watercourse IMB passes through the land which is of the same level.

As a result of the difference of 4 feet as mentioned above, the digging and maintenance of the extended watercourse 'AA' would mean the spoilage of the whole of the petitioner's land. As a result the petitioner would suffer an irreparable loss and injury.

(vii) That the order in question could not be legally passed even on technical grounds of better irrigation. This has been done only because Shri Manphool Singh, Congress M.L.A. from Tohana Constituency exerted his political pressure and prevailed upon the Divisional Canal Officer, respondent 1, to favour respondents 3 to 5.

(viii) That the result of the passing of the order in question would be that respondents 3 to 5 will irrigate their lands through both the watercourses, namely LMB and LAA'B receiving water from the same outlet, namely RD 41250 T.L. and this would mean a decrease in the supply of water to the petitioner's land.

In this way the respondents would be getting undue advantage and harm the interests of the petitioner."

5. Separate returns to the writ petition have been filed by respondent 1 and respondents 3 to 5. In the return filed by respondents 3 to 5 some preliminary objections have been taken.

6. The first objection is that besides respondents 3 to 5 there are several other

right-holders whose list is attached as Annexure 'R-1' to the return, who are affected by the decision in this writ petition because their lands will also be irrigated by the disputed watercourse. Those persons not having been made parties to the writ petition it is liable to be dismissed. I do not find any merit in this objection. It is not stated that these persons were mentioned in the scheme as the persons interested in or affected by the proposed scheme. The record has not been produced before me to verify this fact. It is the case of the petitioner that although the lands of other persons are irrigated by this watercourse the persons really interested are respondents 3 to 5 and the petitioner. There is not sufficient material on the record of this case to dismiss this writ petition on this ground.

7. The second preliminary objection is that the petitioner along with his brother Bir Singh instituted a civil suit in the Court of a Subordinate Judge at Hissar, for a permanent injunction restraining the defendants of that suit from digging the watercourse which is a matter in issue in the writ petition. The plaintiffs applied for a temporary injunction restraining the defendants from digging the watercourse. The learned Subordinate Judge passed an order that in case the watercourse had been sanctioned by the Canal authorities, the defendants had the right to dig the same. No reference to the suit was made in the writ petition and since this material fact was suppressed the writ petition should be dismissed on this ground. Again, I find myself unable to accede to this request. This writ petition is only on behalf of Bhagwana and Bir Singh and Bhagwana are not brothers as is clear from the plaint, a copy of which has been filed by respondents 3 to 5 along with their written statement. Bhagwana is the son of Matu while Bir Singh is the son of Kanshi. Bhagwana swore the affidavit to be filed in support of the writ petition on February 22, 1965. His counsel drafted the writ petition on the basis of the sworn affidavit and issued notices of motion to the respondents on February 26, 1965 intimating that the petition would be filed in this Court on March 4, 1965 when prayer for ad interim stay would be made. According to that notice he filed the writ petition in this Court on March 4, 1965. It appears that Jagde respondent 3, and his two brothers threatened to dig the watercourse probably because they had come to know that the petitioner was going to file a writ petition. That suit was filed to restrain the defendants from digging the watercourse. The suit was not directed against respondents 1, 2, 4 and 5 of the writ petition and was not filed to have

the orders of respondents 1 and 2 set aside. In view of these facts, I do not think that it was necessary to make a mention of that suit in the writ petition. The learned Single Judge declined to issue the stay order on the ground that the suit was pending and a temporary injunction had been refused. I do not think it fair to dismiss the writ petition on that ground.

8. The next preliminary objection is that the writ petition is not competent as the petitioner did not pursue other remedies available under the Act but it is not shown what other remedy was available to the petitioner. This objection is also repelled.

9. On merits, it has been pleaded that the procedure prescribed under Sections 30-A and 30-B of the Act was followed in principle although not exactly. Sections 30-A and 30-B of the Act as were in force in 1964 when the impugned orders were passed by respondents 1 and 2 read as under—

"30-A (1) Notwithstanding anything contained to the contrary in this Act and subject to the rules prescribed by the State Government in this behalf, the Sub-Divisional Canal Officer may, on his own motion or on the application of a share-holder, prepare a draft scheme to provide for all or any of the matters, namely—

- (a) the construction, alteration, extension and alignment of any watercourse or realignment of any existing watercourse;
- (b) reallocation of areas served by one watercourse to another,
- (c) the lining of any watercourse;
- (d) any other matter which is necessary for the proper maintenance and distribution of supply of water from a watercourse.

(2) Every scheme prepared under subsection (1) shall, amongst other matters, set out the estimated cost thereof, the alignment of the proposed watercourse or realignment of the existing watercourse, as the case may be, the site of the outlet, the particulars of the shareholders to be benefited and other persons who may be affected thereby, and a sketch plan of the area proposed to be covered by the scheme.

30-B. (1) Every scheme shall, as soon as may be, after its preparation be published in such form and manner as may be prescribed by rules made in this behalf inviting objections and suggestions with respect thereof within 30 days of the publication.

(2) After considering all objections and suggestions that may have been received by the Sub-Divisional Canal Officer, the Sub-Divisional Canal Officer shall submit the scheme with such amendments as he

considers necessary together with his remarks on the objections and suggestions received by him, to the Divisional Canal Officer for his approval.

(3) The Divisional Canal Officer may direct the Sub-Divisional Canal Officer to furnish such information as he may require for the purpose of approving the scheme submitted to him under this section.

(4) The scheme submitted by the Sub-Divisional Canal Officer may be approved by the Divisional Canal Officer either as it was submitted to him by the Sub-Divisional Canal Officer or in such modified form as he may consider fit."

The petitioner has categorically stated in his petition that no scheme as envisaged by Section 30-A(2) of the Act was framed and the notice of the scheme was issued on December 1, 1964 and even if that notice is considered as the proposed scheme, it did not mention (i) the estimated cost of the proposed scheme, (ii) the alignment of the proposed watercourse, (iii) the particulars of the share-holders to be benefited and the persons affected thereby and (iv) a sketch of the plan of the area proposed to be covered by the scheme.

10. In the return filed by respondent 1 it is stated in reply to this allegation that a drawing, showing the existing and proposed watercourses, was prepared which was shown to all the persons before inspecting the watercourse in question and announcing the decision. Khaka-plan was also shown by the Zileadar while making his recommendation for sanction of the watercourse. Khaka-plan showing all the details except No. 1 — an estimated cost of the proposed scheme — was prepared and shown to all persons affected. It is further stated that irregularity in not giving the estimated cost in the draft scheme does not invalidate the scheme as it was not a new scheme but only the extension of the existing watercourse. It is pertinent to note that it has not been denied that the particulars of the share-holders to be benefited and the persons affected thereby were not stated nor is it denied that the sketch plan of the area proposed to be covered by the scheme had not been published along with the scheme. All that is stated is that a Khaka-plan was prepared which was shown by Zileadar to the right-holders while making his recommendations and it was shown to all persons affected. The record of the case has not been produced for my inspection to verify whether a proper scheme had been prepared or not. From the return it is quite clear that a proper scheme in accordance with Section 30-A(2) was not prepared or published.

11. Section 30-B(1) provided that the scheme should be published and the

right-holders affected should be given 30 days' time to file their objections. In this case it is stated that the notice was issued inviting the objections on December 1, 1964 and the date for hearing the objections was fixed as December 22, 1964. It is not stated in the return as to when this notice was published in accordance with Section 30-B and the Rules made under the Act for this purpose but even if the scheme was published within a day or two of issuing the notice, it did not give the right-holders 30 days' time to file their objections. A mandatory provision of Section 30-B(1) of the Act was thus violated prejudicing the petitioner. The result was that the petitioner was not able to file his objections before the Sub-Divisional Canal Officer who decided the matter before the expiry of the period of objections allowed by the Act and made his recommendation to the Divisional Canal Officer. The petitioner filed an appeal stating his objections to the scheme recommended by the Sub-Divisional Canal Officer which was to be sanctioned by the Divisional Canal Officer. No such appeal lay under Section 30-B of the Act but the Divisional Canal Officer has mentioned in his order that the objections of the petitioner were heard on January 25, 1965. It is however, not mentioned what those objections were and why he did not find any force in them. The impugned order does not at all deal with those objections. It cannot, therefore, be said that the opportunity to be heard allowed to the petitioner by the Divisional Canal Officer removed the defect of the Sub-Divisional Canal Officer not affording him due opportunity to file the objections under Sec. 30-B(1) of the Act. Moreover, the denial of opportunity at the initial stage cannot be cured by an opportunity of being heard afforded at a later or higher stage particularly when no appeal lay in this case. I am, therefore, of the opinion that the scheme as sanctioned by the Divisional Canal Officer is not in accordance with law. The error of law is apparent on the face of the order of respondent 2 as it is clear from that order that 30 days' time for filing objections was not given to the petitioner. The impugned orders are, therefore, liable to be set aside.

12. For the reasons given above, this petition is accepted with costs and the impugned orders of the Sub-Divisional Canal Officer and the Divisional Canal Officer, copies of which are Annexures 'B' and 'C' to the writ petition, are hereby quashed. This order will not debar respondent 1 from preparing and sanctioning another scheme, if considered necessary, in accordance with law. Counsel's fee Rs. 100/-.

Petition allowed.

AIR 1970 PUNJAB & HARYANA 544
(V 57 C 90)D. K. MAHAJAN AND
B. S. DHILLON, JJ.

State of Punjab, Appellant v. Shamsher Singh, Sucha Singh and another, Respondents.

First Appeal No. 446 of 1969, D/- 28-4-1970, from decree of Sr. Sub-J., Chandigarh, D/- 16-5-1969.

(A) Constitution of India, Art. 311(1) — Who can dismiss — Termination of service of Subordinate Judge appointed by Government in the name of the Governor — Chief Minister can dismiss because he is not subordinate to the appointing authority. AIR 1957 SC 246, Followed; AIR 1969 Punj 331 & AIR 1966 SC 447 & AIR 1964 SC 648 & AIR 1965 SC 961, Distinguished. (Paras 4 and 11)

(B) Constitution of India, Art. 311(2) — Show cause notice — Termination of Subordinate Judge's services — Chief Secretary to Government is proper authority to issue it. (Para 12)

(C) Civil Services — Punjab Civil Services (Punishment and Appeal) Rules (1952), Rule 9 — Termination of probationer's services for unsuitability — Regular enquiry not essential. AIR 1968 SC 158, Distinguished. (Paras 13 & 14)

Cases Referred: Chronological Paras

(1969) AIR 1969 Punj 331 (V 56) =

1969 Ser LR 194, Manmohan Singh Tandon v. Manmohan Singh Gujral

(1968) AIR 1968 SC 158 (V 55) =

1968 Lab IC 190, State of Uttar Pradesh v. C. S. Sharma

(1966) AIR 1966 SC 447 (V 53) =

(1966) 1 SCR 771, State of West Bengal v. Nripendra Nath Bagchi

(1965) AIR 1965 SC 961 (V 52) =

(1965) 2 SCR 53, Jyoti Prakash Mitter v. Hon'ble Mr. Justice H. K. Bose, Chief Justice, Calcutta

(1964) AIR 1964 SC 648 (V 51) =

(1964) 5 SCR 294, Jayanti Lal Amrat Lal v. F. N. Rana

(1957) AIR 1957 SC 246 (V 44) =

1957 SCR 414, Mohammad Ghouse v. State of Andhra

H. L. Sibal, Advocate-General (Punjab) with S. C. Sibal, for Appellant; B. S. Khosla, for Respondents.

JUDGMENT:— This appeal is directed against the judgment and decree of the Senior Subordinate Judge, Chandigarh, dated 16-5-1969, granting a declaratory decree to the respondent Shamsher Singh against the State of Punjab to the effect that his removal from the service as Subordinate Judge in the State of Punjab under the impugned order Exhibit P.2 is illegal and that he continues to be in ser-

vice in the State of Punjab as Subordinate Judge.

2. Shamsher Singh respondent was appointed as Subordinate Judge in the Punjab Civil Service (Judicial Branch) on 1-5-1964 by the Governor of Punjab under Art. 234 of the Constitution of India read with the Punjab Civil Service (Judicial Branch) (First Amendment) Rules, 1963. He was appointed on probation but before the completion of his probation period, his services were terminated on 24-4-67, vide orders Exhibit P.2. The said order was passed on the recommendation of the High Court, Exhibit D.3 dated 14-4-1967. The order of termination of the services of the plaintiff was signed by Shri G. Balakrishnan of the Services Department of the Punjab Government, and was communicated to him on 29-4-1967. The plaintiff raised a number of pleas in the suit which pleas were controverted by the appellant State of Punjab in the written statement.

3. On the pleadings of the parties the learned trial Judge framed the following 13 issues:—

1. Whether the suit is bad for misjoinder of parties as alleged?

2. Whether the termination of the services of the plaintiff is by an authority subordinate to the Governor? If so, what is its effect?

3. Whether the order terminating the services of the plaintiff was notified according to law? If not, what is the effect?

4. Whether the notice to show cause why the services of the plaintiff should not be terminated issued by proper authority?

5. Whether the order of termination is punitive and is not within the scope of Rule 9 of the Government Servants (Punishment and Appeal) Rules as alleged?

6. Whether the order of termination of services is based on vague allegations and on inadmissible evidence both on grounds of facts and law as alleged?

7. Whether the order of termination of services should have been passed on the recommendation of the High Court and whether the High Court did recommend the termination of services? If not, what is the effect?

8. Whether before terminating the services of the plaintiff his explanation was considered and the order was passed according to the Government Servants (Punishment and Appeal) Rules?

9. What is the effect of absence of permanent allotment of the plaintiff under Section 82 of the Punjab Reorganisation Act?

10. Whether the rules of P. C. S. Judicial Branch dealing with the services of the plaintiff were framed according to law?
11. What is the effect of not imparting training to the plaintiff as alleged?
12. Whether the order is discriminatory as alleged in para 21 of the plaint?
13. Relief.

4. Issue No. 1 was decided in favour of the appellant State of Punjab. The learned trial Judge found issue No. 2 in favour of the plaintiff and came to the finding that the services of the plaintiff were terminated by the Chief Minister, an authority subordinate to the Governor, who was the appointing authority of the plaintiff. Issue No. 3 was found by the learned trial Judge against the plaintiff-respondent. Under issue No. 4 it was found by the learned trial Judge that the show cause notice having been issued by the Chief Secretary to Govt. Punjab was not the proper notice and, therefore, this issue was also found in favour of the plaintiff-respondent. Under issue No. 5 it was found that the plaintiff is not entitled to invoke the protection of Art. 311 of the Constitution of India and, therefore, this issue was decided against the plaintiff. Issues Nos. 9, 10 and 12 were not pressed before the learned trial Judge by the learned counsel for the plaintiff and all these three issues were decided against the plaintiff.

Issue No. 6 was also decided against the plaintiff. Issue No. 7 was decided in favour of the State Government. Issue No. 8 was also decided in favour of the Government. Issue No. 11 was found against the plaintiff-respondent. As a consequence of the findings mentioned above, the learned trial Judge decreed the suit of the plaintiff and granted him a declaratory decree against the State of Punjab quashing the removal of the plaintiff from the post of Subordinate Judge of the Punjab State.

5. Mr. H. L. Sibal, the learned Advocate-General, Punjab, assailed the finding of the learned trial Judge on issues Nos. 2 and 4. He contended that the finding arrived at by the learned trial Judge on issue No. 2 is contrary to law and the same is liable to be set aside. The learned Advocate-General straightway conceded that there are some provisions in the Constitution where the Governor or the President are enjoined to act upon their individual discretion and not with the aid of the Council of Ministers. But he contended that provisions of Art. 154 read with Arts. 163 and 166 of the Constitution clearly provide the democratic machinery through which the executive powers of the State which is vested in the Governor shall have to be exercised.

The learned Advocate-General contended that no doubt the provision of Art. 233

of the Constitution, whereby the appointments of District Judges in a State have to be made by the Governor of the State in consultation with the High Court, does postulate individual discretion of the Governor, therefore, he has no hesitation in conceding that as far as the question of appointment and removal of the District Judges is concerned, it is within the individual discretion of the Governor that the orders have to be passed by him and not by the State Government as such. He contended that the provisions of Art. 234 of the Constitution are differently worded. His contention is that as far as the question of appointment and removal of the persons other than the District Judges in the Judicial Service of a State is concerned, the Governor of a State does not act in his individual discretion but in fact in accordance with the rules framed by him in consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such a State and it is the State Government who is to pass such orders.

6. The learned counsel further pointed out the provisions of General Clauses Act, 1897, Section 3, Cls. 59, 60 (a), 60(b) and 60 (c) where it is provided that in respect of anything done after the commencement and before the commencement of the Constitution, the State Government shall mean in a Part A State, the Governor; in a Part B State, the Rajpramukh, and in a Part C State, the Central Government. The learned Advocate-General further pointed out that the Governor of Punjab framed the Punjab Civil Services (Judicial Branch) Rules, 1951, in exercise of the powers conferred by Art. 234 read with the proviso to Art. 309 of the Constitution of India, and Rule 7 deals with the appointment of the persons to the Punjab Civil Service (Judicial Branch). His contention is that in fact it is the State Government who is to make the appointment and, therefore, the State Government is also competent to remove the person so appointed to the Punjab Civil Service (Judicial Branch).

He contended that in view of the Rules of Business of the Punjab Government, 1966, framed by the Governor of Punjab, it was the Chief Minister who was competent to dispose of the cases relating to the administration of justice as he was in charge of the said portfolio and the orders having been passed by the said authority and issued in the name of the Governor of Punjab, keeping in view the provisions of Art. 166 of the Constitution, it cannot be said that the orders have been issued by an authority subordinate to the Governor, who is the appointing authority. The learned Advocate-General, for this proposition, has relied upon a ruling reported as *Mohammad Ghouse v. State of Andhra*, AIR 1957 SC 246, and he con-

tended that the finding of the learned trial Judge on issue No. 2 is erroneous and should be reversed.

7. Mr. B. S. Khoji, the learned counsel for the respondent, contended that the provisions of Art 234 are in the same terms as that of Art. 233 of the Constitution. He relied upon the rulings cited by the learned trial Judge and contended that the finding of the learned trial Judge on issue No. 2 is in accordance with law and the same should not be set aside.

8. After considering the respective contentions of the learned counsel for the parties, and after going through the case law referred to in the judgment and also after examining Mohammad Ghouse's case, AIR 1957 SC 246 (supra), we are of the opinion that the contention of the learned counsel for the appellant has to be accepted. The facts in Mohammad Ghouse's case, AIR 1957 SC 246 (supra) are that Mohammad Ghouse, appellant before the Supreme Court, was recruited to the Madras Provincial Judicial Service as District Munsif in 1935. While he was posted as Subordinate Judge at Masulipatnam, Krishna District, he heard the arguments in a case pending before him and reserved the judgment. Before he had pronounced the judgment, a transfer application was filed in the High Court of Madras for transferring the said suit to some other Court on the ground that the appellant was attempting through his brother to take bribe from the parties. The said case was transferred and the High Court started investigation into the allegations made in the affidavit in the stay petition which resulted into an enquiry and a number of charges were framed against him.

The appellant filed a petition under Art. 226 of the Constitution of India in the High Court of Madras for quashing the order of suspension dated 28-1-1954 on the ground, firstly, that in accordance with the rules applicable to him, the enquiry could only be held by a Tribunal to which the Government might have referred the matter and, therefore, proceedings which culminated in his suspension, were without jurisdiction, and, secondly, that the order in question was void and it was in contravention of Art. 311 of the Constitution. It is the second contention with which we are now concerned.

9. In para 8 of the judgment, the contention raised on behalf of the appellant that the appointing authority of the appellant was the Governor of the Province and it was the Governor alone who could dismiss or remove him from the service and the order of suspension made by the High Court was in contravention of the provisions of Art. 311 of the Constitution, was repelled. Their Lordships of the Supreme Court while repelling this contention held that:—

"The facts are that Balakrishna Ayyar, J. sent his report on the enquiry into the charges against the appellant, and expressed his opinion that he should be dismissed or removed from service. The High Court approved of it, and passed an order on January 28, 1954, suspending him until further orders. The report was then sent to the Government for action, and, in fact, the Andhra Government has issued a notice to the appellant on August 12, 1954, to show cause why he should not be dismissed or removed from service. Thus, it is the appropriate authority under Article 311 that proposes to take action against the appellant, and it is for that authority to pass the ultimate order in the matter."

10. No doubt, there is no detailed discussion as to the scope of the provisions of Art. 234 as compared with the provisions of Art. 233 of the Constitution, but the decision of their Lordships of the Supreme Court is binding upon us and we have no option but to follow the same. Thus we find that their Lordships found that it was the Andhra Government which issued a notice to the appellant to show cause as to why he should not be dismissed or removed from service and the State Government was found to be a proper authority for the purposes of taking action under the provisions of Art. 311 of the Constitution in connection with the Subordinate Judge.

11. The judgments relied upon by the learned trial Judge are not relevant to the facts of the present case. Manmohan Singh Tandon v. Manmohan Singh Gujral, 1969 Ser LR 194 = (AIR 1969 Punj 331) a Division Judgment of this Court, is not quite relevant to the facts of the present case as their Lordships in that case were considering the case of the appointment of a District Judge under Art. 233 (1) of the Constitution. Similarly, in State of West Bengal v. Nripendra Nath Bagchi, AIR 1966 SC 447, their Lordships of the Supreme Court were considering the scope of Arts 235 and 311 of the Constitution. This was also a case of dismissal of a District and Sessions Judge.

In case reported as Javantilal Amratlal Shodhan v. F. N. Rana, AIR 1964 SC 648, their Lordships held that in view of the provisions of Art. 258 (1) of the Constitution, the President of India can entrust the State functions which are vested in the Union and not those which are vested in him as President. In Jyoti Prakash Mitter v. Hon'ble Mr. Justice H. K. Bose, Chief Justice, Calcutta, AIR 1965 SC 961, it was held by their Lordships that under Art. 217 (3) of the Constitution, the question of determination of age of the High Court Judge vests exclusively in the President of India in his individual discretion. No doubt that there are certain specified

constitutional powers of the Governor on one hand and the executive powers of the State Government headed by the Governor on the other, in the Constitution of India, but it has not been shown to us that the provisions of Art. 234 of the Constitution belongs to the category where the Governor has to act in his individual discretion.

The only case decided by the Supreme Court which throws light on the issue involved in this case is Mohammad Ghouse's case, AIR 1957 SC 246 (supra) and a similar contention as has already been raised on behalf of the plaintiff-respondent, was repelled by the Supreme Court in that judgment. Following this authority of the Supreme Court, we have no option but to accept the contention of the learned Advocate General, Punjab, and reverse the finding of the learned trial Judge on issue No. 2. Thus we find that the order terminating the services of the plaintiff-respondent was not issued by an authority subordinate to the appointing authority of the plaintiff-respondent.

12. In view of our finding on issue No. 2, the finding of the learned trial Court on issue No. 4 cannot stand. If the State Government is the appropriate appointing and removing authority of a Subordinate Judge, it is not shown to us as to why the show cause notice issued by the Chief Secretary to the State Government was invalid. It may be mentioned that this show cause notice was issued by the Chief Secretary to Government, Punjab, on the recommendation of the High Court, therefore, we reverse the finding of the learned trial Court on issue No. 4 also.

13. Faced with this situation, the learned counsel for the respondent raised the following additional points. The learned counsel contended that the finding of the learned trial Court on issue No. 5 is erroneous. There were three charges in the show cause notice which charges relate to a misconduct on the part of the plaintiff. He contended that in fact a regular enquiry should have been instituted against the plaintiff and his services could not be terminated under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952. The learned counsel for this contention relied on State of Uttar Pradesh v. C. S. Sharma, AIR 1968 SC 158, and contended that in view of the serious allegations being levelled against him in the show cause notice, which are in the following terms, a regular enquiry should have been instituted.

"(2) While posted at Sultanpur Lodhi:

(i) You decided the case titled as 'Prem Sagar v. Sohan Lal' without affording full opportunity to the plaintiff to lead evidence.

(ii) In the case 'Sohan Lal v. Prem Sagar' the decree-holder made an applica-

tion for execution on 17-4-1965, without enclosing therewith a copy of the judgment and that of the Jamabandi of the land to be attached. You, without obtaining office report, ordered on the same date, that warrants for possession be issued. You also incorporated some additions in the original judgment and the warrants of possession, later on with different ink and thus behaved in a most irresponsible manner. The District Judge, Kapurthala, in his report stated inter alia as under:—

"The Sub Judge Shri Shamsher Singh also it appears was inclined to help the opponents of Shri Prem Sagar. In the complaint case when the complainant (Shri Prem Sagar) had examined the witnesses and had closed his evidence, there was no occasion for the complaint to be sent to S. H. O. Sultanpur, for investigation under Section 202, Criminal P. C. The learned Sub Judge had not properly tried the suit instituted by the opponents of Prem Sagar. Three issues suggested by Shri Prem Sagar, who was defendant in that suit, were not framed. The other issues in that suit were framed on 7-4-1965. After that no evidence was allowed to be led in that suit. The suit instituted by the opponents of Shri Prem Sagar, which was for possession of the land, was decreed prematurely.

The more objectionable procedure was followed in the execution proceedings. Although arguments were heard in the suit on 17-4-1965, but the judgments were announced the same day and the execution application was entertained the same day and the learned Sub Judge had without taking report of the office ordered the warrant for possession to be issued the same day. It appears that the warrant was issued without delay, because it was taken to Kapurthala on the same day and endorsement of the Collector was obtained on the same date. In the warrant, the learned Sub Judge had written with his own hand the words 'Trees, well, crops and other rights attached with the land.' Although the words 'crops' did not find place in the suit, but it was added in the typed judgment by the learned Sub-Judge with his own pen, and then this word was incorporated in the warrant also."

(iii) You misused your position as a Judicial Magistrate by proclaiming that you would get one Om Parkash Agriculture Inspector, involved in a case, if he did not co-operate with Shri Mangal Singh, Block Development Officer, Sultanpur, who was a personal friend of yours. As a result of a complaint by the aforesaid Om Parkash, a warning was administered to you."

14. We are unable to accept this contention of the learned counsel for the respondent. In accordance with the provisions of Rule 9, where it is proposed to terminate the employment of the proba-

tioner whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment. It is not the case of the plaintiff that he was being dismissed from the service. Of course, if he was being dismissed from the service on the allegations of misconduct, then a regular enquiry was necessary and should have been held before his services could be terminated. But here is a case of a probationer whose conduct was being watched during the probationary period and about whom the opinion had to be formed whether he completed the probation period successfully or was he unsuitable for holding the post.

In the present case the authorities concerned watched the working of the plaintiff during the period of his probation and came to the conclusion that he was not suitable to be retained in the service. For the purposes of Rule 9, a show cause notice was issued and his explanation was considered by the High Court before a recommendation was made to the State Government for terminating his services. No stigma is attached by the impugned order and the plaintiff cannot be debarred from seeking any other employment in the Government for that reason. Of course if the plaintiff would have been dismissed on the ground of misconduct or some such charge, a regular enquiry was essential.

15. C. S. Sharma's case, AIR 1968 SC 158 (supra), on which the learned counsel for the plaintiff-respondent relies, is distinguishable on facts. In that case, Shri Sharma was dismissed on the basis of an ex parte preliminary enquiry held against him. In the present case, no preliminary ex parte enquiry was held against the plaintiff-respondent. It was in these circumstances that their Lordships of the Supreme Court have held that the order terminating the services of the petitioner was bad as the proper opportunity was not afforded to Shri Sharma, and he was being dismissed on the basis of an enquiry which offended the provisions of Art. 311 (2) of the Constitution.

16. The learned counsel for the plaintiff-respondent next contended that the finding of the learned trial Court on issue No. 8 is erroneous. He contended that the plaintiff had submitted his preliminary explanation to the High Court and in reply to the show cause notice he mentioned that he did not want to say anything except what he had already stated in his preliminary explanation. He contended that the copy of the preliminary explanation

was not forwarded by the High Court to the State Government and, therefore, it was not before the State Government that (when—Ed.) the final orders were passed. In this view of the matter the learned counsel for the respondent contended that the finding of the learned trial Judge on this issue is likely to be reversed.

17. We are unable to agree with this contention of the learned counsel for the respondent. There is no doubt about the fact that the preliminary explanation of the plaintiff was considered by the High Court and after considering the same, a reference, copy of which is marked as Exhibit D.1, was made by the Registrar of the High Court to the Chief Secretary to the Government of Punjab wherein this fact was mentioned that the Hon'ble the Chief Justice and Judges of the High Court had been reviewing the work and conduct of Shri Shamsher Singh, plaintiff-respondent, with reference to the record of his service, reports of the District and Sessions Judges, the results of enquiries into complaints against him, the latest annual confidential report received from the District and Sessions Judge, Jullundur and had gone through the preliminary explanation submitted by Shri Shamsher Singh, and that their Lordships were of the considered view that this officer had failed to make a satisfactory grade in service as his work and conduct had been consistently listed as 'below average'. Therefore, it was recommended that the proceedings should be taken against him for terminating his services.

When a final show cause notice was given by the Chief Secretary to Government, Punjab, it was open to the plaintiff-respondent to have reiterated what he had submitted in his preliminary explanation or to have attached a copy of the said explanation along with his final explanation. Merely because the copy of the preliminary explanation was not forwarded by the High Court to the State Government, would not warrant a finding that the explanation given by the plaintiff was not before the appointing authority. In fact the reply given by the plaintiff to the show cause notice issued by the Chief Secretary to Government, Punjab, was before the State Government, copy of which is marked as Exhibit D.2, and it was after the consideration of the explanation that the impugned orders were passed. Thus there is no merit in this contention of the learned counsel for the plaintiff-respondent.

18. The learned counsel then contended that the final recommendation of the High Court to the State Government was not made in the meeting of the Hon'ble Judges. This contention of the learned counsel is again without any merit. The preliminary explanation submitted by the

plaintiff-respondent was considered in the meeting of the Hon'ble Judges of the High Court and in his final explanation no new facts were mentioned by him which could be worthy of any consideration. In this situation, it cannot be held that the explanation submitted by the plaintiff-respondent to the show cause notice was not considered by the High Court.

19. The learned counsel for the respondent next contended that the Punjab Civil Services (Judicial Branch) Rules, 1951, having not been framed by the Governor himself under the provisions of Art. 234 of the Constitution, were ultra vires and, therefore, the appointment of the plaintiff is not governed by any such rules. We see no merit in this contention of the learned counsel for the respondent as well. The opening part of the rules clearly postulates that the said rules are being framed in exercise of the powers conferred by Art. 234 read with the proviso to Art. 309 of the Constitution of India, after consultation with the State Public Service Commission and the High Court of Punjab providing for the appointment of persons as Subordinate Judges in the Punjab Civil Service (Judicial Branch) and regulating the recruitment and the conditions of service of persons appointed thereto. This contention of the learned counsel is again without any merit.

20. No other point is pressed by the learned counsel for the appellant or by the learned counsel for the respondent.

21. For the reasons recorded above, this appeal is allowed, the judgment and decree of the learned trial Judge are set aside and the suit of the plaintiff-respondent stands dismissed. However, keeping in view the facts and circumstances of this case, there will be no order as to costs.

Appeal allowed.

AIR 1970 PUNJAB & HARYANA 549
(V 57 C 91)

MEHAR SINGH, C. J. AND
BAL RAJ TULI, J.

Devinder Singh, Appellant v. Smt. Shiv Kaur and others, Respondents.

Letters Patent Appeals Nos. 500, 501 of 1969 and 25 and 26 of 1970, D/- 23-4-1970, from judgment of Second Appeal No. 1350 of 1969, D/- 29-7-1969.

Contract Act (1872), Section 64 —
"Benefit under the contract" — Meaning of.

The mother as a natural guardian of a minor sold the land belonging to the minor. According to the sale-deed the mother received from the vendees certain amounts as earnest money in cash and the balance was left in trust with the vendees. The amounts which were left

in trust had to be paid by the vendees at the time of purchase of the land by the mother for the minor as per her representation to the vendee which was recorded in the sale-deed. The vendees, however, did not bring about the purchase of the land for the minor by his mother nor any stipulation for the land or with regard to that land was made by the vendees. The mother purchased the land for the minor with the consideration received from the vendees. The minor on attaining majority filed a suit against the vendees and his mother for possession of the land sold by means of the sale-deed, but he did not disown purchase of the land. The question for consideration was whether the vendees were entitled to receive back only the sums paid by them to the mother or they were entitled to receive the land which was purchased with that money for the minor.

Held, the benefit under the contract of sale received by the minor from the vendees was only in the form of cash consideration and not the land purchased with that consideration and, therefore, the vendees were entitled to only the sums paid by them. The purchase of the land for the minor and the sale of the land in favour of the vendees were not one integrated transaction so that it could not be said that the land purchased was the benefit received by the minor from the vendees under the contract of sale. There was no stipulation that in case the minor on attaining majority avoided the sale in their favour, the vendees would be entitled to the lands purchased with the consideration paid by them. Moreover, the minor on attaining majority had accepted the purchase of the land and the contract of that purchase could not be said to be a part of the voidable contract of sale with vendees. AIR 1919 Mad 650 & AIR 1943 PC 34, Referred; 1964 Ker LT 952, Distinguished, 1961 Ker LT 1018, Rel. on; S. A. No. 1350 of 1969, D/- 24-9-1969 (Punj), Reversed. (Paras 6, 8, 9, 11)

Cases Referred: Chronological Paras

(1964) 1964 Ker LT 952 = 1965 Ker LJ 265, Cheriathu Varkey v. Meenakshi Amma	9
(1961) 1961 Ker LT 1018 = 1961 Ker LJ 1226, Chandrasekhara Pillai v. Kochu Koshi	12
(1943) AIR 1943 PC 34 (V 30) = 70 Ind App 35, Muralidhar Chatterjee v. International Film Co., Ltd.	10, 12
(1919) AIR 1919 Mad 650 (V 6) = 35 Mad LJ 652, Chinnaswami Reddi v. Krishnaswami Reddi	7, 9

J. N. Kaushal with H. L. Mital, for Appellant; H. L. Sibal with S. C. Sibal, for Respondents.

BAL RAJ TULI, J.: This judgment will be read in four connected appeals

under Clause 10 of the Letters Patent (L. P. A. No. 500 of 1969 Devinder Singh v. Smt. Shiv Kaur and other, L. P. A. No. 501 of 1969, Devinder Singh v. Kapur Singh and others, L. P. A. No. 25 of 1970, Devinder Singh v. Smt Shiv Kaur and others and L. P. A. No. 26 of 1970, Devinder Singh v. Kapur Singh and others), which have arisen out of two suits filed by Devinder Singh against the respondents and which were consolidated. L. P. A. No. 500 of 1969 was filed against the judgment of the learned Single Judge dated September 24, 1969, deciding R. S. A. 1330 of 1969. There was some typographical mistake in the said judgment and for the correction of the same an application under Section 151 of the Code of Civil Procedure was filed, which was allowed by the learned Single Judge on November 28, 1969 with the result that the judgment was corrected. L. P. A. No. 25 of 1970 was then filed against the judgment of the learned Single Judge dated September 24, 1969, as amended on November 28, 1969. In substance both the appeals are against the same judgment. Similar is the case with regard to L. P. A. No. 501 of 1969 and L. P. A. No. 26 of 1970.

2. The facts are not in dispute and can be stated in a short compass. Devinder Singh is the son of Bhagat Singh who died in Pakistan. He was a minor in 1957 and his mother Smt. Dalbir Kaur sold 48 Kanals of land belonging to the minor situate in village Dhoori, tahsil and district Jullundur, to Smt. Shiv Kaur and Smt. Kartar Kaur for a sum of Rs 7000/- on November 29, 1957. The vendees sold 10 Marlas of land to defendant 5 (Khushia son of Nathu) and Smt. Kartar Kaur sold another piece of land measuring 10 Marlas in favour of defendant 4 (Parkash son of Tuls). These subsequent vendees were made defendants to the suit. The number of the suit in respect of the land sold in favour of Smt. Shiv Kaur and Kartar Kaur was 63 of 1967.

3. Smt. Dalbir Kaur effected a second sale of the minor's land measuring 64 Kanals 1 Marla for a sum of Rs 9000/- in favour of Kapur Singh and others on December 10, 1957. The suit in respect of this land filed by Devinder Singh was numbered as 64 of 1967.

4. No permission was obtained from the Court under Section 8 of the Hindu Minority and Guardianship Act, 1956 for effecting the above two sales by Smt. Dalbir Kaur, the natural guardian of Devinder Singh plaintiff with the result that the sales effected by Smt. Dalbir Kaur were voidable at the instance of Devinder Singh as provided in Section 8(3) *ibid.* Devinder Singh minor on attaining majority filed suits against the vendees and his mother Dalbir Kaur for possession

of the land sold by means of the sale-deeds mentioned above. The suits were contested by the defendants and it was pleaded that, with the consideration received from the vendees, Smt. Dalbir Kaur purchased land measuring about 112 Bighas, being 8/17th share of 238 Bighas 19 Biswas, in the name of Devinder Singh in Tehsil Samana, district Patiala, on February 5, 1958, and the sale-deed in respect thereof was registered on the following day. The other co-vendees with the minor Devinder Singh were his maternal uncles at the time of the purchase of that land. The defendant-vendees paid the balance amount due from them under the sale deeds dated November 29, 1957, and December 10, 1957, by bank drafts, which were passed on to the vendors of the land at Samana. In the first sale-deed dated November 29, 1957, it is mentioned that Smt. Dalbir Kaur had received Rs 1000/- as earnest money in cash and the balance amount of Rs 6000/- would be paid by the vendees at the time when she purchases land in Patiala region for the minor within a week. In the other sale-deed dated December 10, 1957, it was mentioned that she had received Rs. 1700/- on account of earnest money in cash and the balance amount of Rs 7300/- was left in trust with the vendees to be paid to her at the time of purchase of the land with her real relatives within two weeks.

5. The question of law that has arisen and which has been argued at length by the learned counsel for the parties is whether the defendant-vendees are entitled to receive back only the sums of Rs 7000/- and Rs 9000/- paid by them to Smt. Dalbir Kaur, the mother of Devinder Singh minor, which was the consideration for the sales, or they are entitled to receive the land which was purchased with that money by Smt. Dalbir Kaur for the minor in Tehsil Samana, district Patiala. The answer to this question depends on the interpretation to be placed on Section 64 of the Indian Contract Act (Act 9 of 1872), which reads as under:—

"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

6. It is the second sentence of this section which is applicable to the facts of the present cases. On the language of this sentence it is quite clear that the vendees in the instant cases are entitled to the benefit received by Devinder Singh from them under the contracts of sale

dated November 29, 1957, and December 10, 1957. What requires determination is the meaning of the word 'benefit' under the voidable contracts which Devinder Singh avoided. From the language of the sale-deeds, it is also quite clear that the consideration for the sales was the amounts of Rs. 7000/- and Rs. 9000/- and not any land that might be purchased by Smt. Dalbir Kaur with that amount. It is true that the amounts which were left in trust with the vendees had to be paid by them at the time of the purchase of the land by Smt. Dalbir Kaur for the minor, as per her representation to the vendee, which was recorded in the sale-deeds. The defendant-vendees, however, did not bring about the purchase of the land in Tehsil Samana for the minor Devinder Singh by his mother Dalbir Kaur. That transaction of purchase of land was brought about by the brothers of Smt. Dalbir Kaur. The land purchased in Tehsil Samana measured 238 Bighas 19 Biswas in which the minor's share was 8/17th and the share of other co-vendees was 9/17th. The sale consideration was Rs. 33,500/- so that the price of 8/17th share of Devinder Singh came to Rs. 15,764.70. There is no doubt that Smt. Dalbir Kaur purchased the land for Devinder Singh in Tehsil Samana with the consideration received from the defendant-vendees but this fact alone does not make the contracts of sale of Devinder Singh's land in favour of the defendant-vendees and the purchase of land for him by his mother in Tehsil Samana as one integrated transaction so that it may be said that the land purchased in Tehsil Samana was the benefit received by Devinder Singh from the defendant-vendees under the contracts of sale entered into by his mother with them on November 29, 1957, and December 10, 1957.

7. On behalf of the defendant-vendees reliance has been placed on a judgment of a Division Bench of the Madras High Court in Chinnaswami Reddi v. Krishnaswami Reddi. 35 Mad LJ 652 = (AIR 1919 Mad 650), wherein Kumaraswami Sastri, J., observed as under:—

"Ordinarily, the benefit which a party receives when he sells the property is the price which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where however for the protection of a purchaser contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties such as the purchase of other lands with the consideration and the money is so applied, the benefit which the other party obtains will be the land or other property

acquired with the consideration. There must, in my opinion, be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him. Section 35 of the Transfer of Property Act makes this clear. It requires that the benefit received should be part of the same transaction and should be direct. The authorities cited by the learned Advocate-General do not support the view that the purchaser is entitled to follow up properties purchased with the consideration irrespective of whether there was any arrangement or not."

8. These observations, in my opinion, do not help the learned counsel as the learned Judge himself pointed out that there must be something more than a mere application of the consideration in a particular way in order to entitle the purchaser to claim restoration of the properties acquired with the consideration paid by him and that the benefit received should be part of the same transaction and should be direct. In the instant cases it cannot be said that the purchase of land in Tehsil Samana was part of the same transaction as the sales of land in favour of the defendant-vendees or that the purchase of land was in any way directly connected with the said sales. The last sentence of the learned Judge makes it further clear that the purchaser is not entitled to follow up properties purchased with the consideration irrespective of whether there was any arrangement or not. In the instant cases, in the sale-deeds with the defendant-vendees, there was no stipulation or arrangement that in case the minor on attaining majority avoided the sales in their favour, the vendees would be entitled to the lands purchased with the consideration paid by them, nor was there any condition that the sales in their favour were to be null and void in case Smt. Dalbir Kaur did not purchase any land for the minor with the consideration received from them. In the Madras case, the decree for the land purchased with the consideration received from the vendees was not allowed because it had been found as a fact that the purchase of the lands at Sriperumbudur was not in the contemplation of the parties, at the time of the sale to the plaintiff. In the instant cases, there is no doubt that the purchase of some land in Patiala region was in the contemplation of Smt. Dalbir Kaur but no stipulation for that land or with regard to that land was made by the defendant-vendees, as has been pointed out above. No assistance, therefore, can be derived from this decision of the Madras High Court.

9. The learned counsel for the defendant-vendees has then relied upon a Divi-

sion Bench judgment of the Kerala High Court in Cheriathu Varkey v. Meenakshi Amma 1964 Ker LT 952. That judgment is distinguishable on facts. In that case the mother of the minors sold some properties belonging to her and the minors to the second defendant and with a part of the consideration received she purchased some other properties in her name and in the names of the minor-plaintiffs on the same day. The plaintiffs disowned the acquisition of the latter properties and contended that the sale of their properties in favour of defendant 2 was for no necessity and sought to set aside the alienation and recover the properties which had been sold by their mother to defendant 2. The suit of the plaintiffs was decreed but the counsel for defendant 2 pleaded that in cancelling the alienation as regards the plaintiffs' share, the benefit conferred on the plaintiffs' estate by that alienation should be directed to be surrendered to the alienee-defendants. This plea was accepted and the alienee-defendants too were held entitled to recover 3/4th of plaint B schedule properties with mesne profits from the date of their eviction from the property decreed with a further direction that they would be paid compensation for their improvements on the property from where they were ousted. In making this decree in favour of defendant 2 the learned Judges followed the decision of the Madras High Court in 35 Mad LJ 652=(AIR 1919 Mad 650) (supra). In the instant cases the acquisition of land in Tehsil Samana has not been disowned or avoided by Devinder Singh. He has accepted the purchase of that land and the contract of that purchase cannot be said to be a part of the voidable contracts of sale with the defendant-vendees.

10. On behalf of the appellant, the learned counsel has relied upon a judgment of Privy Council in Muralidhar Chatterjee v. International Film Co. Ltd., AIR 1943 PC 34, wherein the following observations occur:—

"Sections 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of 'profit' or 'clear profit' nor does it matter what the party receiving the money may have done with it. To say that it has been spent for the purposes of the contract is wholly immaterial in such a case as the present. It means only that it has been spent to enable the party receiving it to perform his part of the contract — in other words, for his own purposes."

11. No assistance can be had from this judgment as the defendant-vendees are not seeking to recover any 'profit' or 'clear profit' from the plaintiff-appellant in the garb of 'benefit'. They lay their claim to the land acquired by the plain-

tiff's mother for him in Tehsil Samana on the ground that it had been purchased with the consideration paid by them and the plaintiffs' estate benefited by the acquisition of that land and that benefit was directly in the contemplation of the parties at the time of the sales. This argument is fallacious as the utilisation of the consideration paid by the defendant-vendees does not amount to the benefit derived from them under the voidable contracts of sale with them which the plaintiff-appellant avoided, as he was entitled to do. The benefit under those contracts of sale received by the minor (plaintiff-appellant) from the defendant-vendees was only in the form of cash consideration and not the land purchased with that consideration in Tehsil Samana.

12. The learned counsel for the appellant has then referred to a Single Judge judgment of the Kerala High Court in Chandrasekhara Pillai v. Kochu Koshi, 1961 Ker LT 1018, in which the consideration for sale of the suit property as per Exhibit I was Rs. 862½/- made up of a cash consideration of Rs. 10/- and a sum of Rs. 789½/- to be advanced for an assignment, Exhibit II, in the name of 2nd defendant's tavazhi, of a mortgage on a property belonging to Velayuda Kurup, the husband of the 2nd defendant, and Rs. 63½/- for paying for a puravallpa, Exhibit III taken from Velayuda Kurup in regard to the same property. Thus, excepting the cash consideration of Rs. 10/-, the rest of the price was for investment on a mortgage of property that belonged to Velayuda Kurup, the husband of the 2nd defendant and the father of plaintiffs 1 and 2 and the 3rd defendant. The sale of the suit property was avoided and the counsel for the alienee contended that, in the event of rescission of the sale, the plaintiffs' tavazhi should be directed to surrender the mortgage rights they had acquired with the consideration of the impugned sale. Reliance was placed on Sections 64 and 65 of the Indian Contract Act. After setting out those sections, the learned Judge observed:—

"These sections require only that, when a transaction is avoided, or found to be void, the party, who had received any benefit or advantage thereunder, shall restore the same to the person from whom he received it. The benefit or advantage received by the plaintiffs' tavazhi under the impugned sale was only the sum that the tavazhi received as consideration for the sale, namely, the sum of Rs. 852½/-, leaving out of account the cash consideration of Rs. 10/-, not shown to have been utilised for the tavazhi. The plaintiffs' tavazhi is bound to restore the same to the 1st defendant before they recover the property from him.

The further contention that the plaintiffs' tavazhi should surrender the mortgage right which they acquired with that amount does not appear to be warranted by law. The acquisitions of the mortgage rights under Exhibits II and III were not benefits received under Exhibit I, but were benefits derived by a further investment which the plaintiffs' tavazhi made with that amount. As observed by the Privy Council in AIR 1943 PC 34 (supra), Sections 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of 'profit' or 'clear profit', nor does it matter what the party receiving the money may have done with it. Whether the investment made by the vendor with the consideration paid under the impugned sale ended in a profit or a loss, is of no consequence to the alienee. He can neither claim the benefit of the investment nor be bound by the loss resulting therefrom. He is concerned only with what he paid, and nothing more. I would, therefore, repel the claim for a surrender of the mortgage rights taken by the plaintiffs' tavazhi with the price paid under Exhibit I and direct the plaintiffs' tavazhi to restore the sum of Rs. 852½/- only to the 1st defendant before they take the property from him."

13. For the reasons given above, I hold that the plaintiff-appellant Devinder Singh is entitled to a decree for possession of the lands claimed by him in the suits subject to his paying Rs. 7000/- and Rs. 9000/- to the respective vendees, provided the land claimed in the suits is found to be the land allotted to the vendees, in lieu of the lands sold to them by Dalbir Kaur, in consolidation proceedings. In the suit filed by Devinder Singh against Smt. Shiv Kaur and others the land sued for was mentioned as measuring 102 Kanals 8 Marlas whereas the land sold measured 48 Kanals. The first appellate Court has observed that it was necessary to find out whether the entire land in suit had been allotted to the vendees of that suit in lieu of the land sold by Smt. Dalbir Kaur, but the necessity for determining the identity of the land was not felt in view of the compromise entered into by the parties before him according to which Smt. Kartar Kaur was to deliver possession of land measuring 22 Kanals 11 Marlas to the plaintiff-appellant and Smt. Shiv Kaur was to deliver possession of 23 Kanals 7 Marlas of land to him, and regarding the rest of the land the plaintiff's suit was to stand dismissed. The particulars of the land, the possession of which was to be delivered to Devinder Singh by Smt. Shiv Kaur and Kartar Kaur, were given in the statements of parties and were incorporated in the decree passed by the first appellate Court. This compromise was conditional, that is, it was to be effective in case the plain-

tiff-appellant was held entitled to the decree in suit. Since the first appellate Court held that the plaintiff-appellant was entitled to the decree sought for by him, the suit was decreed in terms of the compromise entered into by the parties before him. Since I have also come to the same conclusion, the plaintiff-appellant is entitled to the decree passed in his favour by the first appellate Court. I accordingly accept L.P.A. 500 of 1969 and L.P.A. 25 of 1970 and setting aside the judgment and decree passed by the learned Single Judge restore the decree passed by the first appellate Court on July 29, 1969. In view of the complicated nature of the point of law involved in the appeals, I leave the parties to bear their own costs in this Court.

14. In the other suit against Kapur Singh and others, there has been no compromise. There is a dispute with regard to the land to the possession of which the plaintiff-appellant is entitled. In paragraph 3 of the plaint, the plaintiff stated that in lieu of the land described in paragraph 1 of the plaint and entered in the sale deed dated December 10, 1957, the land described in the heading of the plaint and entered in the jamabandi for the year 1961-62 was allotted to defendants 1 to 5 in consolidation proceedings and the plaintiff-appellant was, therefore, entitled to the possession of that land. The reply to this paragraph of the plaint by the defendants was:—

"Para 3 of the plaint is not admitted as correct and the plaintiff is put to proof." No issue, however was framed on this part of the case and no evidence was led to show that the allegations in paragraph 3 of the plaint were correct. The learned Single Judge observed in his judgment that in case his decision was not affirmed in appeal, this matter would have to be put in issue and determined. With this observation I entirely agree. I accordingly frame the following issue:—

"What was the land allotted to defendants 1 and 2 in consolidation proceedings in lieu of the land purchased by them from Smt. Dalbir Kaur as guardian of the plaintiff by sale-deed dated December 10, 1957?"

15. The case is remitted to the learned trial Court with a direction to try this issue by affording an opportunity of leading evidence to the parties, and to return the evidence to this Court together with its findings thereon and the reasons therefor within four months from today. L. P. As. Nos. 501 of 1969 and 26 of 1970 may be set down for hearing after the receipt of the report from the trial Court.

MEHAR SINGH, C. J.:— 16. I agree
Order accordingly.

AIR 1970 PUNJAB & HARYANA 554
(V 57 C 92)

MEHAR SINGH, C J. AND
R S NARULA, J.

Additional Director(I) Consolidation of Holdings, Punjab and another, Appellants v. Raghwant Singh Gurbachan Singh and others, Respondents

Letters Patent Appeal No 370 of 1964, D/-7-1-1970 from judgment of A. N. Grover, J in Civil Writ No 1728 of 1962, D/-7-8-1964.

(A) Constitution of India, Art. 226 — Certiorari — Order without jurisdiction — Decision on question of limitation though relating to jurisdiction of deciding court, an order passed on basis of erroneous decision about limitation or without suo motu noting bar of limitation is not an order without jurisdiction — Order not a nullity so as to be liable to be quashed in certiorari. AIR 1966 SC 153 & AIR 1961 SC 907, Rel. on. (Para 3)

(B) Constitution of India, Art. 226 — Writ of Certiorari — Order passed without considering question of limitation — Order not liable to be set aside on ground of relative application having been filed beyond limitation. AIR 1961 SC 907, Followed. (Para 3)

(C) Constitution of India, Art. 226 — Writ of certiorari — New point — Question of limitation not raised before tribunal — Question cannot be raised for first time in writ petition. (1966) 68 Pun LR 496 & ILR (1967) 2 Pun & Har 89 & AIR 1968 Punj 282, Followed. (Para 3)

(D) Civil P. C. (1938), S. 115 — Jurisdiction — Question of limitation — Decision though it relates to question of jurisdiction of court, order of court based on wrong decision on limitation or absence of decision not an order without jurisdiction. (Para 3)

(E) Constitution of India, Art. 226 — Certiorari—Tribunal's order on question of limitation, when liable to be quashed.

An order of a tribunal on a question of limitation, as indeed on any other legal question would no doubt be liable to be set aside if it is either based on extraneous considerations or based on no evidence whatever, or contains an error of law apparent on its face. But in that case it would not be liable to be set aside because it is without jurisdiction, but because it suffers from an error of law apparent on its face. (Para 3)

Cases Referred: Chronological Paras
(1968) AIR 1968 Punj 282 (V 55) =
(1963) 70 Pun LR 301, Thambu
v Addl Director Consolidation of
Holdings I
(1967) ILR (1967) 2 Punj & Harayana
83, Sewa Singh v. State of Pun-
jab I

(1966) AIR 1966 SC 153 (V 53) =

(1966) 1 SCR 102, Pandurang
Dhondi Chougule v. Maruti Harl
Jadhav 2

(1966) 68 Pun LR 496 = ILR (1966)
2 Punj 664, Bhagat Singh v. Addl.
Director Consolidation of Holdings
Punjab Jullundur I

(1964) AIR 1964 SC 907 (V 51) =
(1964) 1 SCR 495, Ittayavira Mathal
v Varkey Varkey 3

(1963) Civil Writ No. 1458 of 1962,
D/-8-4-1963 (Punj), Deendar v.
State of Punjab I

(1949) AIR 1949 PC 239 (V 36) =
76 Ind App 131, Joy Chand Lal
v Kamalaksha Chaudhury 2

(1935) AIR 1935 PC 85 (V 22) =
62 Ind App 20, Maqbul Ahmad
v Onkar Pratap Narain Singh 3

B S Dhillon Advocate-General Punjab
with Sukhdev Khanna, for Appellants;
H L Sarin Sr Advocate (R C Nagpal,
with him), for Respondents Nos. 1 and 2
only

NARULA, J.:— The only ground on which the learned Single Judge, against whose judgment this appeal has been preferred, allowed the writ petition of Raghwant Singh and Gurdev Singh respondents and quashed the order of the Additional Director, Consolidation of Holdings, Punjab, was that the petition under Section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948) (hereinafter called the Act) which was entertained and allowed by the Additional Director had been filed beyond the period of limitation prescribed by Rule 18 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Rules, 1949. It is the common case of both sides that no objection as to limitation was raised by the writ petitioners or any one else on any of the dates of hearing of the application under Section 42 of the Act. While allowing the writ petition, the learned Single Judge had followed the judgment of Mahajan, J. D/- 8-4-1963, in Deendar v. State of Punjab, Civil Writ No. 1458 of 1962 (Punj). In that case, the question of limitation had been raised before the Additional Director and he had merely waived the time limit in order to redress the grievance of the petitioner. Mr. B. S. Dhillon, who appears for the appellants, submits that he has no quarrel with the proposition of law laid down in Deendar's case, Civil Writ No 1458 of 1962, D/- 8-4-1963 (Punj) as subsequently confirmed in various subsequent decisions of this Court, but his only argument in support of the appeal is that it was not open to the writ petitioners to raise the question of limitation for the first time in their petition under Articles 226 and 227 of the Constitution. Mr. Dhillon is

no doubt supported in this submission by at least three Division Bench judgments of this Court. In *Bhagat Singh v. Addl. Director, Consolidation of Holdings, Punjab, Jullundur*, (1966) 68 Pun LR 496, it was held by my Lord the Chief Justice and Pandit, J. that where the question of the revision under the Act being barred by time is not raised before the Director of Consolidation, the same cannot be raised before the High Court for the first time in proceedings under Article 226 of the Constitution. A similar question was again referred to a Division Bench consisting of *Shamsher Bahadur, J.* and myself in *Sewa Singh v. State of Punjab*, ILR (1967) 2 Punj and Har 89. *Shamsher Bahadur, J.*, who spoke for the Division Bench, held that failure to raise an objection of limitation by a party which could have done so would be a bar to the certiorari petition made to quash such an order. The Bench held that *except for a patent or inherent defect of jurisdiction*, an objection which would oust the jurisdiction of a quasi-judicial tribunal ought to be raised in the first instance before the tribunal itself. The third case in which this point came up for consideration was decided by *S. B. Capoor, J.* and myself in *Thambu v. Addl. Director Consolidation of Holdings*, (1968) 70 Pun LR 301 = (AIR 1968 Punj 282). It was held that where an objection as to an application under Section 42 of the Act being barred by time was not raised before the Additional Director, he was not bound to take notice of it *suo motu* and the proceedings held before him were not a nullity. In the course of the judgment of the Division Bench prepared by me, it was observed that a petitioner who does not raise a legal defence to an action before the tribunal where the action is brought should not ordinarily be permitted to raise the said defence for the first time in a writ petition.

2. Mr. Harbans Lal Sarin, who appears to support the judgment of the learned Single Judge, submits that the decisions of the previous three Division Benches on the point in issue need reconsideration on the ground that on the principles of Section 3 of the Limitation Act, it is the duty of the Additional Director to take notice of the question of limitation *suo motu* and that if the Additional Director fails in so doing, his decision lacks inherent jurisdiction and should be quashed *ex debito iustitiae* by a writ in the nature of certiorari. He has referred to the judgment of their Lordships of the Judicial Committee in *Joy Chand Lal v. Kamalaksha Chaudhury*, AIR 1949 PC 239, wherein it was held that where a subordinate Court by its own erroneous decision on a point of limitation or on a point of *res judicata* invested itself with a jurisdiction which

in law it did not possess, the High Court had the power to interfere in revision under Section 115 of the Code of Civil Procedure. The observations of their Lordships of the Supreme Court in *Pandurang Dhondi Chougule v. Maruti Hari Jadhav*, AIR 1966 SC 153, were then referred to. *P. B. Gajendragadkar, C. J.*, as he then was, speaking for the Court observed in that case as follows:—

"It is conceivable that points of law may arise in proceedings instituted before subordinate Courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court, which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under Section 115."

3. On the other hand Mr. Dhillon has placed reliance on the law laid down by the Supreme Court in *Ittyavira Mathai v. Varkey Varkey*, AIR 1964 SC 907. In the course of the judgment of the Supreme Court prepared by *Mudholkar, J.*, it was held as below:—

"All that the decision relied upon (*Magbul Ahmad v. Onkar Pratap Narain Singh*, AIR 1935 PC 85) says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the Court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the Court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. If the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity."

The legal proposition which emerges from the study of the abovementioned decisions of the Supreme Court is that though a decision on a question of limitation relates to the question of jurisdiction of the Court deciding the question, but an order based on an erroneous decision of such a question or an order passed without *suo motu* noticing such a bar and deciding it, is not an order without jurisdiction and cannot, therefore, be declared as a nullity so as to be liable to be quash-

ed in certiorari proceedings. An order of a tribunal on a question of limitation, as indeed on any other legal question, would no doubt be liable to be set aside if it is either based on extraneous considerations or based on no evidence whatever, or contains an error of law apparent on its face. But in that case it would not be liable to be set aside because it is without jurisdiction, but because it suffers from an error of law apparent on its face. In this view of the matter, it appears to us that the order of Additional Director of Consolidation of Holdings was not liable to be set aside by this Court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution merely because in the opinion of this Court the application on which the order had been passed was presented to the State Government long after the expiry of the period of limitation. If the objection had been raised before the Additional Director, the applicant under Section 42 of the Act might have applied for condonation of delay, and if the applicant was able to show sufficient cause for not filing the application within time, the delay might have been condoned. In the alternative, the applicant might even have convinced the Additional Director that the application had been filed within time. In any event, we are bound by the earlier three Division Bench judgments referred to above, and following the same we must hold that the question of limitation not having been raised before the Additional Director, it was not open to the writ petitioners to raise the same for the first time in the writ petition. The impugned order under Section 42 of the Act was quashed by the learned Single Judge solely on the ground of limitation, and as we have held that it is not open to this Court to allow the question of limitation being raised for the first time in certiorari proceedings, we have to accept this appeal and to set aside the order of the learned Single Judge.

4. We accordingly allow this appeal, set aside the order of the learned Single Judge, and dismiss the writ petition of respondents 1 and 2, but leave the parties to bear their own costs.

MEHAR SINGH, C. J.:— 5. I agree.
Appeal allowed.

AIR 1970 PUNJAB & HARYANA 556
(V 57 C 93)

A. D. KOSHAL, J.

Kartar Kaur and another, Appellants
v. Dhan Kaur and others, Respondents.

Second Appeal No. 941 of 1960, D/- 30-1-1970, from decree of Addl. Dist. J., Ambala Camp Ludhiana, D/- 27-7-1959.

EN/EN/C130/70/VSS/C

(A) Civil P. C. (1908), O. 22, R. 4 — Procedure in case of death of one of the respondents — Second appeal — Application for bringing L. Rs. of deceased long after limitation — Prayer for condonation of delay on the ground that appellants did not know of his death as they lived 20 miles away — Held that appeal had abated as ignorance of death of a party was no sufficient cause for condonation of delay. AIR 1960 Punj 335 (FB), Foll. (Para 2)

(B) Civil P. C. (1908), O. 22, R. 4 — Death of one of the respondents — Second appeal against judgment and decree in suit for possession by plaintiffs as appellants — Abatement of appeal against one respondent — Appeal became incompetent as a whole and could not be proceeded with as against surviving respondents. AIR 1969 Punj & Haryana 216, Followed. (Para 3)

Cases Referred: Chronological Paras
(1969) AIR 1969 Punj & Haryana 216

(V 56) = ILR (1968) 2 Punj 660,

Swaran Singh Puran Singh v.

Ramditta Badhawa 3

(1962) AIR 1962 SC 89 (V 49) =

(1962) 2 SCR 636, State of Punjab

v. Nathu Ram 3

(1960) AIR 1960 Punj 335 (V 47) =

ILR (1960) Punj 935 (FB), Firm

Dittu Ram Eyedan v. Om Press

Co. Ltd. 2

(1924) AIR 1924 Lah 461 (V 11) =

80 Ind Cas 694, Munshi Ram v.

Radha Kishen 2

Rajinder Sachar with R. K. Chhibbar and V. P. Prashar, for Appellants; V. P. Sharda, for Respondents.

JUDGMENT: Jaimal Kaur respondent No 6 and the two appellants before me, all of them being real sisters to each other and daughters of one Sunder, brought the suit out of which this appeal has arisen for possession of a house and land measuring 34 bighas 15 biswas, 4 biswasanis pukhta situated in Bhaini Bringan, Tehsil and District Ludhiana, against respondents Nos. 2 to 5 who are admittedly collaterals of the said Sunder, on the ground that the deed of relinquishment executed on the 15th of February, 1947, by Shrimati Dhan Kaur defendant-respondent No. 1, the widow of the said Sunder, in favour of respondents Nos. 2 to 5 was void and ineffective, the plaintiffs being preferential heirs of Sunder as compared to his widow. The trial Court decreed the suit. In appeal Shri A. N. Bhanot, Additional District Judge, Ambala, maintained the decree in so far as it related to the house but set the same aside with regard to the land which was proved to be ancestral property qua respondents Nos. 2 to 5.

2. The present second appeal was filed on the 28th of October, 1959, and when

it came up for hearing before me on the 12th of December, 1969, Mr. Sharda, learned counsel for respondents Nos. 2 and 3, stated that Amar Singh respondent No. 4 had died on the 30th of March, 1964. The parties were allowed to file their respective affidavits with regard to the factum and date of Amar Singh's death and there is no dispute now that the same were correctly stated by Mr. Sharda. An application under Rule 4 of Order XXII of the Code of Civil Procedure read with Section 151 thereof, however, has been filed on behalf of the appellants praying that the legal representatives of Amar Singh respondent No. 4 be brought on the record with a finding that the appeal had not abated. The sole reason put forward in support of the prayer for condonation of the delay is that the appellants live in village Thakarwal which lies at a distance of over 20 miles from the village of respondent No. 4 and that the latter died while he was serving in the Army outside his village so that the appellants did not come to know of his death before their counsel informed them thereof in December, 1969, after the same had been brought to the notice of this Court. These facts, it is contended by Mr. Sachar for the appellants, are sufficient for the condonation prayed for. In my opinion, however, this contention has no force. Mere ignorance of the death of a party does not furnish sufficient ground for setting aside an abatement after the expiry of the periods mentioned in Articles 120 and 121 of the Limitation Act, XXXVI of 1963 (Articles 177 and 171 respectively of the Indian Limitation Act, IX of 1908). In so holding, Tek Chand, J., with whom the other two Judges agreed in *Firm Dittu Ram Eyedan v. Om Press Co. Ltd, Fazilka*, AIR 1960 Punj 335 (FB), observed:—

"Before ignorance of death can be deemed to be a good ground, there must exist good grounds for ignorance not attributable to negligence. When law imposes an obligation on a person to bring legal representatives of deceased opponent on the record, within the prescribed period, mere want of knowledge of death will be insufficient to secure him against consequences of abatement of his suit or appeal; he has further to show absence of want of care. When reasonable vigilance is a duty, unqualified ignorance cannot be deemed venial. Want of information may be overlooked if want was not induced by neglectful indifference or blameworthy remissness. Allowing oneself to remain in the dark cannot be treated as a persuasive ground for condonation of delay."

Expressing the view that it was for the applicant to make out cogent grounds for excusing delay either by positive evidence led in this behalf or from the cir-

cumstances justifying such a conclusion, Tek Chand, J., held:

"The burden cannot be cast upon the opposite party who secures a valuable advantage by the lapse of period of limitation, to adduce proof of facts and circumstances showing negligence or want of good faith on the part of the applicant. In the absence of circumstances or proof of want of negligence, a bald statement that the applicant was ignorant of the death cannot be deemed sufficient for revival of the suit or appeal."

In *Munshi Ram v. Radha Kishen*, AIR 1924 Lah 461, an application under Order XXII, Rule 9, of the Code of Civil Procedure was made three years after the death of a party. The cause alleged in the affidavit filed in support of the application was that the parties were living in different districts and their residences were separated by a distance of 200 miles, but this was not considered to be a sufficient reason for excusing the delay in making the application after such a long period. This case was quoted with approval in AIR 1960 Punj 335 (FB) (*supra*), and the facts in the present case where the delay covers a period of more than five years and the distance between the village of the appellants and that of the deceased is only 20 miles, constitute a stronger reason for turning down the prayer of condonation. The appeal must, therefore, be held to have abated against the deceased respondent.

3. The only question which remains to be decided is as to whether the appeal can proceed as against the surviving respondents. This point is also covered by authority. In *Swaran Singh Puran Singh v. Ramditta Badhava*, AIR 1969 Punj & Haryana 216, the plaintiffs were the sister's sons of the deceased and claimed a joint decree for possession against his collaterals alleging that they (the plaintiffs) were his preferential heirs. The suit was dismissed by the trial Court as well as by the first appellate Court. During the pendency of the plaintiffs' second appeal before the High Court one of the collaterals died and as no application to bring his legal representatives on the record was brought within the time allowed by law in that behalf, the appeal was held not only to have abated as against the deceased respondent but to have become incompetent as a whole. *Mehar Singh, C. J., and Narula, J.,* who decided the case, relied on the dicta of their Lordships of the Supreme Court in *the State of Punjab v. Nathu Ram*, AIR 1962 SC 89, to the following effect:

- (a) If the decree under appeal is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the

abatement of the appeal against the deceased respondent.

(b) The view taken by the Courts in some cases previously to the effect that the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents may be suitably dealt with by the appellate Court is incorrect. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour.

(c) The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the appellate Court cannot in any way modify that decree directly or indirectly.

In following this authority, the Division Bench turned down an argument that the suit of the plaintiffs should be visualised as such number of separate suits as there were collaterals, with the following observations —

"The fact remains that they filed one suit for a joint decree for possession against all the defendants and having done so they cannot now argue that the suit should be deemed to be for separate decrees for possession of undivided specified shares in the property in question for the purposes of deciding the question of abatement."

These observations by which I am bound apply with full force to the facts of the present case. Following them, therefore, I hold that the appeal has become incompetent as a whole and cannot now be proceeded with against the surviving respondents.

In the result, the appeal is dismissed as having abated. There will be no order as to costs.

Appeal dismissed.

AIR 1970 PUNJAB & HARYANA 558
(V 57 C 91)

D K. MAHAJAN AND
S S SANDHAWALIA, JJ.

The Commissioner of Income-tax, Punjab, Jammu & Kashmir and Himachal Pradesh, Patiala, Petitioner v. Kartar Singh, Respondent

Income-tax Case No 3 of 1965, D/-2-2-1970

DN/DN/B653/70/YPB/C

Income-tax Act (1922), S. 66 (2) — Power of High Court to direct Tribunal to state case — Exercise of.

In an application under Section 66 (2) High Court will not issue Mandamus to the Appellate Tribunal to refer questions of law which have already been decided by other High Court, unless the High Court comes to the conclusion that that decision is patently erroneous.

(Para 4)

Cases Referred: Chronological Paras
(1968) 68 ITR 62 = (1968) 1 ITJ
148 (Bom) Commr of Income-tax
Bombay City II v London Hotel 4
(1965) 58 ITR 622 = 1965-2 Mad LJ
272, P Appavu Pillai v Commr.
of Income-tax, Madras 4

P N Awasthy with B. S. Gupta, for
Petitioner H L Soni with Gurpreem Singh
Dhillon for Respondent

MAHAJAN, J :— The Commissioner of Income-tax, Punjab, Jammu & Kashmir & Himachal Pradesh at Patiala, has moved this Court under Section 66 (2) of the Indian Income-tax Act, 1922, asking us to issue a Mandamus to the Tribunal concerned to refer the following two questions of law for our opinion:—

"(i) Whether on the facts and in the circumstances of the case, the Tribunal was legally justified in entertaining the so-called Memorandum Book which was never admitted or produced in the assessment proceedings?

(ii) If the answer to the first question is in the affirmative, whether on the facts and in the circumstances of the case, the requirement of the first proviso to Section 10 (2) (vii) of the Indian Income-tax Act, 1922, was satisfied by the entries in the Memorandum Book?"

2. The assessee, an individual, carried on contract business for the supply of ballast. He employed his own trucks for the purpose of the contract business. No accounts of his business were produced by him. His income from such business was assessed by applying a rate on the receipts and depreciation on the trucks. In the assessment year 1960-61, the assessee claimed a loss of Rs 50,679/- under Section 10 (2) (vii) of the Act. This loss was allowed by the Income-tax Officer by his order dated the 12th of July, 1961. The assessee appealed against the order of the Income-tax Officer on certain other matters. During the course of the hearing, the Appellate Assistant Commissioner noticed that loss of Rs. 50,679/- arising in the sale of trucks had been wrongly allowed. He took the view that the assessee had not maintained account-books and so the condition for allowing the loss under the first proviso to Section 10 (2) (vii) of the Act was not satisfied; inasmuch

as the amount should have been actually written off in the books of the assessee. Accordingly, a notice was issued to the assessee to show cause why his income should not be enhanced by the amount of Rs. 50,679/-. After hearing the assessee, the Appellate Assistant Commissioner enhanced the amount of income by the figure of the loss claimed, by his order dated the 15th of March, 1963. The assessee then appealed to the Tribunal; and the Tribunal reversed the decision of the Appellate Assistant Commissioner and agreed with the Income-tax Officer in allowing the amount of Rs. 50,679/- as loss.

3. The contention before the Tribunal by the Revenue was that the Memorandum Book produced by the assessee was not a book within the meaning of Section 10 (2) (vii). This contention was negated by the Tribunal. The Revenue then moved the Tribunal for reference of the questions already referred to above. This application was rejected by the Tribunal by its order dated the 4th of December, 1964, with the observations that, "on the facts of this case, it could not be stated that the Tribunal was not legally justified in entertaining the said note-book and using it as a piece of evidence in deciding the case." It is in these circumstances that the present petition has been preferred.

4. It may be said at the outset that a question of law does arise. But in view of the clear pronouncements of the Madras and Bombay High Courts in *P. Appavu Pillai v. Commr. of Income-tax, Madras*, (1965) 58 ITR 622 (Mad) and *Commr. of Income-tax, Bombay City II. v. London Hotel*, (1968) 68 ITR 62 (Bom), we decline the prayer for Mandamus. Normally speaking, if a matter is settled by a High Court in this country, that should be enough for the purposes of the Revenue, unless this Court comes to a conclusion that that decision is patently erroneous. This avoids multiplicity of decisions on the same question and is really a commendable course. We do not see anything wrong with the view adopted by the Madras High Court. The Revenue has so far taken no steps to assail its correctness by taking the matter to the Supreme Court. That view appeals to commonsense and reason. This is what the learned Judges said while dealing with Section 10 (2) (vii) of the Act:—

"* * * * The expression 'books of the assessee' in the context in which it appears in Section 10 (2) (vii) cannot give any indication of the particular type of accounts which the assessee should maintain. That the accounts maintained by the assessee are defective, in the sense that they do not lead to a correct assessment of the income, profits and gains of the business, has nothing whatever to do with the allowance that can be granted under Section 10 (2) (vii). * * *"

In the present case, the Memorandum Register was produced which showed the relevant entry regarding the purchase and sale of vehicles wherein the loss had been calculated and written off within the meaning of Section 10 (2) (vii). The decision of the Madras High Court is fully applicable to the facts of the present case.

5. In this view of the matter, we see no reason to grant the application for mandamus. The application is dismissed but there will be no order as to costs.

SANDHAWALIA, J.:— 6. I agree.
Petition dismissed.

AIR 1970 PUNJAB & HARYANA 559
(V 57 C 95)

D. K. MAHAJAN AND
S. S. SANDHAWALIA, JJ.

Des Raj and others, Appellants v. Vinod Kumar Lal Chand, Respondent.

Ex. Second Appeal No 498 of 1967, D/-11-2-1970, from judgment of Harbans Singh Actg., C. J., D/-17-7-1969.

Civil P. C. (1908), S. 11 — Res judicata — Principles of — Scope — Suit for pre-emption decreed with direction to deposit balance of pre-emption money by particular date — Delay of two days in depositing money due to treasury being closed — No objection taken by vendee to the framing of decree in trial Court or in lower appellate Court or even in second appeal — Objection to late deposit is deemed to have been waived and objection to framing of decree contrary to the directions in the judgment is res judicata. (Para 4)

N. L. Dhingra and M. S. Dhillon, for Appellants; K. L. Sachdeva, for Respondent.

MAHAJAN, J.:— This execution second appeal has been placed before us in view of the order of Harbans Singh, Acting, C. J., dated the 17th July, 1969. The matters which the learned Judge wanted to be settled by a larger Bench, in our opinion, do not arise as will presently appear from the narration of facts. As the whole case has been placed before us, we have dealt with it and disposed of the same.

2. The land in dispute was sold by Smt. Rallu Devi, the grandmother of the present respondent. This sale was pre-empted by Vinod Kumar who was the grandson of the vendor. His suit was decreed by the trial Court on the 31st of August, 1962, with regard to two-third of the land on payment of Rs. 19,333-33. A direction was given in the decree that the balance of the pre-emption money had to be deposited by the 10th of November, 1962. The money could not be deposited by the 10th of November, 1962, because the Treasury was closed and, in fact, the

EN/EN/C114/70/YPB/C

deposit was made on the next working day, that is, the 12th of November, 1962. Against the decree, that was prepared, two appeals were preferred: one by the plaintiff-pre-emptor and the other by the defendant-vendee. The vendee's claim in appeal before the learned District Judge was that the pre-emption should have been allowed on payment of Rs. 29,000 and not on Rs. 19,333-33, as was done by the trial Court. On the other hand, the pre-emptor's claim in appeal was that he was entitled to pre-empt one-third of the land.

The learned District Judge allowed the pre-emptor's appeal and dismissed the vendee's appeal, with the result that a decree in favour of the pre-emptor was passed on payment of Rs. 29,000. The pre-emptor was given time to make good the balance to make up the amount of Rs. 29,000 by the 6th of August, 1963. This was done within time. Against the decision of the learned District Judge, the vendee appealed. He contested the decision of the lower appellate Court on the ground, that possession by pre-emption could only be allowed to the extent of two-third of the land sold. This plea prevailed with this Court, with the result that the trial Court's decree was restored.

3. When the pre-emptor proceeded to execute the decree, an objection was raised before the executing Court that as the pre-emption money, namely, Rs. 19,333-33 had not been deposited on the 10th of November, 1962, the pre-emption suit should be deemed to have been dismissed; and, therefore, no decree could be passed and there was nothing to execute. This objection was rejected by the executing Court and so also by the appellate Court. Both the Courts proceeded on the view that the pre-emption money was in deposit in the Court before the 6th of August, 1963, and as the trial Court's decree had merged with the decree of the District Judge the deposit was within time. The vendee is dissatisfied with this decision and has come up in appeal to this Court.

4. It is not necessary to deal with the matters raised in the order of Harbans Singh, Acting C. J., which led the learned

Judge to refer the matter to a Division Bench. In our opinion, the appeal stands concluded on a narrow ground which escaped notice. The ground, on which we have proceeded to dismiss the appeal, is purely one of law; and in order to appreciate our decision, the following facts have to be kept in view. Under the trial Court's decree, the balance of the pre-emption money had to be deposited by the 10th of November, 1962. It was not deposited on that date, but was deposited on the 12th of November, 1962. The reason for this delay was that the Treasury was closed on the 10th as well as on the 11th of November, 1962. In any event, if the deposit made on the 12th of November, 1962, was not a good deposit, the suit should have been dismissed and not decreed. However, a decree was framed and two appeals against that decree were preferred — one by the pre-emptor and the other by the vendee. No objection was taken to the framing of the decree by the vendee in the trial Court or in the lower appellate Court. Both the parties proceeded on the assumption that the decree had been validly framed. The vendee could have non-suited the plaintiff-pre-emptor on this ground. This ground was available to him in appeal. Therefore, two results follow:—

- (1) that the objection to late deposit has been waived; and
- (2) that the objection to the framing of the decree contrary to the directions in the judgment has become *res judicata*.

The matter does not rest here. Even in second appeal, no objection to the decree on this ground was taken. In this situation, it is idle to suggest that the decree, which has now become final *inter partes*, is, in any manner, defective. The defect, if any, in the decree has been cured by the application of the rules of *res judicata* and *waiver*.

5. For the reasons recorded above, this appeal fails and is dismissed, but there will be no order as to costs in this Court only.

SANDHAWALIA, J.:— 6. I agree.
Appeal dismissed.

in the progress of the suit. The Court, in which the suit is pending, is therefore duty bound to revive the proceedings either suo motu or at the instance of the plaintiff who has filed the suit.

(Para 12)

Cases Referred: Chronological Paras
(1964) 1964 Raj LW 442 = ILR (1964)

14 Raj 1088, Karansee v. Basti Chand 2, 5
N. M. Kasliwal, for Petitioner; Lekhraj Mehta and S. K. Mal, for Opposite Parties in Civil Revn. No. 353/1966; Hastimal Parakh, for Petitioner in Civil Revn. No. 382 of 1966.

BHANDARI, C. J.—These three references have been made by Jagat Narayan, J., in revision petitions filed in this Court and a common question of law regarding interpretation of Sections 5 and 6 of the Rajasthan Relief of Agricultural Indebtedness Act, 1957 (Act No. 28 of 1957) (hereinafter called the Act) has been raised in them. These sections run as follows:—

“5. Abatement or stay of suit or insolvency petition.—(1) Whenever a suit or an insolvency petition against a debtor shall have been brought or made and pending in a competent Court and such debtor or the person who brought or made such suit or petition applies to such Court in this behalf, the Court shall—

(i) abate such suit or petition if it is satisfied on affidavit or otherwise that an application to the Debt Relief Court under Section 6 or Section 6A has been made and admitted and is pending, or

(ii) stay proceedings in such suit or application if it is satisfied as aforesaid that the defendant or the opposite party, as the case may be, is a debtor within the meaning of this Act:

Provided that, in the case of an application for stay under clause (ii), the Court shall fix a period, not exceeding ninety days, within which the application to the Debt Relief Court shall be made.

(2) If any such suit or petition as is referred to in sub-section (1) shall have been pending—

(i) against a member of a Scheduled Caste or a Scheduled Tribe, at the date of the applicability of this Act to such castes or tribes appointed under Section 2-A, and

(ii) in other cases at the date of the commencement of this Act, an application for stay of proceeding under sub-section (1) may be made within six months of the date of such applicability or such commencement, as the case may be.

6. Application to Debt Relief Court:—

(1) Any debtor, who is liable for debts individually or jointly with another person, may file an application before the Debt Relief Court having jurisdiction in the area in which he ordinarily resides or earns his livelihood praying for the determination of his debts.

(2) Such an application, praying for the determination of the debts outstanding against a debtor, may also be filed by his creditor or his surety, whether such debtor is liable for such debts individually or jointly with another person.

(3) Every application under sub-section (1) or sub-section (2) shall be signed and verified in accordance with Order VI, Rule 15, of the First Schedule to the Code of Civil Procedure, 1908 (Central Act V of 1908) and shall contain the following particulars, namely:—

(a) a statement that the debtor is an agriculturist or a member of a Scheduled Caste or a Scheduled Tribe,

(b) the place where he normally resides,

(c) a statement of all debts outstanding against him, including those referred to in Section 4, as nearly as may be ascertainable and the names and addresses of his creditors,

(d) a statement of all his property, including claims due to him, together with a specification of the value of his property, and the place or places at which any such property is to be found, and

(e) such other particulars as may be prescribed.

(4) In cases covered by Clause (ii) of sub-section (1) of Section 5 an application under sub-section (1) or sub-section (2) of this Section, as the case may be, shall be filed within the period fixed under the proviso to sub-section (1) of Section 5.

(5) All applications pending before Debt Relief Court at the commencement of the Rajasthan Relief of Agricultural Indebtedness (Amendment) Ordinance, 1961 (Ordinance No. 7 of 1961), shall continue and be deemed to have been presented under this section.

(6) The suit or insolvency petition in which proceedings may have been stayed under Clause (ii) of sub-section (1) of Section 5 shall abate—

(i) if no such application as is referred to in sub-section (4) is filed, or

(ii) if such an application is admitted and notice of such admission has been received by the court concerned.

(7) If such an application is rejected the debtor shall not be entitled to file another application in any Debt Relief Court and any proceedings stayed under sub-section (1) of Section 5 shall be resumed.”

2. In Civil Revision No. 209/66 Pyarelal had filed a suit against Smt. Rani Raman Kumari for the recovery of Rs. 1086.76 in the court of Munsif East, Jaipur City. The defendant filed an application in that suit contending that she was an agriculturist and was a debtor within the meaning of Section 2 (cc) of the Act and that she would file an application under Section 6 of the Act in the competent Debt Relief Court and that till then the suit be stayed. The court accepted that she was a debtor and stayed

the proceedings in the suit. Shrimati Rani Raman Kumari then filed an application under Section 6 (1) of the Act before the Munsif Dausa praying for determination of her debts. On 2nd August, 1964 counsel for the plaintiff admitted in the court of Munsif, East Jaipur City that the defendant had filed an application under Section 6 (1) of the Act and on this admission the court passed the order that in view of the admission, the suit be stayed and added that the suit be struck off from its number and be consigned to the record room. There is no express order of the abatement of the suit. On 23rd December, 1964 the Debt Relief Court decided that Rani Raman Kumari was not a debtor within the meaning of the Act and her application under Section 6 (1) of the Act was not maintainable. Thereupon on 24th March, 1965 the plaintiff filed an application in the court of Munsif, East Jaipur City, that the suit filed by him be restored to its original number and that further proceedings be taken thereon. The learned Munsif by his order dated 5th May, 1965 relying on the authority of this Court in *Karansee v. Bastichand*, 1964 Raj LW 442 dismissed the application on the ground that the suit could not be restored as it had abated. The plaintiff filed a revision application in this Court which came for hearing before Jagat Narayan J. The learned Judge has taken the view that *Karansee's* case 1964 Raj LW 442 required to be reconsidered. He formulated the following question and referred the case to a larger bench:—

“Whether the Civil Court can revive proceedings abated under Sections 5 and 6 of the Rajasthan Relief of Agricultural Indebtedness Act, 1957.”

3. The facts in Civil Revision No. 382/66 are similar except that the court in which the suit was filed had passed an express order of abatement of the suit.

4. Similar question arose in an execution case out of which Civil Revision No. 353/66 has arisen.

5. The answer to the question referred to us depends on the meaning to be given to the word “abate” in Section 5 (1) (i) and Section 6 (6) of the Act. In 1961 Raj LW 412, Jagat Narayan, J. has taken the view that the dictionary meaning of “abate” was “to put an end to” and that in this sense this expression was used in Order 22 of the Code of Civil Procedure. He pointed out that the expression “abate” was used in a sense different from stay and that it did not mean merely a stay for an indefinite period as contended by the creditor in that case. He further pointed out that before the amendment of the Act by the amending Act “The Rajasthan Relief of Agricultural Indebtedness (Amendment) Act, 1960 (Rajasthan Act No. 33 of 1960)”, there was a provision only for the stay of proceedings but the legislature deliberately put the provision for abate-

ment of the suit by the amending Act. For all these reasons he held that when a suit or execution application has abated by virtue of Sections 5 and 6 of the Act, it could not be revived and that the remedy of the creditor or decree-holder was to file new suit or new execution application as the case may be.

6. Let us examine the scheme of the Act when it lays down that under certain circumstances, a suit or insolvency petition shall abate. Broadly speaking, the purpose behind Sections 5 and 6 is to confer exclusive jurisdiction on Debt Relief Court of the area in which the debtor ordinarily resides or earns his livelihood to determine all his debts and to grant him appropriate relief in accordance with the provisions of the Act. For this purpose a summary remedy has been provided and it consists in making an application by the debtor for determination of his debts as provided in Section 6 (1). But by the Amending Act (Act No. 33 of 1960) this remedy may also be filed by the creditor or the surety of the debtor. Cases may arise in which a suit or insolvency petition has already been brought or made in a competent court against a debtor. Section 5 (1) (ii) provides that in such a case if the debtor or the person who brought or made such suit or insolvency application applies to that court for stay of proceedings, it may stay the proceedings in such suit or application provided it is satisfied by affidavit or otherwise that the defendant or the opposite party as the case may be is a debtor within the meaning of the Act. At the same time, it may fix a period not exceeding ninety days within which the application to the Debt Relief Court has to be made. If such an application is not made either by the debtor or by the creditor, the consequences will be that the suit or the insolvency petition in which proceedings have been stayed shall abate. It is so provided in sub-section (6) (i) of Section 6 of the Act. This appears to be a bit harsh and unjust to the creditor because it may turn out to be a case in which the creditor had opposed the application of a debtor under Sec 5 (1) for stay of proceedings on the ground that the defendant or the opposite party as the case may be was not a debtor within the meaning of the Act and yet while filing the application under Section 6 (2) he is asked to take up the position that the defendant or the opposite party is a debtor. But the reason may be that stay of proceedings have been ordered by the court in which the proceedings were pending after satisfaction that the defendant or the opposite party as the case may be is a debtor within the meaning of the Act and the creditor must take appropriate steps by filing revision application or otherwise for setting aside that finding of the court otherwise he must obey that finding and go to the Debt Relief Court which has been granted exclusive jurisdic-

tion in the matter. The other types of cases may be where there is already an application pending under Section 6 (1) or Section 6(2) and thereafter a suit or an insolvency petition has been brought against the debtor. Section 5 (1) (i) says that in such a case, the debtor or the person who brought or made such suit or petition may apply for abatement of such suit or application. Section 5 (1) (i) lays down that abatement of suit or insolvency application be ordered when the court in which it is pending is satisfied that an application to the Debt Relief Court has been made, and admitted and is pending.

7. Unfortunately in the Act there is no provision what procedure is to be followed for admission of an application under S. 6. We are inclined to take the view that an application under Section 6 cannot be declared to be admitted unless the court is satisfied that the application is either made by a person who is a debtor within the meaning of the Act or by his creditor or his surety and such application has been brought in a competent Court. It appeared to us more in consonance with the scheme of the Act as well as with justice and equity that such preliminary matters must be decided before an application is declared to be admitted. But the Act appears not to have been artistically drafted. The heading of Section 7 says that there is some sort of preliminary procedure to be followed in such cases, but the section opens by saying that the preliminary proceeding is to be followed upon the admission of an application under Section 6 or Section 6A and that procedure is that all the creditors of the applicant are to be joined as parties to the proceedings and the Debt Relief Court is to pass an order fixing the date of hearing. There is no indication in the Act that the objection whether the Court is competent to decide the matter or whether the person whose debts are to be determined is or is not a debtor within the meaning of the Act is to be decided first. In some other Acts of other States of similar nature there is such provision. For example, we may refer to Section 17 of the Bombay Agricultural Debt Relief Act. We should have remedied this defect by laying down that such preliminary matters must be decided after giving notice to all creditors of that person and then only the application is deemed to be admitted. But the opening words of Section 7 are that even such notices are to be given after admission and thus no room is left for us to give such interpretation. We may by the way point out that in the expression "all creditors of the applicant", the use of the word "applicant" is not appropriate when the application under Section 6 has been filed not by the debtor but by the creditor or his surety. Perhaps this was not noticed while amending Section 6 by the amending Act otherwise Section 7 should also have been amended.

8. Having pointed out these defects in drafting, let us revert to Sections 5 (1) (i) and 6 (6) of the Act. Section 5 (1) (i) lays down that if the Court in which the suit or insolvency petition is pending is satisfied that an application under Section 6 or 6A has been made and admitted and is pending, it may order abatement of such suit or insolvency petition. Similarly, S. 6 (6) (ii) says that if an application under Section 6 is admitted and notice of such admission has been received by the court concerned, then the suit or insolvency proceedings which had been stayed under Clause (ii) of sub-section (1) of Section 5 shall abate. We have to determine what is the meaning of the word "abate" in these sub-sections.

9. Ordinarily, it is the duty of a court or a tribunal which has been created for deciding certain disputes between the parties to decide those disputes finally. But circumstances may arise when such final determination may not be possible. Confining ourselves to suits, we find that in the Civil Procedure Code there are provisions for dismissal and abatement in such cases. For example, it is provided in Rule 2 of Order 9 Civil Procedure Code that where on the day fixed in summons for the defendant to appear and answer, it is found that the summons has not been served properly upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges, the court may make an order that the suit be dismissed. Similarly, provision in Rule 3 of the same Order is that where neither party appears when the suit is called for hearing, the court may order that the suit be dismissed. When a suit is dismissed, ordinarily the court dismissing the suit becomes functus officio and the remedy of a party lies in an appeal for getting the order of dismissal set aside. But under Rule 4, that very court is competent to set aside the order of dismissal. The suit of the plaintiff had been dismissed because of the default committed by the plaintiff, yet he has the remedy to satisfy the court that there was sufficient cause for him for having committed such default and he may get an order of dismissal of the suit set aside. Thus even dismissed suits can be restored. The suit had been dismissed for the reason that further proceedings could not be taken thereon on account of default committed by plaintiff. But the plaintiff may come forward to satisfy the court that for sufficient cause his default should be condoned and the proceedings in the suit may be revived.

10. Let us come more closely to the point and examine in what sense the word "abate" has been used in Order XXII of the Code of Civil Procedure.

11. Order XXII, Rule 3, Civil Procedure Code provides that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or

plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Then it is provided that where within the time limited by law, no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned. Similarly, there is a provision under O XXII, R. 4 for the abatement of suit as against the deceased defendant. Under Order XXII Rule 9 the plaintiff or the person claiming to be the legal representative of a deceased plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as it thinks fit. Thus the abatement of suit under Order XXII is not of such a nature that the proceedings in that suit cannot be continued under any circumstances, or in other words, that suit may be revived if certain conditions provided in Order XXII, Rule 9, Civil Procedure Code, are satisfied. We mean to point out that the order of abatement of suit under O XXII is not of such a nature that it cannot be vacated by that very court. On the other hand, if certain conditions are satisfied, the proceedings in that suit may be continued. It is not final dismissal of the suit in the sense that there can be no continuance of the proceedings in any contingency whatsoever after abatement.

12. We find no difficulty in adopting this meaning of the expression "abate" while dealing with Sections 5 and 6 of the Act. Now what does Section 5 say? Section 5 (1) (i) says that the court shall abate the suit if it is satisfied on affidavit or otherwise that an application to the Debt Relief Court under Section 6 or Section 6A has been made and admitted and is pending. This Section gives effect to the general rule of law that if two courts of concurrent jurisdiction are seized of the matter, the legislature may prohibit the other court from taking any proceedings in the matter. When it is said in Section 5 (1) (i) that the court shall abate the suit, it means that the court will stop taking all further proceedings in the suit and may consign it to the record room. In Section 6 (6) of the Act, such abatement is to be ordered in the suit in which the proceedings may have been stayed under Clause (ii) of sub-section (1) of Section 5 if no such application as is referred to in sub-section (4) is filed, or if such application is admitted and notice of such admission has been received by the court concerned. In all the cases before us, the abatement has taken place under Sec. 6 (1) (ii). Now, it may turn out that the application filed by a person claiming himself to be a debtor within the meaning of Sec-

tion 2 (cc) of the Act may be dismissed on the objection taken by his creditors that he is not a debtor within the meaning of the Act or the court in which the application is filed is not competent to entertain the application or that the application does not comply with the provisions of Sec. 6 (3). What is to be done after such abatement? The Debt Relief Court dismissing or rejecting the application must withdraw the notice of the admission of the application which it had sent to the court concerned and even if it does not expressly withdraw such notice, it must be deemed to have done so by dismissing or rejecting the application of that person. What is the effect then on the abatement of the suit after such notice of admission has been withdrawn by the Debt Relief Court? Will the order of abatement remain in force even after the notice is withdrawn or deemed to be withdrawn? Such cannot be the consequences. In effect the Debt Relief Court informs the court in which the suit is pending that it was not right in sending the notice of admission to the court in which the suit is filed and it further informs that court of the rectification of that mistake. Even if no express information is sent, then by rejecting the application of that person who has filed the application under Section 6 (1) of the Act, the Court must be deemed to have sent such notice. Obviously the order of abatement could not have been operative had this mistake been not made by the Debt Relief Court. As soon as the court rectifies this mistake by rejecting the application, it means to convey to the court that so far as it is concerned, it places no hurdle in the progress of the suit. The court, in which the suit is pending, is therefore duty bound to revive the proceedings either suo motu or at the instance of the plaintiff who has filed the suit.

13. Our answer to the question is that the proceedings in the suit can be revived on the rejection of the application of the debtor. We need not make any pronouncement whether the order of abatement can or cannot be vacated in a case in which no such application has been filed as is referred to in sub-section (4) of Section 6 of the Act and the abatement of suit takes place by virtue of the force of sub-section (6) (i) of Section 6.

14. Our answer to the question is that civil Court can revive the proceedings abated under Section 5 (1) (i) or Section 6 (6) (ii) of the Act if the order of admission of the application under Section 6 has been set aside by the Debt Relief Court itself or by any other Court competent to set aside that order.

Order accordingly.

AIR 1970 RAJASTHAN 261 (V 57 C 61)

JAGAT NARAYAN, C. J. AND

L. N. CHHANGANI, J.

Rajasthan State Electricity Board, Jaipur and another, Appellants v. Shrikishan and another, Respondents.

Spl. Appeals Nos. 54 and 60 of 1968, D/-13-1-1970 against order of Kan Singh, J. D/-17-10-1968 reported in 1969 Lab IC 513 (Raj).

(A) Civil Services — Rajasthan Service Rules (1951), Rule 18 — Government Servant's lien on his post — Government employee provisionally transferred to State Electricity Board — Loss of service cannot be inferred simply because Government failed to mention specific permanent post on which his lien could be retained. 1969 Lab IC 513 (Raj.), Reversed.

A rule creating a very valuable right in favour of the employees cannot be availed of to lead to the serious consequences of loss of service on the basis of actual or presumed contravention of the rule by the State. 1969 Lab IC 513 (Raj.), Reversed; AIR 1967 SC 1857 and AIR 1966 Raj 1, Distinguished.

(Para 7)

(B) Civil Services — Rajasthan Service Rules (1951), Rule 141 (as in force in 1958) — Bar on transfer of Government Servant to foreign service without his consent — In absence of express or implied orders of Government transfer without consent does not result in termination of services. 1969 Lab IC 513 (Raj.), Reversed.

(Para 8)

(C) Civil Services — Rajasthan Service Rules (1951), Rule 17 (b) — Power of Government to suspend lien of servant on his substantive post — Provisional transfer of Government servant to State Electricity Board — Failure to suspend lien does not result in termination of services under the State.

(Para 12)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1857 (V 54) =

1967-3 SCR 377, Electricity Board,

Rajasthan v. Mohanlal

(1966) AIR 1966 Raj 1 (V 53) =

ILR (1965) 15 Raj 707, Mohanlal

v. State

4, 13

B. C. Chatterji, Addl. Advocate General, for State; H. P. Gupta, for Appellants; M. Mridul, for Respondents.

JUDGMENT: These are two special appeals under Section 18 of the Rajasthan High Court Ordinance, one by the State of Rajasthan and the other by the Rajasthan State Electricity Board, Jaipur (hereinafter to be referred to be the Board) against the order of a learned Single Judge of this Court dated 17th October, 1968, quashing the order Ex. 1 dated 29th June, 1967, of the Chairman of the Board, retiring the respondent Shri Shrikishan from service and further directing the respondent State Govt. and the Board not to give effect to the order qua

the petitioner Shri Shrikishan. Both these appeals shall be disposed of by this common order.

2. The relevant facts may be briefly stated as follows:—

The respondent Shri Shrikishan is a resident of Kishangarh and was born on 1-7-1910. He joined Government service in the erstwhile State of Kishangarh as a wireman in the State Power House. With the formation of Rajasthan, the respondent became the employee of the State of Rajasthan. He was a Head Line-man with effect from 1-4-1950. Sometime in the year 1957, (on 28-6-1957) the Rajasthan State Electricity Board was constituted, in pursuance of the relevant provisions of the Electricity Supplies Act, 1948 (hereinafter to be referred to as the Act). After the formation of the Board the State Government issued directions under Section 78-A of the Act vide order Ex.A dated 12th February, 1958, placing the services of the employees of the Electrical & Mechanical Department excluding the Electrical Inspectorate of the State at the disposal of the Board. This order indicated the manner of regulation of the service conditions as follows:—

(1) The services of the Govt. employees of the Electrical and Mechanical Department both permanent and temporary shall be provisionally placed at the disposal of the Rajasthan Electricity Board with effect from 1st July, 1957.

(2) The Board shall be required to permit each Government servant to exercise option either to:—

(a) accept the new grades and service conditions framed by the Board under its regulations; or

(b) Continue in the present grades and service conditions except in regard to conduct and discipline rules; or

(c) obtain relief from Government service by claiming pension or gratuity as may be admissible on abolition of posts under the Rajasthan Service Rules (Rules 215 to 226).

(3) In case of permanent Govt. servant of the Electrical and Mechanical Department opting to continue in the service of the Board subject to these existing conditions, the grant of pension is guaranteed by the Government subject to an arrangement to be made with the Board.

(4) The Government servants are to be permitted to avail themselves of leave earned under the Government after their transfer to the Board to draw the salary therefore, in accordance with an arrangement to be made with the Board."

It does not appear from the record whether the Board took any action to create new grades or service conditions but it is a common ground that there arose no occasion for the employees provisionally transferred to exercise any option provided in Clause (2) of the order Ex. A. It may be incidentally mentioned that sometime in the

year 1963 the Board prepared the draft standing orders for laying down the conditions of the service of the employees providing the age of superannuation of its employees at "55" and submitted them before the certifying officer in accordance with the Standing Orders Act, 1946. The Union of the workers opposed the certification of the standing order proposed by the Board and suggested the fixation of the age of superannuation at "60" and not "55". The Certification Officer did not certify the order about the age of superannuation and we are told that the age of superannuation was left to be determined by the past practice. On 13th June, 1967, the Government of Rajasthan issued orders bearing No F 1 (42) FD (Exp-Rules) 67-1 amending Rule 56 of the Rajasthan Service Rules (hereinafter to be referred to as the Service Rules) and substituting "55" years as the age of superannuation in place of "58" years. The said order was endorsed to the Chairman of the Board. In pursuance of that order, on 29th June, 1967, Chairman of the Board, issued the order Ex. 1 retiring the respondent Shri Shrikishan from service. Aggrieved by this order, the respondent Shri Shrikishan submitted writ petition in this Court on the following grounds:—

1. That he was not employee of the State and could not have been retired in terms of Government Notification dated 13-6-1967 by which the State Employees were retired. Consequently, the order Ex. 1 could not be issued.

2. The respondent Shri Shrikishan also referred to the absence of the certification of the standing order in relation to superannuation age and contended that in the absence of a standing order duly certified he could not have been retired by the Board.

3. The writ was opposed by the appellants. The reply of the Board was that the services of the respondent like other employees of the Power Houses were provisionally placed at the disposal of the Board and that he was only on deputation with the Board and never came to be absorbed in the service of the Board and that he could be retired on reaching the age of 55 years in terms of the Service Rules as amended in June, 1967. It was also urged that even after the transfer of the Power Houses by the State Government to the Board, the State Government continued to exercise disciplinary control over employees whose services were placed at the disposal of the Board. In the reply as also by means of a separate application the Board also contended the Court should not exercise its extraordinary jurisdiction having regard to a serious dispute on a question of fact between the parties viz. whether the petitioner was or was not an employee of the State. The State filed a separate reply more or less on the same lines.

4. The writ came up before a learned Single Judge in the first instance on 22-8-

1968. On that day the counsel for the Board submitted that he had documentary evidence to produce for showing that the respondent Shri Shrikishan continued to be a Government servant in spite of his services having been placed at the disposal of the Board in terms of order Ex. A. The Court then expressed the opinion that the decisive thing for seeing whether the respondent Shri Shrikishan continued in Government service or not will be to find out whether his lien was kept with the Government or whether any permanent post was kept for him on which his lien was suspended. He, therefore, directed the counsel for the Board to gather information about the lien of Shri Shrikishan with the Government in the first instance and directed that the question whether a further opportunity should be given to the counsel for the Board to adduce evidence in the shape of other documents for establishing the continuance of the respondent in the service at a later date.

The Board subsequently on 28-8-68 produced a copy of letter No. F.4 (95) Pow/67 dated 26th August, 1968 written by the Assistant Secretary to the Government (Power Department) and addressed to the Secretary, Rajasthan State Electricity Board Jaipur, stating "their services have not been transferred to the Board and they still hold a lien under the Government". The principal question was formulated by the learned Judge as follows:—

"Whether the petitioner (respondent here) was a State employee and he was not absorbed in the service of the Board, but continued to be on deputation with the Board so that he could be retired on the basis of the Government notification issued on 13-6-67 in terms of Rule 56 of the Rajasthan Service Rules, 1951, as they stood amended on 13-6-67?"

In answering the question, the learned Judge examined the language of the order Ex. A of 1958 in the light of the Service Rules, particularly, Rule 18 relating to the lien of Government servants and 141 relating to the deputation of Government servants to foreign employments, and recorded the following conclusions:—

(1) "Therefore, to my mind, the only choice left with a Government servant whose services were placed at the disposal of the Board, in terms of order Ex. A was either to continue in service with the Board on terms that the Board might offer or on his old terms or to go home and to ask for post retirement benefits from the Government."

(2) Emphasising that it was the duty of the Board to have given this option, to the employees concerned and its omission for 10 long years, he observed that "that does not lie in its mouth to say that the employee is not its employee. By logic of events that had overtaken what was laid down in the

order Ex. A, the parties concerned namely, the Board and the employees concerned will be taken to have established a relationship of master and servants as between themselves by conduct."

(3) Referring to letter dated 26-8-68 (Ex. C) the learned single Judge observed:—

"The letter written by one respondent to another, even if one of the respondents is the Government during the pendency of the writ petition and after the query has been made by the Court itself on 22-8-68 has evidentiary value."

(4) The learned single Judge also relied upon the stand taken by the Board in *Mohanlal v. State*, AIR 1966 Raj 1 holding that Mohanlal a similar employee was treated as an employee of the Rajasthan State Electricity Board after the Power Houses were transferred to the Board. The learned Judge further pointed out that the case went up to the Supreme Court at the instance of the Board (*Electricity Board Rajasthan v. Mohanlal*, AIR 1967 SC 1857) and the judgment of the Court was affirmed vide order 3-4-1967.

Reaching the conclusion that the respondent was no longer the employee of the State, the learned single Judge held that the order Ex. 1 could not have been issued by the Chairman of the Board. The learned single Judge consequently allowed the writ petition with costs and quashed the order Ex. 1. The State Government and the Rajasthan State Electricity Board have filed the present appeals.

5. At the outset, we think it proper to emphasise the following facts which hardly admit of any controversy:—

(1) That by Government's order dated 12th February, 1958 (Ex. A) their services were only provisionally placed at the disposal of the Board. There is no subsequent order of the Government either terminating their services or otherwise indicating that they ceased to be Government employees.

(2) That there was no exercise of any option in terms of Clause (2) of Ex. A by the respondent Shri Shrikishan and there is no order of the Board appointing or absorbing the respondent as permanent employee of the Board.

6. We consider it proper to point out at this stage that we have not been able to understand how the order Ex. A imposed a duty on the Board to have given option to the State employees whose services were provisionally placed at the disposal of the Board. There are also no materials on record whether the Board created new grades or conditions of service and whether there arose any occasion for the exercise of option in terms of Clause 2 (b) of Ex. A. We consider, there was no adequate justification for the basic assumption made by the learned single Judge in this behalf. *Prima facie*, these facts do not lead to an inference

that the respondent, like other employees, continued to be in the service of the Board. The learned Judge however, relied upon Rules 18 and 141 of the Service Rules and reached a contrary conclusion. The question before us is whether on a proper and reasonable interpretation and construction of these rules the conclusion reached by the learned single Judge is sustainable?

7. Rule 18 of the Service Rules provides that "A Government servant's lien on a post may in no circumstances be terminated, even with his consent if the result will be to leave him without a lien or a suspended lien upon a permanent post." The rule is intended to safeguard the rights of the Government servant and to impose a corresponding duty upon the Government and it cannot be reasonably interpreted to imply not only loss of lien and further a termination of the services of the State employees simply because the Government while provisionally transferring the respondent mentioned no specific permanent post on which his lien could be retained. A rule creating a very valuable right in favour of the employees cannot be permitted to be availed of to lead to the serious consequences of loss of service on the basis of actual or presumed contravention of the rule by the State.

The rule on the other hand, should and does enable a State employee to compel the Government to take appropriate steps for the retention of his lien including the creation of a supernumerary post. A contrary view contended for by the respondent and relied upon by the learned single Judge will lead to a serious invasion on the rights of the Government servants and cannot be reasonably countenanced. Having regard to the language of the rule and the materials on record, we are unable to agree with the learned single Judge that the right of the respondent in respect of his lien on Government service was extinguished and that the respondent lost his service also. In our opinion the learned single Judge was hardly justified in being influenced by reference to Rule 18 in interpreting the impugned order Ex. 1.

8. Rule 141 of the Service Rules as it stood in 1958, prohibited transfer of a Government servant to foreign service without his consent. It, however, does not state expressly or by necessary implication that a transfer by the Government in disregard to the rule is bound to have the effect of terminating the services of the Government servant. On the basis of the rule the Government servant could object to the transfer and insist upon his right to remain with the Government and the Government will be bound to allow the objection and to cancel the transfer. It may be that the Government may not have any job on which to retain the employee in consequence of abolition of post and may have no alternative

but to terminate the services of the employee after giving necessary benefits under Rr. 215 to 226 of the Rules. But it cannot be assumed in the absence of express or implied orders of the Government or proper materials that the Government by effecting transfer terminated or intended to terminate the services of its employees.

It must be emphasised that there is nothing on record to show that the respondent, in any way, objected to the transfer. On the other hand, he acquiesced in the order of transfer and consequently, there arose no question for the termination of the respondent's service. The learned Judge thought that as the Government servant had no real option to object to the transfer on account of the liability of the termination of his services as provided in Clause "C" of Ex. A, the transfer should be treated as compulsory without the consent of the respondent and other employees and that it had the effect of termination of the employment of the respondent with the Government and his consequent absorption by the Board. We find it difficult to accept this conclusion. To us, the position appears to be as follows—

In the year 1958 after the creation of the Board the Rajasthan Government was anxious about the services of the persons in the Mechanical and Electrical Department. The Government therefore, placed their services provisionally at the disposal of the Board evidently retaining them in State Service. The Government contemplated that the Board may create new grades and new conditions of service and, therefore, gave option to the employees to accept new grades and service conditions and be absorbed in the service of the Board or to continue in the service of the State on old terms. Of course, Cl. "c" of para 2 of Ex. A did provide that in case of a Government servant refusing to accept the transfer and to serve under the Board he could claim relief from the Government by claiming pension or gratuity, as may be admissible on abolition of the posts under the Rajasthan Service Rules (Rules 215 to 226). This option given to the Government servant by itself cannot imply termination of Government service.

It may be that the Government servants might not have objected to the transfer in view of the likelihood of their services being terminated under clause "c" of Ex. A. To say this, however, cannot imply that the transfer of the respondent was necessarily without his consent and that it resulted in the termination of the respondent's services in the Government and his absorption by the Board. The counsel for the respondent vehemently contended that the order Ex. A in view of Clause "c" should be interpreted to imply the impossibility of the employees to remain in service with the State and the absorption of the employees in the service of the Board that they had given simply an

option to accept new grades and conditions if and when created by the Board or to remain in service with the Board, on conditions of service as were in force under the State.

We regret, we cannot accept this interpretation. In the instant case the order clearly states for the provisional transfer of their services. It further guarantees pension. Clause 2-c meant an option to the employee to either accept the provisional transfer while continuing in State service or to accept termination of service on the basis of abolition of post with necessary benefits. It may imply a temporary inability on the part of the State to retain the employees with jobs under it but not an inability to retain them in service or to provide work and jobs to them in future. On a proper interpretation of Ex. 1, we are of opinion that the Government servants had option to get themselves absorbed in the service of the Board by accepting new grades and service conditions, if any, created by the Board or to continue in the service of the Government on the old service conditions. Differing from the learned single Judge we reject the contention of the respondent's counsel.

9. We may mention here that Rule 141, Rajasthan Service Rules was amended in 1960 by F. D. Order No. F.7 (a) (31) F.D.A./Rules 60 dated 12-8-1960. The amended rule runs as follows:—

"141. No Government servant may be transferred to foreign service against his will provided that this rule shall not apply to the transfer of a Government servant to the services of a body incorporated or not, which is wholly or substantially owned or controlled by the Government to service paid from a Panchayat Samiti/Zila Parishad Fund constituted under the Rajasthan Panchayat Samitis and Zila Parishads Act, 1959 (Act No. 37 of 1959)."

10. The Rajasthan State Electricity Board is substantially controlled by the Government and under the amended rule, Government became empowered to transfer the services of the respondent to the State Electricity Board on deputation without his consent on 12-8-1960. This amendment regularised the deputation of the respondent even if his implied consent is not inferred.

11. Further, the impugned order provides for the reversion of the employees to the service of the State before retiring them. A supernumerary post is created for each employee on which he reverts and from which he retires.

12. Rule 17 (b) of the Rajasthan Service Rules provides that Government may suspend the lien of a Government servant on a post which he holds substantively if he is transferred to foreign service and Rule 17 (f) provides for the revival of the lien on his reversion to service under the State. The

lien of all Government servants whose services were transferred to the State Electricity Board should have been suspended under the above rule. The failure to do so cannot have the result of terminating their services under the State. Their lien was neither terminated nor suspended expressly. In these circumstances, it can only be deemed to have been suspended. For that was the correct order which should have been passed. It will thus be seen that there is no reason to treat the respondent as being otherwise than on deputation with the State Electricity Board.

13. The learned Single Judge relied upon the case of AIR 1966 Raj 1 in support of his conclusion that the respondent should be treated as an employee of the Board. It is true that Mohanlal was mentioned as an employee of the Board in the above judgment which was also upheld by the Supreme Court. In our opinion, the respondent cannot derive much help from this case. Mohanlal was an employee of the Mechanical Department and his services were provisionally placed at the disposal of the Board. In 1960 he was deputed as Assistant Engineer, Electrical, in the Public Works Department (Buildings and Roads) by order of the Government dated 27th January, 1960. Subsequently by another order of the Government dated 24th November, 1962, he was transferred back to the Board.

It appears that during the period he was on deputation in the Public Works Department there were a number of persons who were junior to him in the pre-existing Electrical and Mechanical Department and like him who were serving in the Electricity Board, had been appointed to higher posts in disregard of his seniority. He filed a writ petition to challenge the promotion of his juniors and to enforce his seniority. The writ was allowed. The facts of his provisional transfer of services to the Board and his subsequent transfer to the Public Works Department of the State and further retransfer to the Board point out that he was being treated as a State employee. There was no controversy in that case whether he should be treated as a permanent employee of the Board or of the State. In fact, the observations of his being an employee of the Board appear to have been made on admissions, there being no controversy or issue. Such observations being casual, cannot be binding while deciding the present case.

14. In the light of the foregoing discussion, we have no alternative but to come to the conclusion in disagreement with the learned single Judge, that the respondent having continued in Government service was validly retired by the Chairman of the Board in terms of Government Notification dated 18th June, 1967, and the learned Judge was not justified in quashing the order of the Chairman. In this view of the matter, it is

hardly necessary to consider the controversy in relation to the standing orders.

15. The appeals are allowed. The decision of the learned single Judge is set aside. Parties to bear their own costs.

Appeals allowed.

AIR 1970 RAJASTHAN 265 (V 57 C 62)
V. P. TYAGI, J.

Kunjbehari Lal, Petitioner v. The Regional Assistant Labour Commissioner, Jaipur and others, Respondents.

Civil Writ Petn. No. 145 of 1967, D/- 11-7-1969.

(A) Payment of Wages Act (1936), Section 15 (2) — Claims arising out of deductions from wages — Jurisdiction of Authority appointed under Section 15 is to determine the actual wages to be paid to employees and not the potential wages.

In view of the definition of wages under Section 2 (vi) of the Payment of Wages Act the Authority under that Act has the jurisdiction to decide what actually the terms of the contract between the parties were, that is to say, to determine the actual wages of the employees but it had no jurisdiction to determine the question of the potential wages which the employee ought to have got. AIR 1955 SC 412, Relied on. (Para 14)

Therefore the authority appointed under the Payment of Wages Act has no jurisdiction to decide a claim that the employer has not paid to its employees the minimum wages fixed under the Minimum Wages Act which according to claimant amounts to deduction of wages. (Para 14)

(B) Minimum Wages Act (1948), Sec. 20 — Claims — Fixation of minimum wages by notification under Section 3 — Employer failing to recognise rights of employees accrued to them by virtue of notification — Dispute can be raised before Authority appointed under Section 20 (1) only within six months from date of notification. (Para 12)

Cases Referred: Chronological Paras
(1955) AIR 1955 SC 412 (V 42) =

1955 SCR 1353, A. V. D'Costa,
Divisional Engineer, G. I. P. Rly.
v. B. C. Patel

14

D. P. Gupta, for Petitioner; S. K. Tewari,
Dy. Govt. Advocate, for Respondents.

ORDER :— Petitioner Kunjbehari Lal, a quarry-holder, has filed this petition under Articles 226 and 227 of the Constitution challenging the order passed by the Regional Assistant Labour Commissioner, Jaipur, who was working as an Authority under the Payment of Wages Act, 1936 (hereinafter called the Act) for Alwar area.

2. The facts giving rise to this litigation are as follows:

Respondent No. 2 Labour Enforcement Officer, Jaipur, who was in charge of the office of Inspector under the Act, moved an application under Section 15 of the Act before respondent No. 1, the Authority appointed under the Act, that the petitioner illegally deducted Rs. 2929 54 Paise from the wages of the employees employed by him at his quarries. This claim was raised by the Labour Enforcement Officer for a period from May, 1965 to September, 1965. The ground on the basis of which this claim was made by the said officer was that the State Government had fixed the wages under the Minimum Wages Act but the contractor, namely, the petitioner did not pay to the labourers who worked at his quarry at the rates so fixed under the Minimum Wages Act by the Government of Rajasthan. The petitioner raised certain preliminary objections before respondent No. 1. One of the objections was that the respondent No. 1 had no jurisdiction to entertain a dispute under the provisions of the Act which ought to have been raised under Section 20 of the Minimum Wages Act. The other preliminary objections, which have not been pressed before me, need not be mentioned here. Respondent No. 1, after hearing the arguments of both the parties, decided this objection of the petitioner against him and held that he had jurisdiction to entertain such a claim under the provisions of the Act. It is against this order dated 27th December, 1966 that the present writ application has been filed with a prayer that the order passed by respondent No. 1 may be quashed as the respondent had no jurisdiction to entertain any claim of respondent No. 2 under the provisions of the Act.

3. The only question that has been urged before me is that the labour working at the quarry of the petitioner was of casual nature that was employed for the purpose of crushing or breaking those pieces of stones which were not used for building purposes. According to the petitioner, mostly females were engaged by him who used to work only for two hours in a day and that too at their sweet will when they could make themselves free after finishing their household work and therefore they were paid piece-rate wages. It is also averred by the petitioner that this work was done merely as an incidental work to the main mining operation and therefore those employees who were crushing or breaking the stones were not in the regular employment of the petitioner and were not working daily at the quarry. It is also averred that the Government of the State of Rajasthan by a notification dated 24th of February, 1965 had fixed minimum wages at Rs. 60/- per month or Rs. 2-31 np. per day for those employees who were engaged on daily wage system but no minimum piece rate wage was fixed by the Government under the Minimum Wages Act.

The employees engaged by the petitioner did not claim the minimum wages as fixed by the Government of Rajasthan and did not move any authority under Section 20 of the Minimum Wages Act. It was the respondent No. 2, the Labour Enforcement Officer, Jaipur, who was working as an Inspector under the Payment of Wages Act and who raised this claim after the expiry of six months from the date of the notification issued by the Government of Rajasthan under the Minimum Wages Act fixing the minimum wages of the labourers. According to the petitioner, this claim was made before respondent No. 1 by respondent No. 2 on 10th of March, 1965 which date falls outside the period of limitation fixed under Section 20 of the Minimum Wages Act for making any claim to get the minimum wages. In this manner, it is contended that the respondent No. 2 wanted to by pass the provisions of Section 20 of the Minimum Wages Act under which he could not put up his claim as being time-barred and now wants to get things which he could not have otherwise got under the Minimum Wages Act.

4. A reply has been filed on behalf of respondent No. 2 wherein it has been admitted by him that the employees of the petitioner on whose behalf the claim had been put up by the replying respondent were piece-rated workers and these so-called casual workers were paid the wages according to the work done by them on piece-rate basis. It was, however, submitted that payment of wages less than the wages fixed under the Minimum Wages Act falls within the category of deduction under the Act and, therefore, respondent No. 2 was entitled to put up a claim for the amount mentioned in his application filed before respondent No. 1.

5. From the pleadings of the parties, it is clear that the employees of the petitioner for whom this dispute has been raised were of casual nature and that they were paid wages according to the work done by them on piece-rate basis. It is also not disputed that the Government did not fix any minimum wages for such workers, but Section 17 of the Minimum Wages Act provides that where an employee is employed on piece work for which minimum time rate and not a minimum piece-rate has been fixed under this Act, the employer shall pay to such employee wages at not less than the minimum time rate. This provision shows that an employee working on the basis of piece-rate wages could claim minimum rate of wages for time worker which in the language of the Minimum Wages Act is known as a minimum time rate.

6. The real question that has been raised for the determination of this Court in this petition is whether by making an application under Section 15 (2) of the Act the respondent No. 2 could ask an Authority appointed under the Act to declare that the employees were entitled to get their wages

at the rate of the minimum wages fixed by the Government of Rajasthan under S. 3 of the Minimum Wages Act. Section 15 (2) of the Act provides:

"Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered Trade Union authorised in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-section (1), may apply to such authority for a direction under sub-section (3):"

7. The case of the respondent No. 2 before the Authority under the Act was that the petitioner had deducted from the wages of the employed persons because, according to him, the petitioner did not pay to his employees in accordance with the minimum wages fixed under the Minimum Wages Act. It is not disputed that whatever amount was paid to the employees as wages for the period in question it was not in accordance with the rate fixed between the employer and the employees. Even before me this dispute has not been raised that the payment was not made in accordance with the agreed wages between the labour and the employer. The grievance of the respondent No. 2 is that after the minimum wages were fixed by the State Government, it was the duty of the petitioner to have paid his employees in accordance with the provisions of the notification issued by the State Government under the Minimum Wages Act fixing the minimum wages for the workers at the quarry.

8. In this connection, reference may be made to certain provisions of the Minimum Wages Act of 1948. Under Section 3 of this Act, the appropriate Government, which is the State Government of Rajasthan in this case, has been authorised to fix the minimum wages for the employees employed in an employment specified in Parts I and II of the Schedule of that Act. A procedure has also been provided therein for the appropriate Government to arrive at the minimum wages to be fixed thereunder.

9. Section 20 of this Act provides:

"(1) The appropriate Government may, by notification in the Official Gazette appoint any Commissioner for Workmen's Compensation or any officer of the Central Government exercising functions as a Labour Commissioner for any region, or any officer of the State Government not below the rank of Labour Commissioner or any other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days

under clause (b) or clause (c) of sub-section (1) of Section 13 or of wages at the over-time rate under Section 14, to employees employed or paid in that area."

10. Sub-section (2) provides that:

"Where an employee has any claim of the nature referred to in sub-section (1), the employee himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector, or any person acting with the permission of the Authority appointed under sub-section (1), may apply to such Authority for a direction under sub-section (3)."

11. A proviso has been added to this sub-section which reads as follows:—

"Provided that every such application shall be presented within six months from the date on which the minimum wages or other amount became payable."

12. From these provisions, I find that under the scheme of the Minimum Wages Act, minimum wages are fixed in accordance with the procedure laid down in the Act by the appropriate Government for the employees employed in an employment specified in Part I or Part II of the Schedule to that Act and that if an employer makes a payment of the wages which are less than the minimum rates of wages fixed under the Minimum Wages Act, then the claims that may arise therefrom may be put up by the persons mentioned in sub-section (2) of Section 20 of that Act before the authority created under sub-section (1) of Section 20. The Legislature has also provided a time limit for raising a claim under the provisions of the Minimum Wages Act and it is six months from the date on which the minimum wages or other amount became payable. It is not disputed that the State Government in this case had fixed the minimum wages for the stone-breakers and stone-crushers by issuing a notification on 4th March, 1965 and according to that notification, a worker on the quarry, who was engaged for stone-breaking or stone-crushing could claim Rs. 60/- per month or Rs. 2.31 nP. for a day as minimum wage under the minimum wages fixed by the Government.

Mr. Gupta argued that according to this notification the wages of the employees of the petitioner calculated at the rates fixed under the Minimum Wages Act became payable to them from the date the said notification was issued by the Government and if the employer (petitioner) failed to recognise the rights of the employees which accrued to them by virtue of the said notification then according to the proviso a dispute in that respect could be raised before an authority appointed under Section 20 (1) of the Minimum Wages Act only within six months from the date of the said notification. His grievance is that the Inspector did not care to file any claim under the Minimum Wages Act before the Authority constituted under

Section 20 of that Act, and now by making a claim under Section 15 of the Act the Inspector wants indirectly to raise the dispute on behalf of the employees of the petitioner under the Minimum Wages Act for which the time prescribed under proviso to Section 20 of the said Act had already expired. I find force in this argument of Mr. Gupta and the real question that virtually arises in these circumstances is whether such a dispute that wages should have been paid by the petitioner to his employees at the rate the Government had fixed the minimum wages under the Minimum Wages Act could be raised before an Authority constituted under the Act.

13. The decision of this dispute depends upon whether non-payment of the minimum wages fixed by the State Government under the Minimum Wages Act would be covered under the term "deduction" under Section 7 of the Act? This brings me to the consideration of the definition of the term "wages" as given in the Act. Section 2 (vi) of the Act describes 'wages' as follows:

"'wages' means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes —"

14. From this definition of the term "wages" the Authority under the Act could see only as to what was the remuneration under the terms of the contract of employment payable to a person employed in respect of his employment or of work done in such employment. This definition suggests that the Authority under the Act has the jurisdiction to decide what actually the terms of the contract between the parties were, that is to say, to determine the actual wages of the employees but it had no jurisdiction to determine the question of the potential wages which the employee ought to have got. In my opinion, the claim raised by the Inspector in this particular case falls in the latter category. By making such a claim before an Authority under the Act the Inspector virtually wants the Authority first to adjudicate that the employees were entitled to get the minimum wages and then to pass an order for the payment of such potential wages which, in my opinion, does not fall within the ambit of the jurisdiction of respondent No. 1. I am fortified in my view by the judgment of the Supreme Court in *A. V. D'Costa, Divisional Engineer, G. I. P. Rly. v. B. C. Patel*, AIR 1955 SC 412, wherein the majority held that the jurisdiction of the Authority under the Act is to determine the actual wages to be paid and not the potential wages.

By adopting this method, the Inspector wants that the Authority created under the

provisions of the Act should first assume jurisdiction as an Authority created under the Minimum Wages Act and then pass an order that the payment should have been made in accordance with the minimum rates fixed by the State Government under the Minimum Wages Act. In my opinion, this course is not open to the respondent. The respondent No. 1, therefore, had no jurisdiction to decide this question while dealing with the claim of the respondent No. 2 whether the employees in this case were entitled to get their wages at the rate fixed by the Government under the Minimum Wages Act as it obviously falls within the jurisdiction of the Authority created under Sec. 20 of the Minimum Wages Act. Since this question was never raised by the employees of the petitioner before a competent authority under the provisions of the Minimum Wages Act, the respondent No. 2 cannot now be permitted to raise that issue indirectly before respondent No. 1. Unless this fact was determined by a competent authority that the minimum wages fixed by the Government governed the wages of the employees of the petitioner also, the question of deduction from the wages of the employees does not arise simply because the payment was not made by the employer to the employees at the rate of the potential wages they were entitled to receive under the provisions of the Minimum Wages Act. In this view of the matter, the claim put by the respondent No. 2 before respondent No. 1 on behalf of the labour employed by the petitioner could not be entertained by respondent No. 1.

15. The order impugned passed by respondent No. 1 cannot, therefore, be sustained and it is hereby quashed. No order as to costs.

Petition allowed.

AIR 1970 RAJASTHAN 268 (V 57 C 63)

JAGAT NARAYAN, C. J. AND

R. D. GATTANI, J.

Bhawani Shanker and others, Appellants
v. State of Rajasthan, Respondent.

Civil Regular First Appeal No. 142 of
1960, D/- 3-3-1970 against decree of Sr.
Civil J., Udaipur, D/- 29-7-1960.

Limitation Act (1908), Articles 56 and 115
— Contract for completed work — Work
completed on 23-4-1955 — Plaintiff protesting
against final bill but department not altering it — Payment under final bill accepted
on 10-2-1956 — Suit for recovery of
money filed on 13-4-1959, after serving notice
under Section 80, C. P. C., held was barred
by limitation — Article applicable held was
56 and not 115 — Even assuming Article 115
to be applicable, time began to run from
10-2-1956, when plaintiff signed the final

HN/HN/D697/70/LGC/M

bill, and the suit was barred by limitation by 3 days after allowing two months' time for notice under Section 80, C. P. C. AIR 1922 Lah 198 (FB) & AIR 1934 Lah 475, Distinguished; AIR 1963 Cal 277, Rel. on.

(Para 8)

Cases Referred: Chronological Paras
(1963) AIR 1963 Cal 277 (V 50) =

M. L. Dalmia and Co. v. Union of India

(1934) AIR 1934 Lah 475 (V 21) =
35 Pun LR 529, Sita Ram v. Mt. Mahmudi Begum

(1922) AIR 1922 Lah 198 (V 9) =
ILR 2 Lah 376 (FB), Mohd. Ghasita v. Siraj-ud-din

R. C. Maheshwari, for Appellants; R. A. Gupta, for State of Rajasthan.

JAGAT NARAYAN, C. J.:— This is an appeal by the plaintiff against a decree of the Senior Civil Judge, Udaipur, dismissing his suit for recovery of money.

2. The plaintiff was a contractor whose tender for the construction of buildings for the Collectorate and other offices at Bhilwara was accepted on behalf of the State. The work was completed on 28-4-1955. It appears that there was some dispute between the contractor and the Executive Engineer incharge of the work as to the payment to which the former was entitled. On 27-12-1955 the plaintiff wrote a letter (Ex. 3) to the Executive Engineer which runs as follows:—

"I regret I cannot sign the bill in full and final settlement of all my dues, for which I have already claimed.

I request you to please pay me the dues as billed by you as an advance in Hand Receipt on running bill.

This may kindly be done early so that I may not waste my time here."

3. The final bill (Ex. A-2) was prepared and payment was made on it on 10-2-1956. The receipt given by the contractor on this final bill runs as follows:—

"Received Rs. 42261/15/6 and deposited Rs. 279/8/6 of stones dues and Rs. 3169/- as security deposit and balance of Rupees 38813/7/- received by cheque.

Sd/- Inder Sahay
11-2-1956
Contractor."

4. It appears that some correspondence took place between the contractor and the P. W. D. authorities after the contractor had accepted final payment. Only two letters have been filed by the plaintiff in this connection. One is from the Chief Engineer dated 14-5-1957. It refers to two applications dated 20-3-1956 and 23-4-1957 sent by the contractor to the Chief Engineer. The Chief Engineer asked the contractor to con-

tact the Superintending Engineer, Udaipur, directly in the matter. This letter is at page 63 of the Paper Book. The other letter is (Ex. 7) dated 31-10-1958 from the Superintending Engineer to the contractor. It was sent in reply to his letter dated 1-10-1958 and runs as follows:—

"Since you have accepted the final bill without any objection, no claims can be entertained at this stage."

5. The present suit was filed on 13-4-1959 after serving a notice under Section 80 of the Code of Civil Procedure. The trial Court held that Article 56 of the Old Limitation Act was applicable and the suit was barred by limitation by three days. It is contended on behalf of the plaintiff-appellant that this finding is erroneous.

6. The plaintiff relies on the copy of a letter (Ex. 1) bearing the date 10-2-1956 to show that he accepted the final payment under protest. The State denied having received this letter. Two witnesses were examined by the plaintiff to prove secondary evidence of this letter. One was the plaintiff himself. He admitted that the final payment was received by him on 10-2-56 (the date given under the plaintiff's signature on final bill Ex. A-2 is 11-2-56 which is obviously erroneous). and alleged that at the time of receiving the final payment, he handed over the original of letter Ex. 1 to the Executive Engineer after getting it written by Kartaram. Kartaram however stated that he was not present when the final payment was received by the plaintiff. He alleged that he wrote the original of letter Ex. 1 and gave it to the plaintiff who signed it and handed it over to the Executive Engineer in his presence. There is thus material contradiction between the statement of the plaintiff and Kartaram on the point as to when this letter was handed over to the Executive Engineer. The plaintiff admitted that no letter of protest was delivered to the Executive Engineer prior to receiving final payment. The Executive Engineer came forward and stated that no letter of protest was delivered to him having contents like that of Ex. 1 either at the time of receiving the final payment by the plaintiff or after it. We are accordingly satisfied that copy Ex. 1 is not the secondary evidence of any letter which was ever handed over to the Executive Engineer. Further we hold that although the contractor had earlier made a protest that the final bill which was being prepared was not correct, he accepted payment on the final bill without any protest.

7. The trial Court applied Article 56 of the old Limitation Act to the suit which runs as follows:—

"56. For the price of work done by the plaintiff Three years. When the work is done." for the defendant at his request, where no time has been fixed for payment.

The contention on behalf of the appellant is that Article 115 of the old Limitation Act

is applicable because the contractor not only did the work for the defendant but also sup-

plied the material. He relied on the following decisions:—

Mohd. Ghasita v. Siraj-ud-din, AIR 1922 Lah 198 (FB), Sita Ram v. Mt. Mahmudi

"115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.

We are of opinion that this Article has no application to the present case. The contract was for completed work. The facts of AIR 1922 Lah 198 (FB), AIR 1934 Lah 475 are distinguishable. In AIR 1963 Cal 277 no doubt Art 115 was applied to such a case. But at the same time it was held that the time under Art 115 ran from the date of intimation by Government of the amount which would be allowed on the final bill. Even if Article 115 is applicable, time under it began to run from 10-2-1958 when the payment was made on the final bill to the plaintiff. The plaintiff had earlier protested that the final bill prepared was not correct but

Begum, AIR 1934 Lah 475 and M. L. Dal-miya and Co. v. Union of India, AIR 1963 Cal 277.

8. Article 115 runs as follows:—

Three years. When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases."

despite this the Department did not alter it. When the plaintiff signed this final bill, he came to know of the decision of the Department and time began to run under Art. 115, assuming that Article to be applicable from 10-2-1956. The suit was barred by limitation on 13-4-1959 when it was filed after allowing for two months' time for notice under Section 80, C. P. C.

9. We, therefore, dismiss the appeal. Having regard to the circumstances of the case, we leave the parties to bear their own costs of the appeal.

Appeal dismissed.

AIR 1970 RAJASTHAN 270 (V 57 C 64)

D M BHANDARI C. J. AND

S N MODI, J.

Rana Hemant Singhji, Dholpur, Petitioner v. Commissioner of Income-tax Rajasthan, Jaipur, Respondent.

Income-tax Ref. Case No. 5 of 1966, D/- 2-12-1969

Income-tax Act (1922), Section 2 (4-A) Clause (ii) — Capital assets — Personal effects — Test — Use of article must be of personal nature — Mere placing of treasure before Goddess while performing puja does not make treasure item of personal use.

In order to constitute an article to be part of personal effects, it is necessary that the article must be associated with the person of the possessor and must, more or less have intimate relation with the possessor. It is necessary that the article must be in personal use. But any kind of use will not be sufficient to constitute a property as 'personal effects'. The use must be of personal nature though such use may be occasional. A treasure (gold sovereigns, silver coins and the bullion in the instant case) placed before Goddess Laxmi while performing Puja would not make such treasure an item of personal use. 1934 AC 348, Ref. (Para 4)

Cases Referred: Chronological Paras (1934) 1934 AC 348 = 103 LJPC 79,

K. D. Joseph v. Esther Phillips 4

A. K. Sen with Devasingh Randhawa, for Petitioner; Sumerchand Bhandari, for Respondent.

BHANDARI, C. J.: — The Income-tax Appellate Tribunal Delhi Bench 'A' (hereinafter HM/HM/D993/70/VBB/M

called the Tribunal) has made this reference to this Court under Section 66 (1) of the Indian Income-tax Act, 1922 (hereinafter called the Act). His Highness Maharaja Uday Bhan Singhji, Ruler of Dholpur died issueless on 22nd October, 1954. After his death, the movable property possessed by the deceased Maharaja Uday Bhan Singhji was sealed by the Government of India. Maharaja Rana Hemant Singhji (hereinafter called the assessee) was thereafter recognised as the successor to the deceased Maharaja and the assets which the Government of India had sealed were released and handed over to Rajmata, the guardian of the assessee. Part of the assets consisting of gold sovereigns, old silver rupee coins and silver bars were sold for Rs. 20,91,785/-. The Income-tax Officer, Bharatpur while assessing the assessee for the assessment year 1958-59 computed Rs. 3, 44,303 as capital gains on these sales taking into account the market value of the assets sold as on 1st January, 1954 as given hereunder:—

(See table of assets on page 271)

The assessee objected to the taxation of the said amount on the ground that the various articles — sovereigns, silver coins and silver bars — were held for the personal use of the assessee and the members of his family and as such they fell within clause (ii) of Section 2 (4A) of the Act. The Income-tax Officer negatived this objection raised on behalf of the assessee. The assessee filed an appeal before the Appellate Assistant Commissioner, B—Range, Jaipur, but was unsuccessful. The assessee filed an appeal to the Tribunal. The Tribunal also rejected the appeal.

	Quantity	Sale Price	Rate on	Cost on
Sovereigns ...	4825	333282	56/8	272612
Silver Coins ...	790440	1301627	136%	1074948
Silver Bars ...	254174	459876	152%	386344
(Total) ...				
		2094785		1733954
Less expenses connected with sale ...		16528		
Net sale price ...		2078257		
Capital gains ...		344303		

2. On the application of the assessee, the following question has been referred by the Tribunal to this Court:—

“Whether on the facts and in the circumstances of the case the assets sold were capital assets within the meaning of Section 2 (4A) chargeable to capital gains tax under Section 12-B of the Income-tax Act, 1922?”

3. The main point which has been urged before this Court on behalf of the assessee is that the said articles were the personal effects of the assessee and were excluded by virtue of the definition of capital assets under Sec. 2 (4A) from being included in capital assets. The relevant part of the definition of capital assets in Section 2 (4A) runs as follows:—

“(4-A) “Capital asset” means property of any kind held by an assessee, whether or not connected with his business, profession or vocation, but does not include —

- (i)
- (ii) personal effects, that is to say, moveable property (including wearing apparel, jewellery, and furniture) held for personal use by the assessee or any member of his family dependent on him;
- (iii)

It is contended that according to the custom of the family, these articles were taken out twice a year for Puja once for Mahalakshmi Puja and again on Diwali and thus they formed part of the property meant for Puja and was thus articles of personal use. In support of this, the assessee has filed an affidavit of Shri Harisingh, Chief A. D. C., of the assessee. Reference in this connection may be made to the judgment of the Appellate Assistant Commissioner of Income-tax. The Appellate Assistant Commissioner has given the finding that the silver bars were never used for Puja. The Tribunal has taken the view that the use of these articles in the manner mentioned by the assessee did not mean that these items were held by the assessee for his personal use and they did not fall within clause (ii) of Section 2 (4-A) of the Act.

4. We are of the view that the Tribunal has taken the correct view. In order to constitute an article to be part of personal effects, it is necessary that the article must be associated with the person of the possessor and must more or less have intimate relation with

the possessor. In Section 2 (4-A) (ii) personal effects have been explained as any moveable property held for the personal use by the assessee or any member of his family dependent on him. In a sense, the definition is wider inasmuch as if any article is in personal use even of any member of the family of the assessee who is dependent on him, it may constitute personal effects of the assessee, but it is necessary that the article must be in personal use. Law does not say that any kind of use will be sufficient to constitute a property as “personal effects”. The use must be of personal nature though such use may be occasional. A treasure placed before Goddess Laxmi while performing Puja would not make such treasure an item of personal use.

Learned counsel for the assessee has relied on K. D. Joseph v. Esther Phillips, 1934 AC 348 in which “personal effects” have been explained in connection with the construction of a will. It has been observed:

“The question is whether the bequest on its true construction is only of things which can properly be treated as personal effects, that is to say, physical chattels, having some personal connection with the testator such as articles of personal or domestic use or ornament, clothing, furniture and so forth which would not include money or securities for money or whether in the actual contents it extends to the choses in action represented by the pass books and the promissory notes.” But these observations do not in any way support the case of the assessee. On the other hand, they lend support to the view taken by the Tribunal.

5. If mere placing of treasure before Goddess Lakshmi when it is worshipped on Diwali or some other occasion is to constitute personal effects, then a person will escape payment of wealth-tax as Section 5 (1) (viii) lays down that wealth tax shall not be payable by an assessee on “furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee.”

6. In interpreting the provisions of the Act also, we cannot adopt the view that merely because the gold sovereigns, silver coins and the bullion were placed before Goddess Lakshmi at the time of Puja, they

become articles of personal use of the assessee.

7. It is contended by learned counsel for the assessee that if the assessee has made any collection which might give him solace or pleasure whenever he looks at the collection, such collection must be deemed to be personal to the assessee and that collection may be taken as "personal effects". It is too wide a construction of the expression "personal effects" and it is not possible for us to accept it.

8. For the aforesaid reasons, we answer the reference in the affirmative. We assess Rs. 200/- as costs to be paid by the assessee to the Department.

Answer in the affirmative.

AIR 1970 RAJASTHAN 272 (V 57 C 65)

C. M. LODHA, J.

Dr. Harumal and others, Appellants v. Smt. Sahjadi Bibi, Respondent.

Second Appeal No. 138 of 1965 and Second Appeal No. 160 of 1967, D/- 14-8-1969.

(A) Civil P. C. (1908), Section 100 — Suit for ejectment — Second appeal lies — 1960 Raj LW 676 and 1960 Raj LW 670 and 1957 Raj LW 497 and 1955 Raj LW 520, Foll. (Para 4)

(B) Transfer of Property Act (1882), Sections 106 and 109 — Date of commencement of tenancy — Date when tenant has been originally let in is decisive — Transfer of the property does not affect it — Tenancy cannot be deemed to have commenced on the date of transfer — Notice terminating tenancy with the expiry of date of transfer invalid — Section 109 supports the view.

The date of commencement of a tenancy is the date on which the tenant has been initially let into possession of the property and it does not get changed on the property being sold by the original owner. The date of transfer cannot be deemed to be the date of commencement of the tenancy. Hence a notice by the owner (transferor) terminating the tenancy must expire with the month of tenancy taking the date of letting in and not the date of transfer as the date of commencement of the tenancy. A notice terminating it with the expiry of the date of transfer is invalid and ineffective. The provision under Section 109, T. P. Act also supports this view in that the transferee possesses only those rights which were possessed earlier by the transferor and will be subject to all those liabilities to which the transfer was subject before the transfer. 1959 Raj LW 81, Foll.; (1965) 67 Punj LR 243, Ref. (Para 7)

(C) Transfer of Property Act (1882), Section 106 — Tenancy at will, what is — Section 106 does not apply to such tenancy.

Where the tenants undertake to give vacant possession of the premises whenever the landlords may desire them to do so the tenancy so created is a tenancy-at-will. In a case like that, no notice within the meaning of Section 106 of the Transfer of Property Act is at all necessary to terminate the tenancy. AIR 1964 Raj 79, Foll. (Para 9)

Therefore, in a case where there was no evidence as to what was the contract between the lessor and the lessee and the parties only pleaded as to the date of commencement of the tenancy and that the rents were being paid monthly,

Held, that the tenancy was not one at will. (Para 15)

(D) Administration of Evacuee Property Act (1950), Sections 4 (2), 9, 12, 56 (2) — Administration of Evacuee Property Rules, Rule 14 (2) and (4) — Power of Custodian to cancel allotment or to terminate lease is subject to restrictions — Powers are only administrative and for managing evacuee properties — Powers do not get transferred to purchasers of such properties — Custodian's power to eject persons without notice under Section 106, T. P. Act cannot be availed of by the purchaser — (T. P. Act (1882), Section 106). (Paras 13 and 14)

Cases Referred: Chronological Paras
(1965) 67 Pun LR 243 = ILR (1965) 1 Punj 624, Kartar Singh v. Barkat Ram 7
(1964) AIR 1964 Raj 79 (V 51) = ILR (1963) 13 Raj 990, Ramnarain v. Kishorelal 0
(1960) 1960 Raj LW 670, Balchand v. Smt. Dhan Kanwar 4
(1960) 1960 Raj LW 670 = ILR (1960) 10 Raj 1453, Anand Singh v. Chandmal 5
(1959) 1959 Raj LW 81 = ILR (1959) 9 Raj 97, Babu Ram v. Narayan Dass 7
(1957) 1957 Raj LW 497 = ILR (1957) 7 Raj 934, Shivkumar v. Ballabhdass 4
(1955) 1955 Raj LW 520, Gordhan Lal v. Nathu Lal 4
(1953) AIR 1953 Orissa 245 (V 40) = 19 Cut LT 29, Smt. Chhoti Dei v. Gangadhar Misra 0
H. C. Jain, for Appellants; K. K. D. Badgel, for Respondent.

JUDGMENT: These are two connected appeals arising out of two suits for ejectment instituted by the landlord Smt. Sahjadi Bibi against Dr. Harumal and Sugnomal (deceased) respectively. It appears that Sugnomal died during the pendency of the suit and is now represented by his heirs, Sita Devi and others. The facts and the questions of law involved in both the appeals are identical and, there-

fore, it would be convenient to decide them by a common judgment.

2. Dr. Harumal and the deceased Sugnomal were admitted as tenants by the Custodian of Evacuee Property on 28-1-48 in the second and third storeys respectively of the house in question. The rent settled with Dr. Haru Mal was Rs. 3 per month and that with Sugnomal Rs. 6/8/- per month. The plaintiff Sahjadi Bibi purchased this property from the Competent Officer, Ajmer, on 26-9-53, and, thereafter on 18-11-53 she gave notices to both the tenants to vacate the property as the same was required by her for personal use and occupation. By these notices, the tenancy was terminated from the midnight of 25th December, 1953. Since the tenants failed to quit, the respondent filed the suits against both of them for ejectment and arrears of rent in the court of the Munsif, Ajmer.

The tenants resisted the plaintiff's suit inter alia on the ground that notice of termination of tenancy was not in order as it did not expire with the end of the month of the tenancy. This objection found favour with the Munsif, Ajmer and accordingly the suits for ejectment were dismissed. The plaintiff filed appeals in the court of District Judge, Ajmer, in both the cases. The appeals were transferred in the court of Civil Judge, Ajmer, who held that the notices for ejectment were valid. Consequently the appeals were allowed and the suits for ejectment were decreed. It may be relevant here to state that all the issues in both the cases, except issue No. 5, refer to the question of property having been damaged by the tenants and issue No. 6 regarding the validity of the notices, were decided in favour of the plaintiff by the trial court and the suit for ejectment was dismissed only on the ground of bad notice. In the first appellate court only the question of validity of notice was argued and so also before me. The only point, therefore, I am called upon to decide is whether the notice given by the plaintiff landlord in each of the two cases terminating the tenancy from the midnight of 25th December, 1953, is valid.

2. Learned counsel for the appellant has submitted that the tenancy in each case commenced from 28th January, 1948 and, therefore, the notice should have expired with the end of the month of the tenancy that is on 28th. The suits were instituted on 28th December, 1953. It is urged that the plaintiff's case in the plaint was that the defendant was admitted as a tenant from 28-1-48 and consequently the tenancy should have been terminated with the end of the month of the tenancy. On the other hand learned counsel for the respondent has supported the judgment of the lower appellate court and has urged that the tenancy was at will and it was not necessary to serve a notice expiring with the end of the month of the tenancy. In the alternative it is argu-

ed that the tenancy between the plaintiff and the defendants was created only when the plaintiff purchased the property from the Competent Officer on 26-9-53 and looked at from that point of view, the notice is valid.

4. I may observe here that the learned counsel for the respondent also raised a preliminary objection that no second appeal lay in these cases, but subsequently gave it up when the learned counsel for the appellant drew his attention to the following decisions of this Court:—

(1) Anand Singh v. Chandmal, 1960 Raj LW 676;

(2) Balchand v. Smt. Dhan Kanwar, 1960 Raj L W 670;

(3) Shivkumar v. Ballabhdass, 1957 Raj LW 497; and

(4) Gordhan Lal v. Nathu Lal, 1955 Raj LW 520.

5. The only point, therefore, which I am called upon to decide is whether the notice of termination of tenancy, which is exactly the same in both the cases is valid and proper.

6. The learned Civil Judge, Ajmer, has held that the Custodian of Evacuee Property was not bound to serve a notice under Section 106 of the Transfer of Property Act in view of the provisions of Section 4 sub-section (2), Section 9 and Section 12 of the Administration of Evacuee Property Act, 1950 (which will hereinafter be called the Act). It has been held by the learned Civil Judge that the appellant was a tenant at will and his tenancy was not a monthly tenancy and consequently it was not necessary for the plaintiff who purchased the property from the Custodian Department to have complied with all the formalities of notice under Section 106 of the Transfer of Property Act. In this view of the matter the learned Civil Judge, decreed the plaintiff's suit for ejectment also.

7. I may first deal with the alternative argument advanced by the learned counsel for the respondent that the tenancy between the appellants and the respondent commenced on 26-9-53 when the plaintiff-respondent purchased the property in question from the Competent Officer and therefore the notice expiring on 26th December, 1953, was valid. In support of his argument learned counsel for the respondent has relied upon Kartar Singh v. Barkat Ram, (1965) 67 Pun LR 243. In my opinion this decision does not help the respondent at all. There was no question involved in this case as to the commencement of the tenancy. It was simply observed in that case that on the date of the purchase of the property by the respondent, the appellant became his tenant. This does not mean that the tenancy of the tenant will also be deemed to commence from the date of the purchase of the property by the respondent.

On the other hand learned counsel for the appellants has relied upon Baburam v. Narayan Dass, 1959 Raj LW 81. In Baburam's case, 1959 Raj LW 81 the plaintiff Narayan Dass purchased the property occupied by the defendant as a tenant on 4-7-50 from Mangilal Ballabhdas and thereafter gave notice dated 23-12-54 for ejectment under Sec. 106 of the Transfer of Property Act. According to the defendant tenant the tenancy between him and Mangilal Ballabhdas commenced from the first of the month according to the Gregorian Calendar. It was observed that "if the tenancy between Babulal and Mangilal Ballabhdas commenced on the first of the calendar month, a new tenancy in favour of Narayan Dass could not be created on 4-7-50 simply because the property was transferred to him on that date." It was further observed that "if Narayan Dass wanted to terminate the tenancy, he should have given a notice expiring with the end of the month of the tenancy according to the contract between Mangilal Ballabhdas on the one hand and Baburam on the other." Thus this case clearly supports the contention of the counsel for the appellants.

In this connection I may also refer to Section 109 of the Transfer of Property Act, which clearly lays down that if the lessor transfers the property leased, or any part of interest therein, the transferee, in the absence of contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred. It further lays down that the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him. It is thus quite clear from the provisions of this section that the plaintiff after the transfer of property in her favour possesses only those rights which were possessed earlier by the Custodian of Evacuee Property and was subject to all those liabilities to which the Custodian of Evacuee Property was subject before the transfer. Therefore, if the plaintiff wanted to terminate the tenancy she should have given the notice according to the contract between the Custodian of Evacuee Property on the one hand and the appellants defendants on the other. Thus there is no force in the contention of the learned counsel for the respondent that because his client purchased the property in question on 26-9-53, therefore, the appellants' tenancy must also be deemed to commence from 26-9-53. I am clearly of the opinion that the date of the commencement of the tenancy of the appellants will be considered to be that date on which the appellants were admitted as tenants by the Custodian of Evacuee Property.

There is no dispute between the parties [that the appellants were admitted as tenants

by the Custodian of Evacuee Property on 28th January, 1948. The notice given by the respondent to the appellants thus did not expire with the end of the month of tenancy as required under Section 106 of the Transfer of Property Act and consequently if Section 106 of the Transfer of Property Act applies to the present case, there is no escape from the conclusion that the notice given by the plaintiff-respondent for terminating the tenancy was bad and the suits for ejectment must fail on that account.

8. The learned Civil Judge, as already pointed above, has held that the appellants were tenants at will of the Custodian of Evacuee Property and, therefore, it was not necessary for the Custodian to give notice as required by Section 106 of the Transfer of Property Act. If this is so, then the plaintiff is also not required to give a notice strictly according to Section 106 of the Transfer of Property Act as she has only stepped into the shoes of the previous landlord, viz. the Custodian. It is, therefore, necessary to determine as to what was the nature of tenancy of the appellants qua the Custodian of Evacuee Property.

9. Learned counsel for the appellants has argued that there is nothing on the record to show that the appellants were tenants at will of the Custodian of Evacuee Property. It is urged that a tenancy at will is terminable by either party and the demand by the landlord for possession is sufficient. It was held in Ramnarain v. Kishorelal, AIR 1964 Raj 79 that where the tenants undertake to give vacant possession of the premises whenever the landlords may desire them to do so the tenancy so created is a tenancy-at-will. In a case like that, no notice within the meaning of Section 106 of the Transfer of Property Act is at all necessary to terminate the tenancy.

It would, therefore, be necessary to find out as to what was the contract between the parties in this respect, that is, whether the appellants had undertaken to give vacant possession of the premises to the Custodian of Evacuee Property whenever the latter may have desired them to do so? I may state at once that there is not an iota of evidence from either side as to what was the contract in this respect. In the notice itself in each of the two cases the defendants were not taken to be tenants-at-will. It was alleged that they were tenants from 28-1-48 and paying monthly rent. There are exactly the same allegations in the plaint also.

Learned counsel for the appellants has argued that the plaintiff's allegation is that monthly rent was paid and no case of tenancy-at-will was ever alleged by her and, therefore, Section 106 of the Transfer of Property Act comes into operation. In support of his contention learned counsel for the appellants has relied on Smt. Chhoti Dei v.

Gangadhar Misra, AIR 1953 Orissa 245. The only answer which the learned counsel for the respondent furnished was that irrespective of the question of any contract, the Custodian of Evacuee Property by virtue of the powers conferred upon him by the Administration of Evacuee Property Act, was competent to terminate the tenancy of the appellants whenever he desired to do so, and, therefore, the appellants must be deemed to be tenants-at-will. The same is more or less the reasoning of the first appellate court, which has referred to Section 4 (2), Sec. 9 and Section 12 of the Act in this connection.

10. For a proper appreciation of the argument of the learned counsel for the respondent, it would be necessary to examine the relevant provisions of the Administration of Evacuee Property Act. Section 4 reads as below:—

“4. Act to override other laws.— (1) The provisions of this Act and of the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law.

(2) For the removal of doubts, it is hereby declared that nothing in any other law controlling the rents of, or eviction from, any property shall apply, or be deemed ever to have applied, to evacuee property.”

11. Then we come to Section 9, which reads as under:—

“9. Power of Custodian to take possession of evacuee property vested in him.— If any person in possession of any evacuee property refuses or fails on demand to surrender possession thereof to the Custodian or to any person duly authorised by him in this behalf, the Custodian may use or cause to be used such force as may be necessary for taking possession of such property and may, for this purpose, after giving reasonable warning and facility to any women not appearing in public to withdraw, remove or break open any lock, bolt or any door or to do any other act necessary for the said purpose.”

12. Section 12 on which great deal of reliance has been placed by the learned counsel for the respondent prescribes the powers of the Custodian to vary or cancel leases or allotments of evacuee property. It may be reproduced here:—

“12. Power to vary or cancel leases or allotments of evacuee property.— (1) Notwithstanding anything contained in any other law for the time being in force the Custodian may cancel any allotment or terminate any lease or amend the terms of any lease or arrangement under which any evacuee property is held or occupied by a person, whether such allotment, lease or arrangement was granted or entered into before or after the commencement of this Act.

Provided that in the case of any lease granted before the 4th day of August, 1917,

the Custodian shall not exercise any of the powers conferred upon him under this sub-section unless he is satisfied that the lessee—

(a) has sublet, assigned or otherwise parted with the possession of the whole or any part of the property leased to him; or

(b) has used or is using such property for a purpose other than that for which it was leased to him; or

(c) has failed to pay rent in accordance with the terms of the lease.

Explanation.— In this sub-section ‘lease’ includes a lease granted by the Custodian and ‘agreement’ includes an agreement entered into by the Custodian.

(2) Where by reason of any action taken under sub-section (1) any person has ceased to be entitled to possession of any evacuee property, he shall on demand by the Custodian surrender possession of such property, to the Custodian or to any person duly authorised by him in this behalf.

(3) If any person fails to surrender possession of any property on demand under sub-section (2), the Custodian may notwithstanding to the contrary contained in any other law for the time being in force, eject such person and take possession of such property in the manner provided in Section 9.”

13. In view of the aforesaid provisions the learned Civil Judge has come to the conclusion that it was not necessary for the Custodian to give notice under Section 106 of the Transfer of Property Act before varying or cancelling the lease. It may, however, be stated here that even the Custodian has not been given an unrestricted power to cancel any allotment or terminate any lease at his sweet will but is required to follow the procedure prescribed in the Rules made under Section 56 (2) of the Act, which reads as under:—

“56. Power to make rules.— (2) In particular, and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters namely:—

(i) the circumstances in which leases and allotment may be cancelled or terminated or the terms of any lease or arrangement varied;”

Sub-rules (2) and (4) of Rule 14 of the Administration of Evacuee Property Rules further provide that in case of a lease or allotment granted by the Custodian himself, the Custodian may evict a person on any ground justifying eviction of a tenant under any law relating to the Control of Rents for the time being in force in the State concerned, or for any violation of the conditions of lease or allotment. But before cancelling, or varying the terms of a lease and before evicting a lessee the Custodian shall serve the person or persons concerned with a notice to show cause against the order proposed to be made and shall afford him a reasonable opportunity of being heard.

14. From the aforesaid provisions of the Act as well as the Rules made thereunder, it would be amply clear that certain statutory powers have been conferred upon the Custodian of Evacuee Property for management of the property, which also include power of terminating, cancelling or otherwise amending the terms of the tenancy. I find myself unable to accept the contention of the learned counsel for the respondent that all these powers with respect to the property in question, which the Custodian was competent to exercise stood transferred to the purchaser that is the plaintiff. These are administrative powers vested in the Custodian by virtue of his office and from the provisions referred to above, it cannot be concluded that there was a contract between the Custodian of the Evacuee Property on the one hand and the defendants-appellants on the other that the latter undertook to give vacant possession of the premises whenever the former may desire them to do so. It is noteworthy that even the Custodian is bound to serve the lessees concerned with a notice to show cause against the order of eviction proposed to be made by him and to give them an opportunity of hearing. It is idle to argue that these powers stood transferred to the plaintiff also when she purchased the property.

15. After a careful consideration of the rival contentions advanced on behalf of both the parties, I am clearly of opinion that the appellants are not tenants-at-will and, therefore, a notice of ejectment as required by Section 106 of the Transfer of Property Act was necessary. The notices in both the cases admittedly did not expire with the end of the month of the tenancy. The tenancy has been terminated from the midnight of 25th whereas it should have been from the midnight of 28th. To my mind it appears that the respondent or whosoever was his adviser laboured under a misapprehension that since she had purchased the property on 26th September, 1953, the tenancy of the appellant shall also be deemed to be commenced from that date. This position, as I have already stated above, is incorrect. Thus there is no escape from the conclusion that the notices served by the respondent on the appellants were not according to Section 106 of the Transfer of Property Act and were, therefore, illegal and void. The learned Civil Judge was, therefore, in error in decreeing the plaintiffs' suit for ejectment.

16. I, therefore, allow both the appeals, set aside the judgments and decrees passed in both cases by the learned Civil Judge, Ajmer, and restore the judgments and decrees of the Munsif Ajmer, District Ajmer, and thereby dismiss the plaintiffs' suits for ejectment against the appellants. Since the appeals have succeeded on a technical point, I hereby direct that both the parties shall bear their own costs throughout.

Appeals allowed.

AIR 1970 RAJASTHAN 276 (V 57 C 66)

L. N. CHHANGANI, J.

Lal Mohammed, Petitioner v. Regional Transport Authority, Jodhpur Region, Jodhpur and another, Respondents.

Civil Writ Petn. No. 274 of 1969 D/- 23-4-1970.

(A) Constitution of India, Article 226 — New point — New ground requiring investigation of facts cannot be raised. (Para 5)

(B) Motor Vehicles Act (1939), Section 60 (3) (as inserted in 1956) — Power to recover composition fee instead of cancelling permit — Passing of simultaneous order both under Section 60 (3) and (1) not contemplated.

Section 60 (3) enables the Transport Authority to impose, instead of severe punishment like suspension or cancellation of permit under Section 60 (1), a lesser punishment by recovery of composition fee and to compound minor breaches of law. It does not contemplate simultaneous order, both under sub-section (3) and under sub-section (1). Thus a conditional order that if fee is not given within prescribed time the permit shall stand cancelled is illegal. (1967) 2 Andh WR 353, Rel. on. (Paras 6, 7)

Cases Referred: Chronological Paras
(1967) 1967-2 Andh WR 353 = ILR
(1968) Andh Pra 491, Ramkrishna
Mudaliar v. Regional Transport
Authority, Chittoor 7

(1966) Wnt Petn. No. 95 of 1965,
D/- 25-7-1966 (AP), Ch. Seshagiri
Rao v. Transport Authority 7

B. L. Maheshwari, for Petitioner.

ORDER:— This is a petition by Lal Mohammed under Article 226 of the Constitution of India praying for a writ in the nature of certiorari, prohibition, mandamus or any other writ, order or direction, to quash and set aside the order of the Regional Transport Authority dated 1-7-1968 and the order in appeal dated 22-2-1969.

2. The facts relevant for the disposal of this writ application may be briefly stated as follows:—

The petitioner is the holder of a non-temporary stage carriage permit on Jodhpur-Barmer route. The permit issued to him covers bus No. RJQ 1291.

A complaint was lodged against the petitioner for carrying passengers in excess of the seating capacity of the bus. The petitioner was served with a notice under Section 60 of the Motor Vehicles Act (hereinafter referred to as the Act) to show cause why the permit should not be cancelled. The petitioner appeared before the Regional Transport Authority at its meeting held on 1-7-1968 and offered to compound the breach of condition and to pay an amount of Rupees 300/-. The Regional Transport Authority

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agreed to compound the breach of the condition and to accept Rs. 300/- as compounding fee. It was, however, further resolved by the Regional Transport Authority that the petitioner should deposit the amount of Rs. 300/- within 15 days, failing which his permit shall stand cancelled.

The petitioner did not deposit the amount of Rs. 300/- within 15 days. He, however, deposited the amount of Rs. 300/- on 28th September, 1968. After the deposit of Rupees 300/-, the petitioner received a notice from the Secretary, Regional Transport Authority, on 28-12-1968 intimating that the permit of the petitioner had been cancelled in pursuance of the aforesaid resolution of the Regional Transport Authority. The petitioner thereafter filed an appeal before the Transport Appellate Tribunal challenging the resolution of the Regional Transport Authority on various grounds. The Transport Appellate Tribunal dismissed the petitioner's appeal as time-barred. After the dismissal of the appeal, the petitioner filed the present writ application challenging the resolution of the Regional Transport Authority as also the order of the Transport Appellate Tribunal dismissing the appeal as time-barred, on various grounds which shall be referred to hereinafter. The petitioner also submitted an application for staying the operation of the resolution of the Regional Transport Authority. This application came up before a learned Single Judge of this Court on 28-3-69. The learned Judge in the absence of any opposition by the Regional Transport Authority, stayed the operation of the resolution of the Regional Transport Authority cancelling the petitioner's permit and allowed the petitioner to ply his bus.

3. The Regional Transport Authority and the Transport Appellate Tribunal have not cared to appear to oppose the writ application.

4. In support of the petition, the learned counsel for the petitioner advanced the following contentions:—

1. That the permit granted to the petitioner did not specify the maximum number of persons to be carried and there was no condition prohibiting the carriage of more passengers than the number specified.

2. That the Regional Transport Authority having agreed to accept an amount of Rupees 300/- from the petitioner in lieu of the cancellation or suspension of the permit under sub-section (3) of Section 60 of the Act, it could not have been simultaneously passed an order under sub-section (1) cancelling the permit even in the form of a conditional order stating that if the fine is not paid within 15 days, the permit shall stand cancelled.

3. That under sub-section (2) of Sec. 60 of the Act, the Transport Authority cancelling or suspending a permit is required to give to the holder of the permit in writing its reasons for taking action against him.

Rule 108 of the Rajasthan Motor Vehicles Rules, 1951 prescribes the period of limitation as 30 days from the date of the receipt of the order sought to be appealed against. Having regard to these provisions, it is contended that the petitioner's appeal was within limitation and the Transport Appellate Tribunal was not justified in rejecting the appeal as time barred.

4. That the petitioner had no knowledge that he was required to deposit the amount within 15 days and that the Regional Transport Authority had passed a mandatory order to the effect that in case the composition fee is not paid within 15 days, the permit shall stand cancelled. In support of this contention, he emphasised the fact that he voluntarily paid Rs. 300/- on 28th of September, 1968 before the receipt of the notice of the Secretary, Regional Transport Authority, intimating to him that his permit had been cancelled.

5. The first contention requires an investigation of facts. The petitioner did not raise any such controversy before the Regional Transport Authority. On the other hand, accepting the breach of law, he agreed to pay an amount of Rs. 300/- as compounding fee. I do not feel inclined to permit the petitioner to make a new ground in the writ application when the point cannot be properly and effectively decided without investigation of facts. The contention is, therefore, rejected.

6. The second contention raises the question of interpretation of sub-section (3) of Section 60 of the Act. Sub-section (3) was not enacted with the original Act. The result was that before the Amending Act of 1956 the Regional Transport Authority was constrained to cancel or suspend the permit for even a minor breach of the relevant laws. In the light of the experience of the working of the Act, the legislators thought it proper to dispense with the punishment of cancellation or suspension of permit in case of trivial breaches of the relevant laws and, therefore, added sub-section (3) enabling the Transport Authority to impose, instead of severe punishment like suspension or cancellation of the permit, a lesser punishment by recovery of composition fee and to enable the Transport Authority to compound minor breaches of law. The sub-section contemplates the following steps before an order under this section can be passed—

1. Firstly, there should be some breach of law for which a permit is liable to be cancelled or suspended.

2. The second step is the formation of opinion of the Transport Authority that having regard to the circumstances of the case it will not be necessary and expedient to suspend or cancel the permit and the determination of amount which the permit holder should be called upon to pay instead of cancellation or suspension of permit.

3. The offer of the permit holder to pay the amount sought to be recovered from him instead of cancellation or suspension of permit and the agreement by him to pay the amount.

7. After the completion of the three steps and in case the permit holder agrees to pay the amount then sub-section (3) contemplates an order in the following terms:—

"Notwithstanding anything contained in sub-section (1), the transport authority may, instead of the cancelling or suspending the permit, as the case may be, recover from the holder of the permit the sum of money agreed upon."

From the above analysis of the sub-section, it is clear that the sub-section contemplates an order alternating with an order under sub-section (1) and that it does not contemplate simultaneous order, both under this sub-section and under sub-section (1) by giving the form of a conditional order. I am supported in this view by a judgment of the Andhra Pradesh in *M. Ramakrishna Mudaliar v. Regional Transport Authority, Chittoor*, 1967-2 Andh WR 353. Exercising powers under Section 68 of the Act, the Andhra Pradesh State framed Rule 244 reading as follows:—

1. "If a Transport Authority considers that instead of suspending or cancelling a permit under Clauses (a), (b) or (c) of sub-sec (1) of Section 60 the permit-holder may be given the option to pay a compounding fee under Section 60 (3) it shall issue a notice in Form CN to the permit-holder by Registered Post Acknowledgment Due or by delivering it to him in person.

2. The permit-holder shall be allowed ten days' time from the date of receipt of the Notice to pay the compounding fee. The Transport Authority may however, grant extension of time in exceptional cases." Form CN was prescribed, the relevant portion of which reads as follows:—

"The permit holder is hereby given the option under Section 60 (3) of the Act paying a compounding fee of Rs. in (words) within ten days of the date of receipt of this notice into any Government Treasury. If payment is not made and the treasury receipt produced within the time stipulated action will be taken to suspend or cancel the permit."

Section 60 sub-section (3) of the Act and the Rule 244 along with the form CN came up for consideration in that case. A Bench of the Andhra Pradesh High Court referred to the decision of Gopal Rao Ekbote, J., in *Writ Petn. No. 95 of 1965 (AP)*, Ch. Seshagiri Rao v. Transport Authority, decided on 25th July, 1966 and observed:—

".....the learned Judge on an exhaustive consideration of the entire question held that Section 60 of the Act does not contemplate the passing of two orders one under sub-section (3) and the another under

sub-section (1) for the same offence and that sub-section (3) thereof does not contemplate any order of an interlocutory nature and that it contemplates the passing of an independent order. The learned Judge further held that the condition in Form CN goes beyond the rule-making power and that the same should be struck down as being ultra vires. We are in respectful agreement with the conclusions of the learned Judge in the said ruling."

In this view of the law, I hold that the Regional Transport Authority having agreed to accept the amount of Rs. 300/- from the petitioner, could not have simultaneously passed an order cancelling the permit by giving it a conditional form and the part of the resolution cancelling the permit on non-payment of fine is not sustainable being not warranted by law.

8. I need not pronounce any final opinion on the third contention of the petitioner by which he challenges the order of the Transport Appellate Tribunal holding the petitioner's appeal as time barred. The petitioner having filed an appeal and having secured no relief and the part of the resolution challenged by the petitioner being unsustainable, I feel justified in setting it aside in the exercise of extraordinary jurisdiction under Article 226 of the Constitution, having regard to the facts and the circumstances of the case.

9. It is also unnecessary to decide the fourth contention.

10. The writ application is allowed and the order of the Regional Transport Authority dated 1-7-1968 cancelling the permit and that of the Transport Appellate Tribunal dated 22-2-1969 dismissing the petitioner's appeal are set aside. There will be no order as to costs.

Petition allowed.

AIR 1970 RAJASTHAN 278 (V 57 C 67)
JAGAT NARAYAN, J.

Inderjeet Singh, Petitioner v. Maharaj Raghunath Singh and others, Respondents.

Civil Revn. No. 534 of 1968, D/- 3-5-1969 from order of Addl. Dist. J., Jodhpur, D/- 28-9-1968.

(A) Evidence Act (1872), Section 101 — Burden of proof — Property suit.

When the plaintiff asserts that the primogeniture rule was inapplicable, that the family was joint and that there was absence of partition or family arrangement, the onus is on him to prove them. (Para 6)

(B) Civil P. C. (1909), Order 18, Rule 3 — Compliance with — Option to be exercised before other party enters evidence. AIR 1956 Sau 52, Dissented from.

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The Rule does not prescribe the stage at which the court should be informed about exercise of the option thereunder. It is sufficient if the party leading evidence does so (provided it has not led any evidence on the issues covered by the option) before the other party begins its evidence. AIR 1956 Sau 52, Referring to AIR 1953 Vindh Pra 84, Dissented from. (Para 13)

Cases Referred: Chronological Paras
(1956) AIR 1956 Sau 52 (V 43),
Motibhai v. Umedchand 11
(1953) AIR 1953 Raj 137 (V 40) =
ILR (1953) 3 Raj 483 (FB), Swarup-
narain v. Gopinath 8
(1953) AIR 1953 Vin Pra 34 (V 40),
Nanhey Raja v. Kedar Nath 11
Hasti Mal Parikh, for Petitioner; Shri-
krishna Mal Lodha, for Respondents.

ORDER: This is a revision application by one of the defendants against an order of the trial court allowing the plaintiffs to produce evidence in rebuttal of the evidence produced by the defendants on issues 3, 4 and 5.

2. The dispute is relating to the properties which formerly belonged to the late Maharaja Guman Singh, who was the grandson of Maharaja Takhat Singh, Ruler of Jodhpur State. Guman Singh had 3 sons, Narpat Singh, Amar Singh and Raghunath Singh, out of whom Narpat Singh is the eldest. Narpat Singh has a son Inderjit Singh. During the life-time of Guman Singh, Narpat Singh took a second wife against the wishes of his father and was disinherited by him and Inderjit Singh was appointed as his successor. After the death of Guman Singh, Inderjit Singh was regarded as a successor. Narpat Singh was then alive. Maji Sahiba Smt. Jawahar Kanwar was appointed as his guardian and Raghunath Singh was appointed as the manager of the estate.

3. The present suit was instituted originally by Raghunath Singh claiming one-fourth share in the properties on the allegation that Guman Singh, his wife, and his sons constituted a joint Hindu family. In his capacity as Manager Raghunath Singh had made various admissions in writing in which it was stated that Guman Singh's properties constituted an impartible estate which descended by the rule of primogeniture and that a family arrangement was made by Guman Singh during his life-time. These admissions went against the case set up in the plaint by Raghunath Singh. He asserted in the plaint that these admissions were obtained fraudulently from him. The suit was contested by Narpat Singh and Inderjit Singh. Amar Singh and Maji Sahiba Smt. Jawahar Kunwar who had originally been impleaded as defendants were transposed as plaintiffs.

4. On the pleadings of the parties the following issues were framed:—

(1) Whether the various admissions of the plaintiffs in the application for appointment

of guardian of minor Rajkumar Inderjit Singh and in the various affidavits filed by the plaintiffs in support of the application were obtained by fraud and misrepresentation of facts as well as of law as pleaded in paras 6 and 7 of the plaint and as such the admissions in the applications and affidavits are not binding on the plaintiffs?

(2) Whether the plaintiffs are entitled to get 1/4th share each in the disputed property?

(3) Whether the parties to the suit are not members of a joint Hindu family nor they are governed by principles of Hindu Law?

(4) Whether the suit property is impartible and succession to the same is governed by law of primogeniture and if so whether the suit for a partition is not maintainable?

(5) Whether Maharaj Guman Singh Ji made a family arrangement of the property in dispute as pleaded in para 2 (b) and additional plea in para 4 of the written statement of defendant No. 1 and if so whether the family arrangement made is valid?

(7) Whether the family arrangement was acted upon by the plaintiffs and the plaintiffs by their acceptance and conduct are bound by it and are estopped from challenging the same?

(9) Whether the plaintiffs are in joint possession of the property in dispute? If not whether the suit is not maintainable without payment of ad valorem court-fee?

(10) Whether the suit is not maintainable unless the plaintiffs get a succession certificate and have their various admissions set aside?

(11) Is the suit barred by Section 47 of the Rajasthan Land Reforms and Resumption of Jagirs Act 1952 and by Section 13 of the Rajasthan Jagir Decisions and Proceedings Validity Act, 1955?

(12) Whether defendant No. 4 Rajkumar Inderjit Singh was declared successor of Maharaja Guman Singh Ji by Additional Collector, Jodhpur, by his order dated April 13, 1959, and if so whether the suit by the plaintiffs is barred?

(13) Whether the notification dated 26th March, 1949 published in Jodhpur Raj Patra dated April 2, 1949, not admissible in evidence as not having been registered and being without authority?

(14) What shall be relief?

The burden of issues 1 and 2 which are issues of fact was placed on the plaintiffs. The burden of proving issues 3 to 5, 7 and 12 was placed on the defendants. Issues 10, 11 and 13 are legal issues.

5. Issues 2, 3, 4 and 5 are overlapping.

6. The plaintiffs led evidence on issues Nos. 1 and 2. Now issue No. 2 is a comprehensive issue which covers issues Nos. 3, 4 and 5 also. The burden of proving issues 3, 4 and 5 was wrongly placed on the defendants by the trial Court. The plaintiffs having come forward with the case in that plaint

that the rule of primogeniture did not apply, that the family of Guman Singh was a joint Hindu family and that there was no partition or family arrangement, the burden lay on them to prove these allegations.

7. On behalf of the plaintiffs 4 witnesses were examined on issues Nos. 1 and 2. Raghunath Singh plaintiff, P. W. 1 stated in his statement that succession to the property of Guman Singh was not governed by the rule of primogeniture, that the family was a joint Hindu family and that there was no partition or family arrangement. The remaining 4 witnesses also stated that there was no partition or family arrangement. Ratan Singh P. W. 5 even stated that Guman Singh used to say in his life-time that he will divide the property into 3 shares for his 3 sons. This part of the evidence of this witness cannot be treated as evidence under issue No. 1. What could be proved under issue No. 1 was that the admissions of the plaintiff in writing were obtained by fraud. Whether or not those admissions were correct was not the subject-matter of issue No. 1.

8. Issues were framed in the suit on 24-9-1962. At that time this High Court was not entertaining any revision against any interlocutory order, because of a ruling of a Bench of 5 Judges in Purohit Swaroop Narain's case, ILR (1953) 3 Raj 483 = (AIR 1953 Raj 1373 (FB)). The defendants therefore had no remedy to get the issues rectified.

9. After concluding their evidence on issues Nos. 1 and 2 the plaintiffs stated that they were reserving a right to produce evidence in rebuttal on issues the burden of proof of which lay on the defendants.

10. After the defendants had led their evidence the plaintiffs applied for permission to produce evidence in rebuttal of the evidence led by the defendants. This prayer was opposed by the defendants. The learned Additional District Judge overruled the objection saying that the evidence of the witnesses of the plaintiffs was given under issue No. 1 only. As I have shown above this is erroneous.

11. On behalf of the defendants it is contended that the correct interpretation of Order 18, Rule 3 is that before examining any witness the party leading evidence should expressly reserve his right to produce evidence on the issues the burden of proof of which lies on the opposite party. Reliance was placed on the decision in Motibhai v. Umedchand, AIR 1956 Sau 52. The question which arose in that case for decision was whether before the date on which the party leading evidence starts examining his witnesses he is required under Order 18, Rule 3 to state that he would reserve his evidence on the other issues.

However in that case the decision in Nanhey Raja v. Kedar Nath, AIR 1953 Vin Pra 34 was also considered, in which it was held as follows:—

"The law does not prescribe a stage at which a party should apprise the Court of its exercising the option under Order 18, Rule 3. But it is only reasonable that this should be done, if possible, before it begins, and in any case before the other party begins its evidence, so that it might clearly note that the first party has not really finished."

12. And the opinion was expressed that Order 18, Rule 3 lays down that the party having a right to begin should exercise the option before he starts examining his witnesses. With all respect I am unable to subscribe to the view taken in the Saurashtra case. Order 18, Rule 3 runs as follows:—

"Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning, but the party beginning will then be entitled to reply generally on the whole case."

13. It does not prescribe the stage at which the party leading evidence should apprise the Court of its exercising the option under Order 18, Rule 3. Although the Code contemplates that the party leading evidence should state his case, this is not done in actual practice. I am of the opinion that the provision under the above rule is sufficiently complied with if the party in question states before the other party begins its evidence that it is reserving its right to adduce evidence in rebuttal on the other issues. This it can do only if it has actually not led any evidence on those issues.

14. In the present case the issues were not correctly framed. The burden of proof of issue No. 2, which is a comprehensive issue, was placed on the plaintiffs and rightly so as pointed out by me above. But misunderstanding was caused by the framing of issues Nos. 3, 4 and 5 the burden of proof of which was placed on the defendants. If the issues had been correctly framed then the burden of proving these issues should have been placed on the plaintiffs. If they succeed in proving that the parties were members of a joint Hindu family, that the estate was not an impartible one and that there was no family arrangement during the life-time of Guman Singh then it would follow as a result of the decision of these issues that the share of the plaintiff Raghunath Singh was one-fourth.

15. On account of the incorrect framing of the issues the plaintiffs might have been misled in not producing all the evidence on the matters covered by issues Nos. 3, 4 and 5 initially. I accordingly allow them to produce further evidence on these issues. They

are entitled to produce rebuttal evidence on issue No. 7. Thereafter the defendants will be entitled to produce rebuttal evidence on issues Nos. 3, 4 and 5 only.

16. The revision application is decided as indicated above.

17. In the circumstances of the case, I leave the parties to bear their own costs of this revision application.

Order accordingly.

AIR 1970 RAJASTHAN 281 (V 57 C 68)

KAN SINGH, J.

Bhagwat Singhji, Petitioner v. Kesar Singhji, Respondent.

Criminal Revn. No. 398 of 1969, D/- 14-4-1970, against Order of Addl. S. J., Udaipur, D/- 5-8-1969.

Constitution of India, Articles 362, 363 — Article 362 does not restrict powers of legislature — Ex-ruler is not exempted from personal appearance in Court in absence of express provision in Criminal Procedure Code.

Article 362 recommends to the Parliament and the State Legislature, in making laws after the Constitution to have due regard to the guarantee or assurance given under any covenant or agreement. But if despite the recommendation that due regard shall be had to the guarantee or assurance given under the covenant or agreement, the Parliament or the Legislature of a State makes laws inconsistent with the personal rights, privileges and dignities of the Ruler of an Indian State, the exercise of the legislative authority cannot relying upon the agreement or covenant be questioned in any Court. Every provision in a Covenant will not have the status of a law. The provisions in a Covenant dealing with the rights or privileges of individuals, be they Ex-Rulers, cannot claim the status of a law and they will not be enforceable in Courts of law as such, unless there is legislative sanction in support of such provisions in the Covenant. (Paras 7, 12)

Article 362 only contains a recommendatory provision for the benefit of the Parliament or the State Legislatures in making the Laws and it does not, in any way, restrict the powers of legislation of the Parliament or the State Legislatures. It is a matter for the Parliament or the State Legislatures to see how far the so-called privileges of the erstwhile rulers were to be incorporated in any law. When the Criminal Procedure Code of the Central Legislature was extended to Rajasthan by the Part B States Act of 1961, no such privilege was incorporated in the Criminal Procedure Code. The Parliament only inserted Section 197-A which gives protection in the matter of launching prosecution against an erstwhile Ruler, but so far as an erstwhile Ruler of an Indian State ad-

vances claim for exemption from personal appearance as a complainant or as a witness no such privilege has been recognised by the Criminal Procedure Code or any other law made by the competent legislature.

(Para 14)

Cases Referred: Chronological Paras

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| (1964) AIR 1964 SC 444 (V 51) = | |
| 1964-5 SCR 1, Bhagwat Singh v. | |
| State of Rajasthan | 8 |
| (1963) AIR 1963 Madh Pra 162 | |
| (V 50) = 1963 (1) Cri LJ 600, | |
| Abdul Alim Khan v. Sagarmal | 3 |
| (1961) AIR 1961 SC 196 (V 48) = | |
| 1961-1 SCR 779, Sudhansusekhar | |
| v. State of Orissa | 7 |
| (1960) AIR 1960 Punj 565 (V 47) = | |
| 1960 Cri LJ 1491, Shaukat Ali Khan | |
| v. State of Punjab | 8 |
| (1950) AIR 1950 SC 155 (V 37) = | |
| 1950 Raj LW 232 = 51 Cri LJ 153, | |
| Ram Babu Saxena v. State | 14 |
| (1905) 1905-2 KB 391 = 74 LJKB | |
| 753, West Rand Central Gold Mining | |
| Co. v. King | 14 |
| A. L. Mehta, for Petitioner; V. S. Dave, | |
| for Respondent. | |

ORDER:— The revision before me raises the question whether the former ruler of an Indian State is exempt from personal appearance as a complainant in a criminal case instituted by him on the basis of his so-called personal privileges saved by or arising from the covenant resulting in the integration of the Indian State of which the complainant was the ex-Ruler with the Union of States. For appreciating the point the relevant facts may shortly be stated as follows:—

2. The petitioner His Highness Maharana Shri Bhagwat Singhji lodged a complaint against Shri Kesar Singhji, the opposite party for an offence under Section 500 Indian Penal Code in the Court of the Munsiff Magistrate, First Class, Udaipur. The complaint was filed by His Highness Maharana Shri Bhagwat Singhji himself. Shri Kesar Singhji was an employee of his Highness Maharana Shri Bhagwat Singhji. The statement of His Highness Maharana Shri Bhagwat Singhji under Section 200, Criminal Procedure Code was recorded by the learned Magistrate at the Maharana's Palace at Udaipur where the learned Magistrate held his Camp, though at that stage he did not consider or decide the question relating to the alleged personal privilege of the Maharana for exemption from appearance in Court. When the accused appeared and the complainant was not himself present on a date of hearing, an objection was raised by the accused that the complaint be dismissed on account of the non-appearance of the complainant. At that stage the claim for exemption from personal appearance in Court was raised on behalf of the Maharana. The learned Magistrate went into it and by his order dated 9-12-1966 he negatived the claim and asked the petitioner to appear in person in Court, if he wanted

to prosecute his complaint and he made it clear that if he did not choose to appear on a further date of hearing without a lawful excuse, provisions of Section 259, Criminal Procedure Code will come into play. Aggrieved of this order of the learned Magistrate the petitioner went up in revision to the Court of Session. The learned Additional Sessions Judge heard the revision application, but he dismissed it. It is in these circumstances that the present revision application has been filed in this Court.

3. I have heard learned counsel for the parties at sufficient length. Two cases have been brought to my notice, one of the Punjab High Court reported as *Shaukat Ali Khan v. State of Punjab*, AIR 1960 Punj 565, and another of the Madhya Pradesh High Court reported as *Abdul Alim Khan v. Sagarmal*, AIR 1963 Madh Pra 162, which deal with a question like the present one. The Punjab High Court has almost in similar circumstances upheld the claim of privilege on behalf of the ex-Ruler, while, on the other hand the Madhya Pradesh High Court has negatived such a claim. The problem thus now is as to which view is to prevail and I will deal with the two cases at the appropriate stage. However, before I do that I may briefly refer to the covenant on which the claim of privilege is based.

4. The former State of Mewar was first integrated with the United State of Rajasthan which had the seat of Government at Kota. The new United State of Rajasthan which was thus formed with the integration of the former Mewar State had its seat of Government at Udaipur. The United State of Rajasthan comprising of all the Indian States in what was formerly Rajputana was formed from 7-4-1949. Its covenant is available as Appendix XL to the White Paper on Indian States. I need not refer to the various articles, which provided for the composition of the New State and also lay down how the legislative power of the New State was to be exercised and by whom. Article XIII which deals with the personal privileges of the Ruler of each covenanting State runs as follows:—

"The Ruler of each Covenanting State, as also the members of his family, shall be entitled to all the personal privileges, dignities and titles enjoyed by them, whether within or outside the territories of the State, immediately before the 15th day of August, 1947." It is on this Article of the Covenant that the petitioner bases his claim. This raises the question as to how far this Article of the Covenant is enforceable in a Court of law.

5. The United State of Rajasthan which came into existence as a result of the aforesaid covenant ceased to exist with effect from 26-1-1950 when the Constitution of India came into force. Articles 362 and 363 make provision for matters relating to the Covenant with the erstwhile Rulers. I may read both the Articles:—

"Article 362. Rights and privileges of Rulers of Indian States. In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in Article 291 with respect to the personal rights, privileges and dignities of Ruler of an Indian State."

"Article 363. Bar to interference by Courts in disputes arising out of certain treaties, agreements, etc. (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provisions of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Government was a party and which has or has been continued in operation after such commencement or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

(2) In this Article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

6. The proviso to Article 131 also throws some light on the legal efficacy of the Covenant. While the enacting part of the Article defines the original jurisdiction of the Supreme Court in disputes between the Government of India and one or more States; or between the two or more States according to the proviso the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which having been entered into or included before the commencement of this Constitution continued in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.

7. In *Sudhansusekhar v. State of Orissa*, AIR 1961 SC 198, their Lordships of the Supreme Court had pointed out that Article 362 recommends to the Parliament and the State Legislatures in making laws after the Constitution to have due regard to the guarantee or assurance given under any cove-

nant or agreement. Their Lordships pointed out that Article 362 is not restricted to agreements relating to the privy purse and covered all agreements and covenants entered into by the Rulers of Indian States before the commencement of the Constitution whereby the personal rights, privileges and dignities of the Ruler of an Indian State were guaranteed. Nevertheless it does not import any legal obligation enforceable at the instance of the erstwhile Ruler of a former Indian State. Their Lordships added that if despite the recommendation that due regard shall be had to the guarantee or assurance given under the covenant or agreement, the Parliament or the Legislature of a State makes laws inconsistent with the personal rights, privileges and dignities of the Ruler of an Indian State, the exercise of the legislative authority cannot, relying upon the agreement or covenant, be questioned in any Court, and that is so expressly provided by Article 363 of the Constitution.

8. In *Bhagwat Singh v. State of Rajasthan*, AIR 1964 SC 444, their Lordships pointed out that the personal rights, privileges and dignities of the Ruler of an Indian State guaranteed or assured under any covenant or agreement, entered into with the concurrence of the Government of India, which are recommended under Article 362 of the Constitution to be respected, avail the Rulers in their status as Indian citizens and not in recognition of any sovereign authority continuing to remain vested in them. In that case His Highness the Maharana of Udaipur had claimed immunity from proceedings under the Industrial Disputes Act and his claim was turned down.

9. I may now refer to the Punjab and Madhya Pradesh cases.

10. In the Punjab case the first information report for an offence under Section 408, Indian Penal Code was lodged by the Private Secretary to the Nawab of former Nalerkotla State which had integrated with the Pepsu Union. The Nawab was sought to be examined as a witness at the instance of the prosecution. The Nawab put in an application representing that he was immune from the ordinary process and was exempted from appearance in Court. The prayer of the Nawab was allowed and he was ordered to be examined on commission. The accused attacked the order in revision before the Court of Session, but was not successful. He then approached the High Court. The learned Judge held that the privilege of immunity from the ordinary process of Court of law had been safeguarded by Article 362 of the Constitution. The learned Judge referred to Para 240 in the White Paper and observed that the sovereign power at the time of integration of Indian States extended solemn assurance which later received constitutional recognition in Articles 362 and 363 guaranteeing the personal privileges and rights including protection from ordinary pro-

cess of Courts to the Rulers of the integrating States. He accordingly came to the conclusion that personal appearance of the Nawab could not be insisted upon.

11. In the Madhya Pradesh case, the Nawab of Jaora whose State had integrated with what was then known as Madhya Bharat moved an application before the Magistrate in a complaint filed on behalf of the Nawab that he be examined as a witness on commission and insisting that as a former Ruler he was a privileged person exempt as of right from personal attendance. The learned Magistrate rejected the application. The Nawab then approached the High Court. The Punjab case aforesaid was cited before the learned Judge. The learned Judge came to the conclusion that a statement in the White Paper on States was relied on in the Punjab case, but according to him, a mere statement in the White Paper is not binding on the Court until it is shown that it was based on a constitutional or statutory provision. The Covenant of the former Ruler was a State Paper, but, according to the learned Judge, it did not become law unless it was made part of the Constitution or any Statute. The learned Judge referred to Section 133, Civil Procedure Code and Section 197-A, Criminal Procedure Code for the sake of analogy and held that unless the so-called privileges were embodied in any statute they could not be enforced in a Court of law.

12. Learned Counsel for the petitioner was not able to attack the reasoning given in the Madhya Pradesh case. There is no gainsaying the fact that every provision in a Covenant will not have the status of a law. There may be provisions in a Covenant which dealt with the transfer of territories or the formation of a new State and such provisions may be recognised by Courts as law partaking the character of an act of the State, but the provisions in a Covenant dealing with the rights or privileges of individuals, be they ex-Rulers, cannot claim the status of a law and they will not be enforceable in Courts of law as such, unless there is legislative sanction in support of such provisions in the Covenant.

13. Learned counsel for the petitioner referred me to some passages in the Halsbury's Laws of England, Third Edition, Vol. 7 and Oppenheim's International Law. In Halsbury's Laws of England in para. 307, it is stated that treaties concluded by the Crown are in general binding upon the subject without express parliamentary sanction but the previous consent of, or subsequent ratification by, the legislature is legally necessary to their validity in certain cases. It is further stated that thus though treaties relating to war and peace, the cession of territory or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamen-

tary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory and it is pointed out that where private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown. In all cases the Courts are competent to inquire into matters involving the construction of treaties and other acts of State; and the plea of an act of State, or that the matter involves the construction of treaties, affords no valid defence to an action against officers of the Crown for interference with the private rights of a British subject or of a resident alien friend. This passage, to my mind, draws a distinction between treaties relating to war and peace, cession of territories on the one hand, and treaties affecting or dealing with the private rights on the other. The former are taken to be binding without express parliamentary sanction whereas the latter are not.

14. In Oppenheim's International Law Vol. I, at page 37, it is observed that there is wide divergence of doctrine as regards the International Law being the part of the Municipal Law. Then the learned author deals with the position in foreign countries. He points out that so far as Great Britain is concerned all such rules of customary International Law as are either universally recognised or have at any rate received the assent of the country are per se part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage, that the Law of Nations is part of the law of the land and it has been repeatedly acted upon by Courts. Apart from isolated obiter dicta it has never been denied by Judges, but it was observed that this unshaken continuity of its observance suffered a reverse as the result of the dicta of some Judges in *Franconia* case though later in the case of *West Rand Central Gold Mining Co. v. King*, 1905-2 KB 391 this classical doctrine was reaffirmed. A little later it has been pointed out by the author himself that such treaties as affect private rights and, generally, as require for their enforcement a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament and to that extent binding treaties which are part of International Law do not form part of the law of the land unless expressly made so by the legislature. The author then discusses the position in the United States and other countries. These passages far from supporting the learned counsel go against his submission. To my mind, no principle of international law is involved in the present case. With the formation of the United State of Rajasthan the inhabitants of the different States became, from the date of the

merger, the subjects of the United State of Rajasthan and they could not be described as the subjects of a particular State. As pointed out by their Lordships of the Supreme Court in *Ram Babu Saxena v. State*, 1950 Raj LW 232 = (AIR 1950 SC 155) after the execution of the Covenant the covenanting States nationally retained their personality for the purposes of succession to Rulership etc., but they did not exist as such. After the Constitution came into force there were no Indian States as such within the boundaries of the Union of India even nationally. Therefore, there could be no international relationship as could be subject of any international law or any principle to govern the relationship of the rulers in the new State. The Rulers became citizens of the new State and did not retain any trappings of sovereignty. With the Constitution coming into force there remained only one sovereign in India namely, the Indian people. To my mind, therefore, there is no room to bring in any principle of International Law in giving effect to the Covenants and the passages on which learned Counsel for the petitioner has relied and which I have already referred do not render any help in the matter. The Covenants can be looked into only to the extent they have been referred to in the Constitution and no further. As pointed out by their Lordships of the Supreme Court, Article 362 only contains a recommendatory provision for the benefit of the Parliament or the State Legislatures in making the Laws and it does not, in any way, restrict the powers of legislation of the Parliament or the State Legislatures. It is a matter for the Parliament or the State Legislatures to see how far the so-called privileges of the erstwhile rulers were to be incorporated in any law. When the Criminal Procedure Code of the Central Legislature was extended to Rajasthan by the Part B States Act of 1961, no such privilege as is claimed was incorporated in the Criminal Procedure Code. The Parliament only inserted Section 197-A which gives protection in the matter of launching prosecution against an erstwhile Ruler, but so far as an erstwhile Ruler of an Indian State advances claim for exemption from personal appearance as a complainant or as a witness no such privilege has been recognised by the Criminal Procedure Code or any other law made by the competent legislature.

15. In these circumstances the so-called claim or privilege based on the Covenant without there being any legislative sanction behind it cannot be recognised by the Courts. The Courts below were, therefore, not wrong in refusing to grant exemption from personal attendance to the petitioner as a complainant.

16. The revision application has no force and it is hereby dismissed.

Petition dismissed.

AIR 1970 RAJASTHAN 285 (V 57 C 69)

JAGAT NARAYAN, C. J. AND
R. D. GATTANI, J.Likhmi Chand and others, Appellants v.
Smt. Sukhdevi and others, Respondents.Civil Regular First Appeal No. 83 of 1962,
D/- 8-5-1970 against judgment of Sr. Civil
J., Churu, D/- 17-5-1962.

Hindu Succession Act (1956), Sec. 14 (2)
— Property of female Hindu — Hindu
widow, having no title in joint family prop-
erties, allotted properties under agreement
for residence during her lifetime — Case
falls under Section 14 (2) and widow will not
become full owner of property after coming
into force of the Act. AIR 1965 Andh Pra
66, Dissented from.

Where a Hindu widow, having no sort of
title in the joint family properties except her
right of maintenance and residence in those
properties, is allotted properties for her resi-
dence during her lifetime under an agree-
ment prohibiting her from disposing of that
property, then, the case falls under Sec-
tion 14 (2) and the widow will not become
full owner of those properties on the coming
into force of the Act. AIR 1965 Andh Pra
66, Dissented from. Case law discussed.

(Paras 16, 20)

The widow, having a restricted life estate
in the property under the agreement, will
have no right to sell, mortgage or transfer
those properties. If in such case in respect of
those properties the widow executes sale deed
the sale deed will be void. But it cannot be
said that by executing sale deed her rights
in the properties granted under agreement
are extinguished altogether. The widow
during her lifetime will remain the limited
owner of those properties with rights res-
tricted as indicated in the agreement.

(Paras 21, 22, 23)

Cases Referred: Chronological Paras

- (1970) AIR 1970 All 238 (V 57) =
1969 All LJ 253, Smt. Prema Devi
v. Joint Director of Consolidation,
Gorakhpur 17
(1969) Civil Appeal No. 1937 of 1966,
D/- 26-8-1969 = 1970-2 SCR 95,
Badri Pershad v. Smt. Kanso Devi 13
(1969) AIR 1969 Andh Pra 300 (V 56),
Vaddaboyina Sesha Reddi v. Vadda-
boyina Tulasamma 17
(1967) AIR 1967 SC 1786 (V 54) =
1967-3 SCR 454, Mangal Singh v.
Smt. Rattno 13
(1967) AIR 1967 Mad 429 (V 54) =
1967-1 Mad LJ 454, Thatha Guruna-
dham Chetti v. Smt. Thatha Navane-
thamma 17
(1965) AIR 1965 Andh Pra 66 (V 52) =
1964-2 Andh WR 470, Gadam Red-
dayya v. Venkataraju 18
(1965) AIR 1965 Mys 290 (V 52),
Damodhar Rao v. Bhima Rao 17

(1960) AIR 1960 Orissa 81 (V 47) =
ILR (1959) Cut 539, Mali Bewa v.
Dadhi Das 17

(1959) AIR 1959 Cal 338 (V 46) =
63 Cal WN 295, Jaria Devi v.
Shyam Sundar Agarwalla 17

S. C. Bhandari, for Appellants; R. K.
Rastogi, for Respondents Nos. 2 and 3.

JAGAT NARAYAN, C. J.:— This is an
appeal by the plaintiffs whose suit for grant
of some reliefs in respect of a 'Nohra' and
a 'Haveli' situated at Bidasar was dismissed
by the Senior Civil Judge, Churu.

2. The findings of fact arrived at by the
trial Court are not disputed before us. The
only question for determination before us is
a pure question of law. The facts neces-
sary for the decision of the question are
these: One Askaran had a son Bhikam-
chand who died in his life-time leaving a
widow Smt. Sukhdevi. Bhikamchand left a
daughter Kan Kanwari who was not implead-
ed as a party to this suit. Askaran was sepa-
rate from his brother Dhanraj but Askaran
and Bhikamchand constituted a joint Hindu
family. On the death of Bhikamchand his
coparcenary interest in the joint family prop-
erty went to Askaran by survivorship. Smt.
Sukhdevi had only a right of residence and
maintenance in the joint family properties.

3. On 7-2-1928 Askaran executed a will
in favour of his nephew Johrimal bequeathing
all his properties on him. In view of this
Smt. Sukhdevi asked for separate provision
to be made for her maintenance and resi-
dence. It may be stated here that Bhikam-
chand was living with Askaran in the family
dwelling house at Bidasar with his wife.
After his death Smt. Sukhdevi continued to
live in the same family dwelling house in
which her father-in-law was living.

4. Smt. Sukhdevi and Askaran appoint-
ed one Mool Chand Sethia as an arbitrator
and he gave an award Ex. 2 on 9-7-1934.
This award was accepted both by Askaran
and Smt. Sukhdevi and so far as the present
case is concerned it constitutes an agreement
between them. Under this award two alter-
natives were given to Smt. Sukhdevi. She
could either take a 'Haveli' and a 'Nohra'
described in the award at Bidasar for her
residence, or a 'Haveli' with 'Bakhal' at
Ladnu. The 'Haveli' offered to her at Bida-
sar was different from the family dwelling
house in which Askaran and Smt. Sukhdevi
were residing at that time. The award went
on to say that if she chose the house and
'Nohra' at Bidasar she would only get Rupees
37,000/- for her maintenance. If on the
other hand she chose the 'Haveli' and the
'Bakhal' at Ladnu she was to get Rupees
45,000/- for her maintenance. The sum of
Rs. 37,000/- or Rs. 45,000/- would become
her absolute property but the immovable
properties were given to her only for her
life-time. Para 3 of the award runs as fol-
lows:—

"3. Out of the properties stated in para Nos. 1 and 2, whichever property Smt. Sukhdevi wants to take, she will reside till her lifetime in them or in it and she can use it in any way she likes. On necessity she will get its repairs done with her own money. She will have no right to sell, mortgage or transfer in any other way. After her death the properties stated in para No. 1 or 2 (whichever she might take) will revert to Askaran, his heirs and legal representatives. Her right will be only in her lifetime. She is authorised to undertake construction for necessity and convenience. She may increase or decrease apartments with her money. But she will not be authorised to destroy, deteriorate its usefulness and condition, etc."

5. Smt. Sukhdevi chose the 'Haveli' and the 'Nohra' at Bidasar which were given to her and she went to reside in them.

6. On 24-4-1945 Askaran died. On 11-4-1960 Smt. Sukhdevi sold the western half of the 'Nohra' to Mangatmal defendant No. 2 by a registered sale deed Ex. 5 for Rupees 10,000/- and the eastern half of it to Trilokchand defendant No. 3 by means of a registered sale deed Ex. 6 for Rs. 10,000/-. The purchasers were put into possession of the 'Nohra' as owners.

7. The present suit was filed by Johnmal and his sons and grandsons for the following reliefs:—

"(a) That it be declared that the Haveli and Nohra described in the schedule annexed to this plaint belong to the plaintiffs and that the interest of the defendant No. 1 in these properties was created only to the extent of residence therein and use thereof during her lifetime, and further that she having relinquished her right of residence and user in the Nohra by transferring its possession to defendants Nos. 2 and 3 under sale-deeds dated 11th April, 1960, she has no more interest in the Nohra even during her lifetime;

(b) that it be declared that the two sale deeds dated 11th April, 1960 executed by defendant No. 1 in favour of defendants Nos. 2 and 3 in respect of western half and eastern half of the Nohra respectively are unauthorised and void and totally ineffective against the plaintiff's vested right of ownership in this Nohra;

(c) that the possession of the Nohra shown in the Schedule be given to the plaintiffs by ejecting defendants Nos. 2 and 3.

(d) That a permanent injunction may be granted against defendant No. 1 restraining her from transferring the Haveli and/or its possession to any person in any manner whatsoever."

8. The suit was resisted by all the defendants on the ground that on the coming into force of the Hindu Succession Act Smt. Sukhdevi became the full owner of the immovable properties allotted to her under the agreement entered into between her and

Askaran. The trial Court held that Smt. Sukhdevi had become the full owner of the properties given to her under the agreement referred to above by virtue of Section 14 (1) of the Hindu Succession Act. He did not consider whether sub-section (2) of Sec. 14 was applicable.

9. The contention on behalf of the plaintiffs-appellants before us is that as the properties were given to Smt. Sukhdevi under a written instrument which restricted her right, sub-section (2) of Section 14 is applicable and she did not become the full owner of these properties on the coming into force of the Act. On behalf of the respondents it was contended that sub-section (2) was not applicable. We have heard learned counsel for the parties and are of the opinion that sub-section (2) of Section 14 is applicable to the present case and the right of Smt. Sukhdevi is a restricted right, the terms of which are contained in agreement Ex. 2.

10. A widow's right to receive maintenance is one of an indefinite character which unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge exists. But where maintenance has been made a charge upon the property, and the property is subsequently sold, the purchaser must hold it subject to the charge. (See Mulla's Hindu Law, 13th Edition, para 569). A widow has a right of maintenance in all joint family properties but she has no title of any sort in those properties till a specific property or a portion thereof is allotted to her for her maintenance.

11. She has a right of residence in the joint family house in which she resided with her husband during his lifetime. (See Para 573, Mulla's Hindu Law). But some other property can be allotted for her residence after she becomes a widow and then her right is transferred to that property. If specific property is allotted to the widow for her residence then she gets some sort of title to this property.

12. Section 14 of the Hindu Succession Act runs as follows:—

"14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner:

Explanation.— In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way

of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

13. This section came up for interpretation before the Supreme Court in several cases which have been summarised in their decision in *Mangal Singh v. Smt. Rattno*, AIR 1967 SC 1786 and again in *Civil Appeal No. 1937 of 1966 (SC)*, *Badri Pershad v. Smt. Kanso Devi* — decided on 26-8-1969 (unreported). In *Mangal Singh's case*, AIR 1967 SC 1786 it was observed:—

"It may be noticed that the Explanation to Section 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words 'as full owner thereof and not as a limited owner' as given in the last portion of sub-section (1) of Section 14 clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership."

14. With regard to sub-section (2) of Section 14 it was held that it is an exception to Section 14 (1) and will only apply where the title of the widow to the property in question was created by the instrument, etc., and will have no application to a case where the deed, etc., merely recognised a pre-existing right.

15. Now when a specific property is allotted to a widow for maintenance, a restricted title is created in her favour in that property. Before the allotment of a specific property for her maintenance she had no title of any sort to any of the joint family properties. In our opinion the words in the explanation to Section 14 (1) "in lieu of maintenance" apply to property specifically allotted to a widow for her maintenance and the words "or in any other manner whatsoever" cover specific property allotted to her for her residence.

16. In the present case we have to see whether Smt. Sukhdevi had any title of any sort to the Nohra or the Haveli in Bidasar before they were allotted to her under the written agreement Ex. 2. We are firmly of the opinion that she had no sort of title in these properties although they were joint family properties and she was entitled to exercise the right of maintenance and residence against them. Her title in the Nohra and the Haveli at Bidasar was only created under the written agreement Ex. 2. Prior to the written agreement she was residing in another property with her father-in-law and she was exercising her right of residence in that property. Therefore, she acquired some sort of title to the Nohra and the Haveli at Bidasar under agreement Ex. 2 and conse-

quently the case falls under the exception enacted under sub-section (2) of Section 14.

17. A number of cases of this Court and of other High Courts were cited before us. Out of the cases which are relevant the following support the view which we have taken:—

Thatha Gurunadham Chetti v. Smt. Thatha Navaneethamma, AIR 1967 Mad 429; *Smt. Prema Devi v. Joint Director of Consolidation, Gorakhpur*, AIR 1970 All 238; *Vaddaboyina Sesha Reddi v. Vaddaboying Tulasamma*, AIR 1969 Andh Pra 300; *Mali Bewa v. Dadhi Das*, AIR 1960 Orissa 81; *Jaria Devi v. Shyam Sundar Agarwalla*, AIR 1959 Cal 338; *Damodhar Rao v. Bhima Rao*, AIR 1965 Mys 290.

18. We are unable to subscribe to the view taken in *Gadam Reddayya v. Varapula Venkataraju*, AIR 1965 Andh Pra 66. In that case a widow by name Challamma adopted the plaintiff some time after her husband's death early in 1935. Shortly thereafter, there were some disputes between the plaintiff and Challamma which were ultimately referred to some mediators for settlement. Ultimately it ended in settlement evidenced by Ex. A-8 by and under which she was given four acres of wet land and one acre of dry land to be enjoyed by her for her life and the rest of the property to be taken by the plaintiff in recognition of his rights as an adopted son. In that case Chellamma had no sort of title to the five acres of land which was allotted to her under settlement Ex. A. 8 before that settlement had taken place because by virtue of the adoption her adopted son had become owner of all the properties owned by her. Therefore in our opinion Section 14 (2) would be attracted in the case, there being no pre-existing right in the widow to specific properties allotted to her under the settlement.

19. Cases in which the Hindu Women's Rights to Property Act, 1937 is applicable are distinguishable as there the widow inherits the share of her husband in the joint family properties on his death and she has a pre-existing share in those properties. This title is a limited one but nevertheless it is a pre-existing title. Even if it is subsequently recognised by partition, by award or by a decree of the Court, Section 14 (2) is not attracted.

20. We accordingly hold that Smt. Sukhdevi did not become the full owner of the 'Nohra' and the 'Haveli' in dispute on the coming into force of the Hindu Succession Act because under the agreement Ex. 2 she had only a restricted life estate in the property. Under this agreement she is prohibited from selling, mortgaging or transferring these properties.

21. So far as relief (a) is concerned, it cannot be declared that the plaintiffs are the owners of the 'Haveli' and the 'Nohra' during the lifetime of Smt. Sukhdevi. Smt. Sukh-

devi will remain the limited owner of these properties with rights restricted as indicated in agreement Ex. 2. She has no right to sell, mortgage or transfer these properties. The properties will revert after her death to the plaintiffs.

22. We are also not satisfied that by executing sale deeds in favour of defendants Nos. 2 and 3 her rights in the properties granted to her under agreement Ex. 2 are extinguished altogether.

23. So far as relief (b) is concerned, we declare that the two sale deeds dated 11th April, 1960 executed by defendant No. 1 in favour of defendants Nos. 2 and 3 in respect of the western half and the eastern half of the 'Nohra' respectively are void and are not binding on the plaintiffs.

24. With regard to relief (c) we are not satisfied that the plaintiffs are entitled to possession over the 'Nohra' so long as Smt. Sukhdevi is alive. Learned counsel for the

plaintiffs has expressed an apprehension that if defendants Nos. 2 and 3 are not evicted they might claim adverse possession over the 'Nohra' under the two void sale deeds dated 11-4-1960. To allay this apprehension Shri R. K. Rastogi has acknowledged on behalf of defendants Nos. 2 and 3 that their possession will be merely permissive if this judgment is finally upheld and the plaintiffs will be entitled to possession over the 'Nohra' after the death of Smt. Sukhdevi.

25. So far as relief (d) is concerned, we grant a permanent injunction restraining Smt. Sukhdevi from selling, mortgaging or transferring the 'Haveli' or the 'Nohra' in future.

26. The appeal of the plaintiffs is allowed in part as indicated above. In the circumstances of the case we allow the parties to bear their own costs of this appeal and the suit.

Order accordingly.

E N D

defendants Nos. 1 and 2 on the other had been in possession of separate parcels of land, of which the descriptions are respectively given in Schedules 2 and 3 of the plaint. In para 5 of the plaint it was specifically asserted that despite the possession of the plaintiffs and the defendants over different parcels of the joint land, "the suit land is joint property possessed separately." In face of such pleadings, the trial Court was in patent error in holding that the plaintiffs had admitted in the plaint that final partition had been effected between them and the defendants Nos. 1 and 2.

5. Under issue No. (2) the Court held that some of the persons to whom, according to the admission of plaintiff No. 1 Nitya Sadhu Jamatia as P. W. 1, a part of the land comprised in jote No. 75 had been sold by the plaintiffs had not been impleaded and, as such, suit for partition was not properly constituted. Shri R. Ghosh, appearing for the plaintiffs-appellants, contended that since the names of the various persons to whom the plaintiffs had sold some areas out of jote No. 75 were elicited by the defendants only during the course of the cross-examination of the plaintiff Nitya Sadhu Jamatia, the proper course for the trial Court to follow was to give an opportunity to the plaintiffs to amend the plaint by bringing those vendees on the record as defendants and that it was altogether illegal for the Court to dismiss the suit on the basis of non-joinder of certain necessary parties to the suit.

I have found substance in this submission of the learned counsel for the appellants. Rule 9 of Order 1, Civil P. C. provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. There are admittedly a number of cases in which the Court cannot, under the substantive law deal with the rights and interests of the parties actually before it in the absence of certain other persons. As an instance, I may mention that the Court cannot, in a suit by a co-trustee for possession of the trust property, grant any relief to the plaintiff in the absence of all other co-trustees on the record, the reason being that all the co-trustees represent a single and indivisible right which cannot be adjudicated upon and no effective decree can be passed by the Court in their absence. Likewise, a partition suit will not be legally constituted if all the co-owners of the properties involved in the suit are not brought on the record. In such cases, the obvious course open to the Court is to bring the necessary parties on the record under Rule 10 of Order 1.

Sub-rule (2) of Rule 10 enjoins that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. The combined reading of Rule 9 and Rule 10 (2) plainly yields the conclusions, (1) that a suit cannot be dismissed on the basis merely of non-joinder of parties, and (2) that power vests in the Court to bring on the record any person who is a necessary party to the suit and in whose absence it is not possible for the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. It would follow that it was obligatory on the Court either to give an opportunity to the plaintiffs to implead those persons in the suit to whom some parts of the land covered by jote No. 75, according to the statement of Nitya Sadhu Jamatia plaintiff, had been sold, or to straightway implead those persons as parties on its own initiative. The Court was clearly not justified in dismissing the suit on the short ground that in the absence of all the co-owners on the record the suit was not properly constituted.

6. As a result, I allow the appeal, set aside the judgment and decree of the trial Court, and remand the case to the trial Court with the direction that it should be entered at its old number and an opportunity given to the plaintiffs to bring on the record such persons to whom any of them may have sold some parcels of the land covered by jote No. 75. Those persons then shall be summoned and the case tried afresh after framing additional issues as may arise from the pleadings of the persons newly brought on the record.

7. Before parting with the case, I would like to state that while discussing the trial Court's finding on issue No. (1) I should not be taken to have held that partition by metes and bounds as pleaded by defendants Nos. 1 and 2 had not been proved. The only conclusion recorded by me is that on the basis of the pleadings adopted by the plaintiffs it is not possible to hold that such a partition had been effected. The trial Court would give its own finding afresh on that issue after taking into consideration the pleadings of the parties and all other data available on the record.

8. Taking all the circumstances into consideration, I have decided to leave the parties to bear their own costs of this appeal and order accordingly.

Order accordingly.

AIR 1970 TRIPURA 82 (V 57 C 21)

R. S. BINDRA, J. C.

Nishi Kumar Das, Petitioner v. Durga Charan Saha Roy, Respondent.

Civil Revn. No. 23 of 1967, D/- 30-3-1970, From order of Addl. Sub-J., Tripura, D/- 21-2-1967.

(A) Civil P. C. (1908), Order 17, Rules 2 and 3 — Case adjourned because Presiding Officer was on leave — Date adjourned is not for hearing of case — Decree passed on such date will fall under Rule 2 and not under Rule 3.

Where, after the plaintiff's evidence recorded on commission was filed, the case was adjourned, because the Presiding Officer was on leave, the adjourned date cannot be for the hearing of the case. In such case, it is obligatory for the Court to issue notice to defendant for appearance. Court passing a decree on plaintiff's evidence taken on commission, cannot be one under Order 17, R. 8 on contest and is liable to be quashed.

(Paras 2, 8)

(B) Civil P. C. (1908), Order 3, Rule 1 — Pleadar can move application on behalf of client.

A counsel, duly appointed by a defendant, has necessary sanction to move an application to set aside an ex parte decree passed against his client. The application need not be signed and filed by the defendant himself. AIR 1929 Lah 96 & AIR 1944 All 238, Rel. on.

(Para 4)

(C) Civil P. C. (1908), Order 26, Rule 9 — Evidence on commission when may be read as evidence in suit — Party must satisfy Court that its case falls within ambit of Rule 8 (a) or must secure specific order from Court under Clause (b) — Where this is not done, suit cannot be decreed on basis of evidence recorded on commission. (Para 9)

Cases Referred: Chronological Paras

(1944) AIR 1944 All 238 (V 31) =
ILR (1944) All 592, Jwala Devi v.
Bhrgunath 5, 0

(1929) AIR 1929 Lah 96 (V 16) =
ILR 10 Lah 570, Abdul Aziz v.
Punjab National Bank Ltd. 5

M. R. Choudhury, for Petitioner; J. K. Roy,
for Respondent.

ORDER:— Durga Charan Saha Roy, the respondent in the present revision petition, filed Money Suit No. 37 of 1965 against the Nishi Kumar Das, the petitioner herein for the recovery of Rs. 168.75 in the Court of Munsiff, Belonia. The suit was fixed for recording parties' evidence on 21-5-1966. Before that date only the evidence of the plaintiff Durga Charan had been recorded

on commission. When the case was called on 21-5-1966, none put in appearance on behalf of the defendant and so the suit was decreed on the basis of plaintiff's evidence taken on commission. A short while after on the same date, Shri Jadunandan Datta, the Advocate of the defendant, moved an application on behalf of the defendant for setting aside the decree, which he described as ex parte, and deciding the suit afresh on hearing the arguments of the parties' counsel. That application was dismissed on 12-8-1966 on the finding that the decree dated 21-5-1966 was not ex parte, it having been made under Rule 3 of Order 17 of the Civil Procedure Code, hereinafter called the Code, and that as such an application under O. 9, Rule 13 of the Code was not the proper remedy for getting rid of the decree. Having felt aggrieved, Durga Charan Saha Roy went in appeal to the Court of Shri S. M. Ali, Additional Subordinate Judge, Agartala. Shri S. M. Ali differed from the trial Court on the point that the decree had been made under Order 17, Rule 3, of the Code. In his opinion, that provision of the law was not attracted because the suit had been adjourned to 21-5-1966 not on the prayer of the defendant but in normal routine by the Court itself. He, therefore, held, speaking virtually, that the suit had been decreed ex parte. However, Shri S. M. Ali rejected the appeal on 21-2-1967 on the finding that the application for setting aside the ex parte decree had been made not by the defendant himself but by his counsel and that the counsel had no legal authority to do so. The instant revision petition is directed against the orders made by the trial Court on 12-8-1966 and the first appellate Court on 21-2-1967.

2. A reference to the order-sheet of the trial Court brings out that on 7-5-1966, the date preceding the one on which the suit was decreed, namely, 21-5-1966, the presiding officer of the Court was on leave. On that date it transpired that the Commissioner, appointed for recording the statement of the plaintiff, had submitted his report along with the relevant documents. Some official of the Court made an order adjourning the suit to 21-5-1966 for peremptory hearing. It does not take long to conclude that the Court official had no jurisdiction to fix the case for hearing, that being the exclusive privilege of the presiding officer. At the best, the Court official could have adjourned the case to some date for being put up before the presiding officer for proper orders. Therefore, 21st of May, 1966, could not be a date for hearing of the case in the eye of law, and as a consequence the suit could not be taken up by the Court for hearing in the absence of the defendant. It was the legal obligation of the Court to issue notice to the defendant for appearance. The decree made on that date cannot stand. The defendant can legitimately demand that that decree should be quashed and suit proceeded with.

3. The order made on 21-5-1966 is a brief one and so I am tempted to reproduce it in full. It runs as under:

"The plaintiff's side present. The defendant absent without taking any step.

I P. W. has been examined and cross-examined and the case of the plaintiff has been proved. Hence ordered that the suit be decreed on contest for Rs. 168.75 with costs."

Evidently, the proceedings in the Court on 7-5-1966 and 21-5-1966 do not establish that either the suit had been adjourned on the former date to the latter at the request of the defendant under Order 17, Rule 3, or that it was decreed on 21-5-1966 on contest. The defendant made no request to Court on 7-5-1966 to adjourn the case to 21-5-1966 and so that adjournment would fall under Order 17, Rule 2. The defendant being absent on 21-5-1966, the question of contest on his behalf could not arise and as such the Munsiff who decreed the suit was not fair in stating that the suit had been decreed on contest. Hence, I agree with the first appellate Court that the trial Court was wrong in holding that the suit had been decreed under Order 17, Rule 3, and that the proper course for the defendant to follow for challenging the decree made was to go in appeal rather than move an application under O. 9, Rule 13. I therefore feel satisfied that the defendant had the legal right to move an application under Order 9, Rule 13, because the suit must be considered in the eye of law to have been decreed ex parte despite the recital in the body of the order dated 21-5-1966 that it had been disposed of on contest.

4. This brings us to the consideration of the question whether Shri S. M. Ali was justified in rejecting the appeal on the basis that it was the defendant and not his counsel who could have moved an application under Order 9, Rule 13. The rights and the obligations of the Pleaders are defined in Order III of the Code. The expression "Pleader" is defined in Section 2 (15) of the Code to mean any person entitled to appear and plead for another in Court, and includes an advocate, a Vakil and an Attorney of a High Court. Rule 1 of Order III of the Code runs as under:

"Any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader (appearing, applying or acting, as the case may be), on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person."

On plain reading of this Rule I see no escape from the conclusion that a Pleader

duly appointed by a party can move an "application" on his behalf provided there is no provision to the contrary in law respecting that application just as an application made by a pauper — vide Order 33, Rule 4, of the Code. Surely the document dated 21-5-1966 which was presented to the Munsiff's Court by Shri Jadunandan Datta, the Advocate of the defendant, soon after the suit was decreed falls in the description of an "application", inasmuch as the prayer made in that document was for setting aside the ex parte decree and Rule 13 of Order 9, envisages an application for such a prayer. Article 123 of the Limitation Act, 1963, prescribing the period for moving the Court for setting aside an ex parte decree forms part of Third Division of the schedule to the Act and that Division bears the heading "Applications". Part I of that Division, again, is headed "Applications in specified cases", and it is under that Part that Article 123 falls. Hence, there can be no manner of doubt that it was an "application" which Shri Jadunandan Datta had moved in the Munsiff's Court on 21-5-1966 praying for setting aside the ex parte decree. It would, therefore, follow that that Advocate had the necessary legal sanction to move the application on his own by virtue of the Vakalatnama which had been executed in his favour by the defendant. Consequently, Shri S. M. Ali was in error in holding that the Advocate could not have moved the application and that it was obligatory that the application should be signed and filed by the defendant himself.

5. The conclusion reached by me gathers support from the authorities reported in AIR 1929 Lah 96, Abdul Aziz v. Punjab National Bank, and AIR 1944 All 238, Jwala Devi v. Bhrigunath. The Lahore High Court held that the authority of the counsel depends on the terms of the power-of-attorney, if any, granted by his client, and in the absence of such an authority, on the intention of the parties, express or implied, and that the general practice in such cases is a good indication of implied authority. It was held further that the provisions of Rule 4 (2) of Order 3 are wide enough to cover the case of an application for restoration of a suit dismissed in default, as all proceedings in the suit are not ended so far as regards the party, merely by its dismissal in default or by an ex parte decree, which part of the proceedings is liable to be set aside on an application and the case restored to its original number. It might be appropriately mentioned here that when the suit of the respondent Bank in the reported case was dismissed in default, an application for its restoration was moved on the same date by the counsel on his own and without securing the signature thereon of any other authorised agent of the Bank. Therefore, the facts of this Lahore case are on all fours identical with those of the case in hand.

6. The Allahabad High Court held in the case of Jwala Devi, AIR 1944 All 238 (supra) that where the vakalatnama filed by the vakil for the defendant in a suit is in the usual terms giving the vakil the power to apply for execution of the decree, which would necessarily be a stage after the decision of the suit, in the absence of any expression indicating limitation on his powers it would be necessarily implied that the vakil has the authority to do everything that was essential for the proper conduct of the case, and if the case had been decided *ex parte* it must be held that there was an implied authority given to the vakil to have that order set aside and the case heard on merits. The application for setting aside the *ex parte* decree, it may be appositely stated, was signed by the vakil in whose favour the vakalatnama had been issued by the defendant and not by the latter himself. The facts of the Allahabad case are also, therefore, identical with those of the present case.

7. Shri J. K. Roy, appearing for the plaintiff-respondent, was unable to cite any authority to the contrary. I would, therefore, hold that Shri S. M. Ali was wrong in his conclusion that the application for setting aside the *ex parte* decree could not have been legally filed by the counsel of the defendant.

8. It was stated in the application filed by the counsel Shri Jadunandan Datta on 21-5-1966 that he had visited the Court early in the day and had learnt on enquiry that the plaintiff had not filed "any *tadbir* or *hazira* of the witnesses", that he was ready to argue the case, and that the case was called and decreed *ex parte* when he was busy in another Court. I see no adequate justification for not taking the counsel at his word, especially when it was not denied on behalf of the plaintiff-respondent during the course of arguments in this Court that no witness had come to the Court on behalf of the plaintiff on 21-5-1966 and when it is obvious that the suit was decreed only on the basis of the statement of the plaintiff which had been recorded on commission.

9. It is germane to point out that according to Rule 8 of Order 26 of the Code, evidence taken on a commission cannot be read as evidence in the suit without the consent of the party against whom the same is offered, unless —

(a) the person who gave the evidence is beyond the jurisdiction of Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorises evidence of any person being read as evidence in the suit, notwithstanding proof that the

cause for taking such evidence by commission has ceased at the time of reading the same.

It was therefore obligatory for the plaintiff to satisfy the Court, before his evidence recorded on commission could be read as evidence in the suit, that his case fell within the ambit of clause (a) of Rule 8 or to secure a specific order from the Court under cl. (b) of that Rule. Nothing of the kind appears to have been done when the case was disposed of on 21-5-1966. Therefore, the Munsiff was clearly in error in decreeing the suit on the basis of plaintiff's evidence taken on commission. That evidence was not admissible for the reasons just mentioned.

10. As a result, I accept the revision petition, quash the Munsiff's order dated 12-8-1966 and that of the first appellate Court dated 21-2-1967, and on allowing the application dated 21-5-1966 set aside the *ex parte* decree. The case is remanded to the trial Court for disposal according to the provisions of law. The suit shall be re-entered at its old number. Taking all the circumstances into consideration, I leave the parties to bear their own costs in all the Courts regarding the application for setting aside the *ex parte* decree.

Revision accepted.

AIR 1970 TRIPURA 84 (V 57 C 23)

R. S. BINDRA, J. C.

Monoranjan Chakraborty, Petitioner v. State, Respondent.

Criminal Revn. Petn. No. 32 of 1968, D/- 15-11-1969, from order of S. J., Tripura, D/- 5-8-1968.

(A) Criminal P. C. (1898), Section 68 and Schedule V — Form of summons — Effect of non-observance of formalities.

Schedule V is as much a part of the Code as any other portion of it, and as such non-compliance with the requirements of the forms in that Schedule cannot be treated lightly, especially when essential features, like the nature of the offence charged, are not outlined in the summons issued. (Para 4)

(B) Criminal P. C. (1898), Sec. 204 (1B) — Issue of process — Copy of complaint to accompany process — Provision however directory.

Section 204 (1B) gives the accused a correct idea of the allegations made against him from the moment the summons is served on him. If, however, neither the summons itself contains the particulars of the offence charged, nor it is accompanied by a copy of the complaint, the person summoned is faced with difficulty. A combined reading of Section 68 (1) and Section 204 (1B) of the Code indicates that the Legislature desires that an accused should know immediately the summons is served on him the

particulars of the offence with which he is charged in the complaint filed in writing. It is, therefore, desirable that the summons should be complete in all respects and it should also be accompanied by a copy of the complaint if the proceedings are instituted against him upon a complaint in writing. However, non-compliance with the provisions of Section 204 (1B) does not invalidate or nullify the issue of process because the provisions are merely directory and not mandatory. AIR 1961 Cal 648 & AIR 1961 Punj 171, Foll. (Para 6)

Cases Referred: Chronological Paras

- (1961) AIR 1961 Cal 648 (V 48) =
1961 (2) Cri LJ 762, Brahma Panda
v. Chairman of Howrah Municipa- 6
lity
(1961) AIR 1961 Punj 171 (V 48) =
1961 (1) Cri LJ 553, Ram Narain 6
v. Bishamber Nath

ORDER:— The present revision petition by Monoranjan Chakraborty illustrates in a telling manner that a small slip in procedural matters by a Court may furnish an occasion to a litigant to stall the proceedings for a long time and occasionally for years together. Hence, the dire necessity for the Presiding Officer of a Court and the staff attached to it to exercise eternal vigilance in carrying out their respective functions to ensure that nothing goes amiss so far as they are concerned.

2. A complaint was lodged against the present petitioner Monoranjan Chakraborty and 4 others in the Court of Shri T. L. Datta, Magistrate first class, Kamalpur, on 3-6-1968 by the Divisional Forest Officer. All the accused including Monoranjan Chakraborty were summoned in due course. The summons issued to Monoranjan Chakraborty marked "A" is on the file of the Criminal Motion No. 156 of 1968 of the Sessions Judge, Tripura. The summons was served on Monoranjan Chakraborty on 25-7-1968 by a forest guard. Monoranjan Chakraborty felt that the summons issued to him was not in the form prescribed by the Criminal Procedure Code and so he moved a revision petition in the Court of the Sessions Judge praying that the latter should recommend to this Court that the summons issued to him be quashed and his acquittal directed. A large number of objections were raised in the revision petition against the validity of the summons. The Sessions Judge dealt only with the main contentions raised before him during the course of arguments, namely, (1) that the summons had not been accompanied by a copy of the complaint as enjoined by sub-section (1-B) of Section 204 of the Code, (2) that summons did not mention the offence with which Monoranjan Chakraborty had been charged, and (3) that the summons had not been happily drafted. However, he rejected the revision

petition with the observation that though it is legally necessary that the summons be accompanied by a copy of the complaint and it should mention the offence with which the accused is charged, but these omissions are curable under Section 537 of the Code. It was also observed by the Sessions Judge that such errors and omissions as had been debated before him could also be cured by subsequent compliance with the provisions of the law. In the last para of the order rejecting the revision petition, the Sessions Judge invited the attention of the Magistrate to sub-section (1-B) of Section 204 of the Code and suggested to him to issue a fresh summons to Monoranjan Chakraborty in accordance with the provisions of law.

3. The order made by the Sessions Judge could obviously have served the purpose which, according to the grounds mentioned in the revision petition, Monoranjan Chakraborty wanted to accomplish. However, it appears to me that Monoranjan Chakraborty had an objective different from that apparently set out in the revision petition moved in the Sessions Court. It was to delay, and possibly to defeat, the trial of the complaint lodged against him and others. I think he has succeeded in achieving both the objectives, one mentioned in the revision petition and the other he had in his mind, namely, to delay the trial, and which perhaps was more important from his standpoint. This view is reinforced by non-appearance of either the petitioner or his counsel when the petition came up for hearing before this Court on the 13th of this month.

4. Section 68 (1) of the Code states that every summons issued by a Court shall be in writing in duplicate, signed and sealed by the Presiding Officer of the Court, or by such Officer as the High Court may, from time to time, by rule, direct. Section 555 of the Code provides that subject to the power conferred by Section 554, and by Article 227 of the Constitution, the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient. Form No. 1 of Schedule V is the form of summons issued to an accused person. According to that form, the particulars of the offence charged have to be mentioned in the summons issued to the accused. Undeniably, the summons marked "A" issued to Monoranjan Chakraborty did not mention the offence charged against him. Therefore, very clearly the summons issued to him was legally defective. It may be pointed out that schedule V is as much a part of the Code as any other portion of it, and as such non-compliance with the requirements of the forms in that schedule cannot be treated lightly, specially when essential features, like the nature of the offence charged, are not outlined in the summons issued. Since in the present case the petitioner challenged the validity of

the summons issued to him at the earliest stage, it is only fit and proper that a direction be issued to the trial Court that a fresh summons in conformity with the provisions of the law be sent to the petitioner.

5. However, I regret that Monoranjan Chakraborty should have come up in revision instead of putting in appearance before the trial Court and requesting it to furnish him with the necessary particulars of the charge. The summons is merely a means of procuring attendance of the accused and once Monoranjan Chakraborty had learnt through a summons that he was required to appear before the Court to answer a charge, he should have, in fairness to the Court, put in appearance. He could have then requested the Court to supply him with the requisite information to enable him to meet the charge levelled against him.

6. Another serious lacuna noticeable and pointedly mentioned in the revision petition is that the summons was not accompanied by a copy of the complaint as required by sub-section (1-B) of Section 204 of the Code. The real purport of that statutory provision unmistakably is to give the accused a correct idea of the allegations made against him right at the moment the summons is served on him. If, however, neither the summons itself contains the particulars of the offence charged, nor the summons is accompanied by a copy of the complaint, as in the instant case, the person summoned undoubtedly is faced with difficulty. A combined reading of Section 63 (1) and Section 204 (1-B) of the Code would indicate that the Legislature desires that an accused should know immediately the summons is served on him the particulars of the offence with which he is charged in the complaint filed in writing. It is, therefore, highly desirable that the summons should be complete in all respects and it should also be accompanied by a copy of the complaint if the proceedings are instituted against him upon a complaint in writing. However, there is abundant authority for the proposition that non-compliance with the provisions of sub-section (1-B) of Section 204 does not invalidate or nullify the issue of process because the provisions are merely directory and not mandatory. Reference in this connection may be made to the cases of *Brahma Panda v. Chairman of Howrah Municipality*, AIR 1961 Cal 648, and *Ram Narain v. Bishamber Nath*, AIR 1961 Punj 171. I think the view expressed in these two authorities is quite sensible if only because non-compliance with the provisions of sub-section (1-B) can be cured by a subsequent compliance therewith. When the accused puts in appearance in obedience to the summons issued, he can request the Court to supply him with a copy of the complaint and thereby get over the difficulty, if any, created for him by non-communication to him earlier of the allegations mentioned in the complaint.

7. For the reasons stated and the conclusions recorded above, I accept the revision petition and direct the Magistrate to re-issue a summons in the proper form to the petitioner accompanied by a copy of the complaint. The file should be immediately sent to the Magistrate to avoid any further loss of time in proceeding with the case.

Revision allowed.

AIR 1970 TRIPURA 86 (V 57 C 23)

R. S. BINDRA, J. C.

Union of India (in all cases), Petitioner v. R. D. Gupta and another, Respondents.

Civil Misc Petns. Nos. 82, 87, 88, 92, 93 and 94 of 1968, D/- 17-11-1969, from order of this Court, D/- 23-12-1967.

(A) Constitution of India Article 133 (1) — Final order — Meaning of.

The final order under Article 133 (1) is one which finally determines the dispute thrown up by the civil proceeding filed in the Court and not the dispute which will arise out of a civil proceeding which may be filed in the Court in future.

Where the only matter in controversy was whether the Arbitrator had to be appointed in terms of the arbitration clause or that clause was vague in the matter of selection of the arbitrator and so it was for the Court to name an arbitrator and this dispute was finally determined by the High Court the order of the High Court is a final order within Article 133 (1). (Para 6)

(B) Constitution of India, Article 133 (1) — Civil Proceeding — What is.

The expression "civil proceeding" in Article 133 (1) is wide enough to cover any proceeding of a civil nature decided by the High Court, whether in its original, appellate or revisional jurisdiction. Further, if the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding. (Para 8)

(C) Civil P. C. (1903), Section 11 — Res judicata — Issue of law.

Section 11 contemplates the bar of res judicata not only respecting the suit as a whole but also concerning an issue decided in a suit, and it is well settled that an issue of law can also be barred by the principle of res judicata. (Para 3)

(D) Constitution of India, Article 133 (1) (c) — Substantial question of law.

Where a clause in an agreement regarding the appointment of Arbitrator is vague, the question whether the arbitration agreement is void and not binding on the parties or the Court can appoint an arbitrator is a point of great public importance and should be decided by the Supreme Court. There is also conflict of decisions on this point among High Courts. (Para 2)

Cases	Referred:	Chronological	Paras
(1964) AIR 1964 Tripura 27 (V 51) =	R. D. Gupta v. Union of India		2
(1956) AIR 1956 All 457 (V 43) =	ILR (1956) 1 All 593 (FB), Moh-		6
	mood Hasan Khan v. Govt. of Uttar Pradesh		
(1956) AIR 1956 Punj 205 (V 43) =	ILR (1956) Punj 488, Delhi and		
	Finance Housing and Construction		
	Ltd. v. Brij Mohan Shah	2, 4	
(1955) AIR 1955 Cal 257 (V 42) =	95 Cal LJ 160, Union of India v.		
	Nalini Ranjan	5, 6	
(1955) AIR 1955 Cal 588 (V 42),	Luxmi Chand v. Kishanlal	4	
(1955) AIR 1955 Punj 172 (V 42) =	57 Pun LR 192, Union of India		
	v. New India Constructors	2	
(1950) 85 Cal LJ 136, Ganpatrai	Gupta v. Moody Bros. Ltd.	4	

H. C. Nath Govt. Advocate, for Petitioner (In all cases); R. D. Gupta, in person (In all cases).

ORDER:— This order will dispose of Civil Misc. petitions Nos. 82, 87, 88, and 92 to 94 filed by the Union of India under Article 133 of the Constitution since the points involved for decision in all of them are exactly identical and the Civil revision petitions to which they pertain were disposed of by a common judgment dated 23rd of December, 1967, by the then Judicial Commissioner Shri Jagannadhacharyulu. The dispute between the parties centred round the interpretation of an arbitration clause contained in the various contracts of construction entered into by the Union of India with the respondents. That arbitration clause provided, in four out of the six cases we are to deal with, that if and when disputes of the nature mentioned therein arose between the parties they shall be referred to the arbitration of the Chief Engineer/Additional Chief Engineer, Central P. W. D., while in the other two cases such disputes were to be referred to the arbitration of Additional Chief Engineer, Central P. W. D. The respondents herein, after the disputes arose between the parties, moved six independent applications under Section 20 of the Arbitration Act in the Court of Subordinate Judge, Tripura, praying for appointment of an arbitrator in each case of its own choice since the arbitration clause contained in the contracts was vague in the matter of choosing the arbitrator. The vagueness pleaded qua the four contracts was that no method was provided to choose either the Chief Engineer or the Additional Chief Engineer to work as arbitrator, and respecting the other two contracts it was urged that there are large number of Additional Chief Engineers of the Central P. W. D. and so in the absence of any determining factor in the contracts it is not possible to say whom to appoint as an arbitrator. The Subordinate Judge did not accept the contention that the arbitration clause was vague in any manner

and so it gave the choice to the parties either to accept the Chief Engineer of the Central P. W. D. as the arbitrator or the Additional Chief Engineer, Zone II, of the Central P. W. D. Having felt aggrieved with the order of the Subordinate Judge, the respondents filed six revision petitions in this Court.

My learned predecessor Shri Jagannadhacharyulu accepted the revision petitions on holding that the arbitration clause was clearly vague and so it was the function of the Court to name an arbitrator in each case. He consequently appointed Shri G. N. Dutta a (retired Chief Engineer) of Gauhati as the sole arbitrator in all the six cases. It is against that order that the Union of India has moved the instant six applications seeking certificates authorising it to file appeals in the Supreme Court.

2. Shri H. C. Nath, the learned Government Advocate, raised two points to support the contention that a good case has been made out for issuing certificate under cl. (c) of Article 133 (1) of the Constitution. According to that clause, an aggrieved party can file an appeal in the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the Territory of India if the High Court certifies that the case is a fit one for appeal to the Supreme Court. In the first place, Shri H. C. Nath submitted that the view taken by Shri Jagannadhacharyulu is directly opposed to the opinion expressed by Shri Tirumalpad, another Judicial Commissioner of this Court, in the case of R. D. Gupta v. Union of India, AIR 1964 Tripura 27. That case, it will be noted, was also between the parties which are arrayed against each other in the present petitions. Shri H. C. Nath emphasised that in view of conflict between two judgments of this Court it is necessary that the matter should go to the Supreme Court for authoritative pronouncement to avoid embarrassment to the Subordinate Courts. He stated further that arbitration clause of the nature at anvil is incorporated in a large number of contracts made between the Union of India and the Government contractors working in this Territory and so it is necessary that the legal question involved should be decided by the highest Court in the realm.

There is no difference between the parties on the points. I may mention, that Shri Tirumalpad happened to interpret an arbitration clause which is exactly identical with that which came up for interpretation before Shri Jagannadhacharyulu, and that the views expressed by the two Judicial Commissioners are diametrically opposed to each other and are so wholly irreconcilable. Since, indisputably, such arbitration clause finds mention in a large number of contracts entered into between the Union of India and Government contractors, it is fit and proper that the matter should be authoritatively decided. It is in order to point out that in

two cases, decided by the Punjab High Court and reported in AIR 1955 Punj 172, *Union of India v. New India Constructors*, and AIR 1956 Punj 205, *Delhi and Finance Housing and Construction Ltd. v. Brij Mohan Shah*, an identical arbitration clause was incorporated in the contracts out of which the disputes arose, and that in the first mentioned case the parties did not challenge the validity of the clause on the ground of its being vague, while in the second case the clause was declared to be vague and the arbitration agreement was held not binding on the parties, being void. In face of this conflict of authorities, I agree with Shri H. C. Nath that the present case is a fit case for going in appeal to the Supreme Court. The point in controversy is clearly of great public importance.

8. The second point urged by Shri H. C. Nath was that the previous decision by Shri Tirumalpad operates as *res judicata* between the parties. He submitted further that the present respondent had moved the Supreme Court under Article 136 of the Constitution for special leave to appeal against the judgment of Shri Tirumalpad but that prayer was rejected. Shri R. D. Gupta, the respondent herein and who argued the case personally in this Court, admitted at the bar that he had gone to the Supreme Court against the judgment of Shri Tirumalpad seeking special leave to appeal but his prayer was not allowed. Section 11 of the Civil Procedure Code, it will be noticed, contemplates the bar of *res judicata* not only respecting the suit as a whole but also concerning an issue decided in a suit, and it is well settled that an issue of law can also be barred by the principles of *res judicata*. Hence, the second point urged by Shri H. C. Nath is also quite substantial and weighty.

4. A legal question of far-reaching consequences that appears to have escaped attention so far, on all hands, is that if the arbitration agreement is vague, as contended by the respondent and as held by Shri Jagannadhacharyulu, then that agreement in terms of Section 29 of the Contract Act would be void. That section provides in unambiguous language that agreements, the meaning of which is not certain, or capable of being made certain, are void.

The Punjab High Court held in the case of *Delhi and Finance Housing and Construction Ltd.*, AIR 1956 Punj 205 (*supra*) that the arbitration agreement of the nature involved in the present cases is vague because of uncertainty and as such void and not binding on the parties. It is on that finding that the High Court dismissed the application made by the defendant under Section 34 of the Arbitration Act for stay of the suit filed against it (the defendant). In support of that conclusion, the Punjab High Court placed reliance on the cases of *Ganpatrai Gupta v. Moody Bros. Ltd.*, (1950) 85 Cal LJ 138,

and *Luxmi Chand v. Kishanlal*, AIR 1955 Cal 588. In each of these two cases the arbitration agreement was found to be vague and uncertain and the arbitration clause in consequence was declared to be invalid. If, therefore, the arbitration agreement concluded between the parties before this Court is actually vague and uncertain respecting the choice of the arbitrator, then nothing out of it survives to be binding on the parties. In that event, the order of this Court appointing Shri G. N. Dutta as the sole arbitrator would become unsustainable, and the respondent shall be left with no alternative but to file a regular suit for appropriate relief in the Civil Court having jurisdiction in the matter.

5. Shri R. D. Gupta raised two objections against the maintainability of the petitions filed by the Union of India. In the first instance, he urged that Shri G. N. Dutta, the sole arbitrator, having died during the pendency of the present petitions, the petitions have become infructuous. To reinforce that contention, he relied on the authority of AIR 1955 Cal 257, *Union of India v. Nalini Ranjan*. That case is clearly distinguishable on facts. Bachawat, J., of the Calcutta High Court had by an order appointed an arbitrator between the parties in an application made under Section 8 of the Arbitration Act, and the Union of India petitioned the High Court for certificate of fitness of appeal to the Supreme Court against that order. It transpired, when that application came up for hearing, that the arbitrator appointed by Bachawat, J., had died in the meantime. A Division Bench of the High Court held that the petition for leave to appeal was not maintainable in view of clause (d) of Article 133 (1) of the Constitution which provides that no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Das Gupta, J., one of the Judges constituting the Division Bench, observed in addition that as a result of the death of the arbitrator the parties are relegated to the same position which prevailed when the application under Section 8 of the Arbitration Act was made and that the order appointing the arbitrator had consequently become infructuous. Obviously, there the dispute did not relate to the exact scope of the arbitration agreement but the difference between the parties centered round the point as to who should be appointed an arbitrator. As against that, the dispute that arises for determination in the cases in hand is more deeper. It is whether one of the officers mentioned in the arbitration clause is to work as an arbitrator, or that clause is void because of vagueness and some arbitrator other than those officers has to be named by the Court. Therefore, with the death of Shri G. N. Dutta the parties are not relegated to their original position. Unlike the Calcutta case, the dispute between

the parties is not about naming the arbitrator but the manner in which he should be named, apart from two other serious contentions which require determination, namely (1) whether the dispute is barred by *res judicata*, and (2) whether the arbitration agreement would survive if it is really vague as contended by the respondent in each of the six cases. Consequently, I reject the first objection raised by Shri R. D. Gupta.

6. The second point urged by Shri R. D. Gupta was that the order dated 23rd of December, 1967, of this Court is neither a judgment nor a decree nor a final order within the meaning of Article 133 (1) of the Constitution, and as such the certificate claimed by the Union of India cannot be issued. He cited the cases of *Nalini Ranjan*, AIR 1955 Cal 257 (supra) and *Mohmood Hasan v. Government of Uttar Pradesh*, AIR 1956 All 457 (FB), to support that contention. The Allahabad High Court outlined the conditions which must be satisfied before an order can be described as a final order within the meaning of Article 133 (1). Those conditions are, (1) that the order should not be an interlocutory order, (2) that even though it is an order which disposes of the proceeding before a Court finally, it should not be an order which leaves the original proceeding in the Court below alive, and (3) that there should be a final determination of the rights of the parties or the order must of its own force dispose of the rights of the parties. I think all these three conditions are satisfied in the present case. Without doubt, the impugned order is not an interlocutory order. Further, that order finally disposes of the case filed before the Subordinate Judge. And, lastly, the rights of the parties which were debated firstly before the trial Court and then before this Court were finally determined. Shri R. D. Gupta argued that since only the question of appointment of an arbitrator has been decided between the parties and not the main dispute arising from the execution of the contract which the arbitrator is yet to determine, it cannot be urged by the Union of India that the disputes between the parties have been finally determined.

I regret I cannot accept that contention as valid. The final order contemplated by Article 133 (1) is an order which finally determines the dispute thrown up by the civil proceeding filed in the Court and not the dispute which will arise out of a civil proceeding which may be filed in the Court in future. In the applications moved by the respondent in the Court of the Subordinate Judge at Agartala, the only matter in controversy was whether the arbitrator had to be appointed in terms of the arbitration clause or whether that clause was vague in the matter of selection of the arbitrator and so it was for the Court to name as arbitrator. That dispute between the parties was finally determined by this Court by its order dated

23rd of December, 1967. Therefore, that order, in my opinion, is a final order within the meaning of Article 133 (1).

7. The Calcutta authority is also of no help to Shri R. D. Gupta. There it was held, in a case filed under Section 8 of the Arbitration Act, that an order appointing an arbitrator decides no question of right between the parties and as such it is not a final order appealable under Article 133. As stated earlier, the dispute had arisen between the parties in that case because they could not agree on an individual to work as an arbitrator and so the Court had been approached under Section 8 of the Act to appoint an arbitrator. However, in our case the dispute is of an altogether different nature. It relates to the exact scope of arbitration agreement entered into between the parties. The respondent, I may appropriately mention, had moved the applications under Section 20 of the Arbitration Act. Such an application had to be and was registered as a suit, and that suit, it is obvious, has been finally disposed of by this Court's order. A final order, in the sense that expression is used in Article 133 (1), is an order which finally determines the points in dispute in the civil proceeding and brings it to an end. This test is fully satisfied respecting the order in dispute. Hence, I repel the second submission made by Shri R. D. Gupta as well.

8. The last point urged by Shri R. D. Gupta, though in a luke-warm manner, was that the dispute between the parties is not respecting a civil proceeding. The expression "civil proceeding" used in Article 133 (1) is wide enough to cover any proceeding of a civil nature decided by the High Court, whether in its original, appellate or revisional jurisdiction. Further, if the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding. Judged by those tests, I feel no difficulty in holding that the impugned order was made in a civil proceeding.

9. As a result, I accept all the six petitions and direct that a certificate do issue in each one of them under clause (c) of Article 133 (1) of the Constitution. However, I make no order as to costs of these petitions.

Certificates issued.

AIR 1970 TRIPURA 89 (V 57 C 24)

R. S. BINDRA, J. C.

Satish Chandra Ghosh, Petitioner v. Smt. Sarba Mangala Dutta and another, Respondents.

Civil Revn. No. 9 of 1967, D/- 14-11-1969 from Order of Sub J., Tripura, D/- 2-3-1967.

(A) Civil P. C. (1909), O. 2. R. 6 — Consolidation of suits — Essentials.

CN/DN/B50/70/MVJ/B

The court can order consolidation of suits in appropriate cases. The basic principles governing consolidation of suits are that there is similarity or identity of the matter in issue in the two suits and that the suits are between the same parties. The object of consolidation is to avoid multiplicity between the same parties when the matter in issue is substantially the same in the two suits. AIR 1961 Guj 92, Foll. (Para 4)

A title suit for partition between two brothers and a money suit for recovery of arrears etc. against a tenant of the joint properties which is the subject-matter of the title suit, cannot be consolidated. (Para 4)

(B) High Court Rules and Orders — Tripura Courts Order 1950, Para 34 (3) and Para 34 (1) (b) — Revision petition against order directing consolidation of two suits is maintainable under Section 115, Civil P. C. — Although Section 115 is not applicable to Tripura by virtue of Para 34 (3) in fit case court can interfere in revision under Para 34 (1) (b). (Paras 5, 6)

Cases Referred: Chronological Paras
(1961) AIR 1961 Guj 92 (V 48), Bhopo
Fakirbhai v. Bai Mani 4, 5

B. Chakraborty, for Petitioner; J. K. Roy, for Respondents.

ORDER: This is a revision petition by the plaintiff, Satish Chandra Ghosh, of Money Suit No. 1 of 1964 against the order dated 2-3-1967, by which Shri S. M. Ali, the Subordinate Judge, directed that that suit be consolidated with Title Suit No. 48 of 1960 pending between aforementioned Satish Chandra Ghosh and his brother Jyotish Chandra Ghosh.

2. To appreciate the controversy, the facts of the two cases may be shortly narrated. In the Title Suit No. 48 of 1960 Jyotish Chandra Ghosh happens to be the plaintiff and that suit is for partition between him and his brother Satish Chandra Ghosh of a large number of immoveable properties. One of the properties included in that partition suit is that which forms the subject of Money Suit No. 1 of 1964. In this Money Suit, the relief claimed is for payment of the arrears of rent respecting that property, and it is founded on the allegations that that property had been jointly leased out by Satish Chandra Ghosh and his brother Jyotish Chandra Ghosh to Sarba Mangala Dutta and the latter had committed default in the matter of payment of rent.

3. Shri S. M. Ali directed consolidation of the two suits on the basis that the evidence in both the cases shall be identical and "the judgment of one case will affect the other if they are tried separately". It is the contention of the petitioner's counsel that neither the evidence in the two suits shall be identical nor the judgment in one suit shall affect the decision in the other and that as such the consolidation was ordered on altogether untenable grounds.

4. It is not disputed that consolidation of suits in appropriate cases can be ordered by the Court. However, the basic principles governing consolidation of suits are that there is similarity or identity of the matter in issue in the two suits and that the suits are between the same parties. The object of consolidation is to avoid multiplicity between the same parties when the matter in issue is substantially the same in the two suits. Let us examine if these tests are satisfied respecting the two suits we are to deal with. The Title Suit is only between the two brothers and Sarba Mangala Dutta is not a party thereto. Further, that suit is for partition of a large number of immoveable properties, while the Money Suit against Sarba Mangala Dutta arises out of an alleged lease agreement between her on one hand and Satish Chandra Ghosh and Jyotish Chandra Ghosh on the other. It is not disputed that the property alleged to have been leased out to Sarba Mangala Dutta is also the subject of the partition suit and that there is no dispute between the parties that that property is equally owned by the two brothers. Hence, neither two suits are between same parties, nor the matters in issue in the two suits respecting the demised property are identical. Again, the decision in the Title Suit respecting the demised property will not determine the dispute whether the demised property had been leased out by both the brothers, as contended by Satish Chandra Ghosh, or by Jyotish Chandra Ghosh all alone, as alleged by the latter. Hence, it is not possible to sustain the consolidation order made by the trial Court. Bhopo Fakirbhai v. Bai Mani, AIR 1961 Guj 92, is an authority for the proposition that where the issues in the two suits are different and the parties are not common, an order for the consolidation of the two suits for hearing evidence in common without the consent of the parties in both the suits is illegal. It was also observed in that case that an order to treat the evidence in one suit as the evidence in another suit cannot be passed without the consent of all the parties in the two suits.

5. Shri J. K. Roy, appearing for the respondents, urged vehemently that no revision against the impugned order is maintainable under Section 115 of the Civil Procedure Code. This point was specifically dealt with in the case of Bhopo Fakirbhai, AIR 1961 Guj 92 (supra). It was held that an application to consolidate the two suits represents a separate and independent proceeding inasmuch as such an application has nothing to do with the matters to be decided in either of the suits. Nor, it was observed further, is such an application in the nature of an interlocutory application in a suit. I agree with these observations of the Gujarat High Court and hold that a revision petition against an order directing consolidation of two suits is maintainable under Sec. 115.

of the Civil Procedure Code. However, it remains to be stated that in face of para. 34 (3) of the Tripura (Courts) Order, 1950, Section 115 of the Civil Procedure Code does not apply to Tripura. Clause (b) of sub-para (1) of para 34 provides that the Court of the Judicial Commissioner may call for the record of any case which has been decided by a Civil Court subordinate to it and in which no appeal lies to it if, on an application made to it, the Court is of the opinion that there is an important question of law or custom involved and such question requires further consideration. In such a situation, it is provided further, the Court may make such order in the case as it thinks fit. I feel satisfied that determination of principles governing consolidation of suits constitutes an important question of law and that such question does require consideration at the hands of this Court. There is no authority of this court, I may add, on the point involved in this revision petition.

6. The trial Court cannot direct consolidation of suits in an arbitrary manner or in complete oblivion of the principles that govern the subject. In the instant case, the consolidation, I feel satisfied, was ordered in a purely capricious manner. Neither, as indicated above, will the evidence in the two suits be identical, nor the judgment of one suit will affect the decision in the other suit. Moreover, the principles governing the consolidation of suits, namely, (1) there should be similarity or identity of the matters in dispute in the two suits, (2) that the dispute in the two suits should be between the same parties, and (3) that the evidence recorded in one suit cannot be read as evidence in the other suit without the consent of the parties, were neither considered nor applied by the trial Court. Hence, a clear case for interference in revision is made out under Para 34 of the Tripura (Courts) Order.

7. As a result, I allow the revision petition and quash the order dated 2-3-1966 consolidating the two suits. The Court shall now proceed with the suits on their individual basis. The petitioner shall get costs from the respondents. Advocate's fee Rs. 16. Revision allowed.

AIR 1970 TRIPURA 91 (V 57 C 25)

R. S. BINDRA, J. C.

Jatindra Kr. Bhattacharjee, Petitioner v. The State, Respondent.

Criminal Revn. No. 4 of 1967, D/- 17-11-1969, from Order of Dist. Magistrate, Tripura, D/- 25-11-1966.

(A) Criminal P. C. (1898), Section 438 (Report to High Court) — District Magistrate in revision on examination of records of subordinate Magistrates must make reference to High Court except in cases falling under Sections 436 and 437. (Para 2)

CN/DN/B501/70/DGB/C

(B) Criminal P. C. (1898), Sections 561-A — Stay of proceeding — Criminal trial cannot be stayed solely on ground that a civil suit involving identical dispute is pending — Though no hard and fast rule can be laid down, criminal trial should not be stayed if civil suit is likely to drag on. AIR 1954 SC 397, Foll.; AIR 1927 Lah 17 and AIR 1952 Mys 37 and AIR 1952 Assam 78 and AIR 1935 Cal 182, Referred to.

(Para 4)

Cases Referred :	Chronological	Paras
(1954) AIR 1954 SC 397 (V 41) =		
1954 Cri LJ 1019, M. S. Sheriff v. State of Madras		4
(1952) AIR 1952 Assam 78 (V 39) =		
1952 Cri LJ 654, Dharmeswar Kalita v. The State		4
(1952) AIR 1952 Mys 37 (V 39) =		
1952 Cri LJ 709, N. B. Chikkathimma Reddi v. State of Mysore		4
(1935) AIR 1935 Cal 182 (V 22) =		
37 Cri LJ 187, Sriksissan v. Emperor		4
(1927) AIR 1927 Lah 17 (V 14) =		
17 Cri LJ 1114, Bishambar Das v. Emperor		4
R. Ghosh and N. M. Paul, for Petitioner.		

ORDER: The facts relevant to this revision petition under Section 439 of the Criminal Procedure Code filed by Jatindra Kr. Bhattacharjee must be set out chronologically to appreciate the point that falls for determination. In connection with defalcation of a sum, as big as Rs. 98,000 from the Sub-Treasury, Dharmanagar, the petitioner, who was the sub-Treasury Officer at the time of alleged defalcation, was charge-sheeted on 1-1-1963, along with two others, under Sections 409, 468 and 477, I. P. C. Thereafter, a civil suit, being Money Suit No. 8 of 1963, was instituted against the petitioner alone by the Government for recovery of Rs. 98,000 and odd for the loss suffered by the Government on account of alleged negligence of the petitioner in the discharge of his functions as Sub-Treasury Officer. The Magistrate's Court at Dharmanagar, in whose Court the criminal case was pending, stayed the same by order dated 7-11-1965, on the ground that since the civil suit involving identical facts was pending and since the civil suit would primarily be decided on the basis of documents, it was desirable that the civil suit should be disposed of first. That order was not challenged by the State Government. However, on 31-5-1966, the prosecution moved the Magistrate praying that the criminal case be proceeded with. That prayer was rejected on 31-5-1966. Thereafter, during the course of inspection it came to the notice of the District Magistrate, Shri S. M. Kanwar, that the criminal case against the present petitioner had been stayed. He reached the conclusion, on examination of the records, that the case being "primarily of criminal nature" and the civil suit having been filed only to recover the amount which had

been misappropriated, it was 'bad and improper' that the criminal proceedings should be stayed. He, therefore, vacated the stay by an order dated 25-11-1966 and directed that the case shall be proceeded with. The consequential steps taken by the District Magistrate were that he firstly withdrew the case on to his own file and then transferred it to Shri P. Nath, the Sub-divisional Magistrate (Northern Zone) at Dharmanagar. It is against that order of the District Magistrate that the instant revision was filed by Jatindra Kr. Bhattacharjee.

2. Shri R. Ghosh, appearing for the petitioner, was highly critical of the order, dated 25-11-1966 of the District Magistrate and branded the same as improper and legally not sustainable. He pointed out that the District Magistrate could not have vacated the order on his own authority even if he was of the opinion that the trial Magistrate had gone wrong in staying the criminal case. At the best, the counsel submitted, the District Magistrate could have reported the matter to the High Court under Section 438, Cr. P. C. Another flaw about that order which was pinpointed by Shri Ghosh, was that it had been made without issuing notice to the petitioner or the Public Prosecutor. I think the criticism is completely valid and wholly justified. The District Magistrate lacked jurisdiction to vacate the stay order on his own authority. Final orders in exercise of revisional jurisdiction on examination of the records of the Subordinate Magistrate can be passed by the District Magistrate only in the cases contemplated by Sections 436 and 437 of the Code. Respecting all other cases he is bound in law to make a reference to the High Court. The facts of the case in hand fall out of the ambit of either section 436 or Section 437. Therefore, the only course open to the District Magistrate, if he felt that the case had been stayed without adequate justification, was to refer the matter to this Court for adjudication. Hence, it is not possible to uphold the validity of the order of the District Magistrate or to approve of the method adopted by him in making that order.

3. When the case came up for hearing before me on 14-11-69 I gave notice to Shri R. Ghosh that though it may not be possible to uphold the District Magistrate's order dated 25-11-1966, I would like to interfere in revision suo motu. Shri Ghosh then requested me to grant him one adjournment. I agreed and so adjourned the case to 15-11-1969.

4. In support of the contention that it is only proper that the criminal case should be stayed until the civil suit was disposed of, Shri Ghosh placed reliance, on 15-11-1969, on the authorities reported in *Bishambar Das v. Emperor*, AIR 1927 Lah 17, *N. B. Chikkathimma Reddi v. State of Mysore*, AIR 1952 Mys 37, *Dharmeswar Kalita v. The State*, AIR 1952 Assam 78 and *Sri-*

kisson v. Emperor, AIR 1935 Cal 182. The question of stay was, however, thoroughly examined by their Lordships of the Supreme Court in *M. S. Sheriff v. State of Madras*, AIR 1954 SC 397, and the observations made therein are conclusive on the subject. I cannot do better than reproduce the principle enunciated in the language of the Supreme Court itself. The relevant observations run as under:—

"As between the civil and the criminal proceedings the criminal matters should be given precedence. No hard and fast rule can be laid down but the possibility of conflicting decisions in the civil and criminal Courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration is the likelihood of embarrassment. Another factor which weighs with the Court is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interest demands that criminal justice should be swift and sure, that the guilty should be punished while the events are still fresh in the public mind, and that the innocent should be absolved as early as is consistent with a fair and impartial trial.

Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to prosecution ordered under Section 476."

It would be evident from these observations that the trial of criminal cases cannot be stayed only for the reason that a civil suit involving identical dispute is pending between the parties. The defalcation is alleged to have been committed by the petitioner sometime in the year 1961. A period of almost 9 years has run out since then. Assuming that the civil suit shall be decided, as stated by Shri Ghosh at the bar, within a few months from now, the decree of the trial Court is likely to be challenged in an appeal, irrespective of its nature, because the amount involved is substantial. The appeal against that decree might take another few years before it can be decided by this Court. Hence, it looks inexpedient that the trial of an offence should be delayed by more than 12 years or so. That trial itself may get protracted like the civil suit. Such a long delay would neither be in public interest nor in that of the petitioner. It would in fact reflect discreditably on the

administration of criminal justice. I have, therefore, decided to vacate the stay orders made by the Magistrate on 7-1-1966 and on 31-5-66. Hence, in exercise of the authority vesting in this Court under Section 439, Cr. P. C., I set aside those two orders and direct that the criminal case should be proceeded with without waiting for the decision of the civil suit.

Order accordingly.

AIR 1970 TRIPURA 93 (V 57 C 26)

R. S. BINDRA, J. C.

Habibullah Majumder, Petitioner v. Nikhil Poddar and others, Respondents.

Civil Revn. Petn. No. 26 of 1967, D/- 7-2-1970, from Order of Munsiff, Belonia, D/- 20-4-1967.

Civil P. C. (1908), Order 26, Rule 5 — Commission to examine witness not resident in India — No reciprocal arrangement recognised by High Court existing between country in which witness resides and India — Party has no right to issue of Commission. AIR 1958 All 19 and AIR 1951 Punj 227, Rel. on; AIR 1953 Ajmer 27 and AIR 1963 Punj 27, Distinguished. (Para 2)

Cases Referred: Chronological Paras

(1963) AIR 1963 Punj 27 (V 50), State Bank of India v. Mrs. J. K. Sohan Singh 4

(1958) AIR 1958 All 19 (V 45) = 1957 All LJ 646, Mohammad Azizul Rahman Khan v. Mohammad Ibrahim 2

(1953) AIR 1953 Ajmer 27 (V 40), Hukumal v. Manghoomal 3

(1951) AIR 1951 Punj 227 (V 38) = ILR (1951) Punj 126, National Fire and General Insurance Co. Ltd. v. Mool Singh 2

(1950) Civil Revn. No. 58 of 1950 (Punj) 2

M. R. Choudhury, for Petitioner; J. K. Roy, for Respondents.

ORDER, In a suit filed against Habibullah, a resident of Pakistan, by Nikhil Poddar and others for recovery of damages on account of malicious prosecution, he (the defendant) moved an application in the trial Court praying that he and his witnesses, who are also residents of Pakistan, should be permitted to be examined on commission. That application was rejected by the trial Court on 10-4-1967 on the basis that there was no reciprocal arrangement between India and Pakistan in regard to examination of witnesses on commission. Aggrieved by that order, Habibullah has come up in revision to this Court.

2. It was held in the case of Mohammad Azizul Rahman Khan v. Mohammad Ibrahim, AIR 1958 All 19, that the

issue of a commission for examination of a witness is not the right of a party but is dependent upon the discretion of the Court. The High Court observed further that if there are no reciprocal arrangements between India and Pakistan respecting the examination of witnesses on commission, the Court is well within its rights in rejecting an application for issue of commission. The High Court agreed with the trial Court's finding that there was no reciprocal arrangement between the two countries for examination of witnesses on commission.

Likewise, the Punjab High Court held in the case of National Fire and General Insurance Co. Ltd. v. Mool Singh, AIR 1951 Punj (Simla) 227, that there was no reciprocal arrangement between India and Pakistan and as such a letter of request cannot be addressed to a Court in Pakistan in terms of Order XXVI, Rule 5, Civil Procedure Code for the examination of a witness residing there. It was held further that an officer of a Court in India, in the absence of any reciprocal arrangement regarding examination of a witness on commission, is not competent to record evidence on commission in Pakistan.

In this case Harnam Singh, J., approvingly referred to a previous judgment of the Punjab High Court in the Civil Revn. No. 58 of 1950 (Punj) decided by Khosla, J., who had held that a party cannot as of right demand the issue of a commission to a place outside India unless reciprocal arrangements exist and have been recognised by the High Court. Khosla, J., also happened to observe that it was conceded before him that there was no such arrangement existing between India and Pakistan. Harnam Singh, J., held further in the case of National Fire and General Insurance Co. Ltd., AIR 1951 Punj 227 that the order of the trial Court refusing the prayer for examining the witnesses on commission in Pakistan does not fall within the ambit of Clauses (a), (b) or (c) of Section 115 of the Civil Procedure Code. Hence, he happened to dismiss the revision petition on the double finding that no revision was competent and that since there was no reciprocal arrangement between the two countries, the commission could not be issued. With respect I agree with these observations of the learned Judge and they are also in accord, I may add, with what was held in Mohammad Khan's case (supra).

3. As against the two authorities of Allahabad and Punjab High Courts cited on behalf of the respondents, Shri M. R. Choudhury, appearing for the defendant-petitioner has placed reliance on the decision in Hukumal v. Manghoomal, AIR 1953 Ajmer 27, where it was held that if "the witness lives at a considerable distance in Pakistan and cannot be compelled to attend the Court"

a commission can be issued for his examination. A perusal of the report shows that no objection was raised before the Judicial Commissioner that there being no reciprocal arrangement between India and Pakistan for examination of witnesses on commission the prayer made for the purpose was not tenable. Therefore, the decision in Hukumal's case is not much of importance because the point that has arisen for determination in the instant revision petition was not debated in that case.

Shri M. R. Choudhury, however, urges that this Court should assume that by the time the case of Hukumal was decided, reciprocal arrangements between India and Pakistan for examination of witnesses on commission had been arrived at. I regret my inability to accept that contention. Hukumal's case was decided on 27-1-1953, whereas the Allahabad High Court decided the case of Mohammad Khan on 22-3-1957. If any such arrangement had been reached between the two countries by 27-1-1953, the Allahabad High Court could not have failed to take notice of it in March, 1957.

4. Shri M. R. Choudhury also placed reliance on the decision in State Bank of India v. Mrs. J. K. Sohan Singh, AIR 1963 Punj 27. However, that judgment has no relevancy to the case in hand. The revision was allowed in that case and the commission recalled on the basis that the facts which were sought to be proved on commission issued to a witness in Pakistan at the instance of the respondent were opposed to the allegations made in the written statement by her and that, as such, there was no justification for issuing the commission. The questions whether or not a commission could be issued to a witness in Pakistan, and whether there was any reciprocal arrangement for execution of commissions for examination of witnesses between India and Pakistan, did not arise for determination in this Punjab case, nor were debated before the High Court nor decided by it. Hence, that case is of no help for the proposition canvassed by Shri M. R. Choudhury.

5. For the reasons given above, the petition fails and is rejected. However, I leave the parties to bear their own costs. I may observe here, as desired by Shri M. R. Choudhury, that if before the suit is disposed of by the trial Court it is proved that reciprocal arrangement has been arrived at between the two countries, India and Pakistan, for examination of witnesses on commission, the defendant-petitioner may move the trial Court for granting the prayer made in the present petition.

Petition dismissed.

AIR 1970 TRIPURA 94 (V 57 C 27)

R. S. BINDRA, J. C.

Sachindra Mohan Das Gupta, Petitioner v. The Chief Commissioner of Govt. of Tripura and another, Respondents.

Writ Petn. No. 11 of 1964, D/- 6-10-1969.

(A) Constitution of India, Article 226 — Limitation — Limit by which party can come to writ court is date by which he could have brought suit for relief claimed in petition.

No period of limitation governs writ petitions filed under Article 226. However, the outside limit by which an aggrieved party can come to the writ court for seeking any relief is the date by which it could have brought a suit in the civil court for grant of such relief. AIR 1964 SC 1006, *Foll.*

(Para 5)

(B) West Bengal Security Act (19 of 1950), Section 29 (3) (b) — Determination of compensation by Arbitrator is subject to Sections 45 and 46 of Arbitration Act (1940) (10 of 1940) — It is open for claimant, therefore, to move appropriate authority for referring matter of compensation payable to him to arbitration — (Arbitration Act (1940), Sections 45 and 46).

(Para 6)

(C) West Bengal Security Act (19 of 1950), Section 37 — Scope — Section 37 has nothing to do with enforcement of right to compensation by individual whose property has been requisitioned.

(Para 7)

Cases Referred : Chronological Paras
(1964) AIR 1964 SC 1006 (V 51) =

(1964) 6 SCR 261, State of Madhya

Pradesh v. Bhailal Bhai

5

J. K. Roy and J. C. Lodh, for Petitioner;
H. C. Nath, Govt. Advocate, for Respondents.

ORDER : In this petition filed under Article 226 of the Constitution the prayer made by Sachindra Mohan Das Gupta is that a writ of mandamus be issued directing the two respondents, the Chief Commissioner of Tripura and the Government of India, to discharge their obligations in terms of Section 29 (3) of the West Bengal Security Act (hereinafter called the Act) as extended to the territory of Tripura.

2. The facts relevant to the prayer made can be set out in a few words. By orders, dated 29-5-1951 and 22-10-1952, lands measuring 1183.4 acres and 109.98 acres belonging to the petitioner were requisitioned by the Tripura Government under the provisions of the Act. The possession of the first mentioned area of the land was taken by the Government on 11-6-1951 and of the second area on 22-10-1952. Subsequently, land measuring 398.33 acres was derequisitioned, leaving a balance of 904.98 acres under requisition. This latter area was acquired in 1955 under the provisions of the West Bengal Land Development and Planning Act of 1948. Though in the writ peti-

tion compensation was claimed respecting 902.3 acres out of a total of 904.98 acres, but in the replication the petitioner stated that he claimed compensation only respecting 882.54 acres, Shri J. K. Roy, appearing for the petitioner, stated at the bar on the date of arguments that compensation was claimed in regard to 882.54 acres from 11-6-1951, until the date this land was acquired in the year 1955. It is mentioned in the writ petition that compensation for the period of requisition was allowed to the petitioner along with the compensation which was determined for acquiring the land, but that compensation was much too short as compared to what he is entitled in law. The compensation for the requisitioned property was allowed, it is commonly agreed, at the rate of 6% per annum on the market value of the land. The precise claim of the petitioner now is that he is entitled to get the difference between the compensation to which he is entitled in law minus what he has already been paid.

3. The respondents denied that the petitioner was entitled to any further compensation. They pleaded that adequate compensation had been paid to the petitioner for the period during which the land remained under requisition.

4. The writ petition, it looks, is not only highly belated but is also misconceived. Consequently, I feel satisfied that it merits dismissal.

5. The Government had secured possession of the entire requisitioned area by 22nd of October, 1952, and the whole of that area was acquired sometime in 1955. The writ petition was filed on 23-6-1964. Obviously a civil suit for recovery of compensation was barred by the date the writ petition was filed. It is correct that no period of limitation governs writ petitions filed under Article 226. However, it is well settled that the outside limit by which an aggrieved party can come to the writ court for seeking any relief is the date by which it could have brought a suit in the civil court for grant of such relief. If the writ petition is filed after that date, it has to be rejected on the ground that it is highly belated. In support of this proposition I may cite the observations of the Supreme Court made in the case of State of Madhya Pradesh v. Bhailal Bhai, AIR 1964 SC 1006. They are as under:—

“Learned Counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for

the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable.”

Since, as stated above, this writ petition was filed after the period of limitation for filing a suit had run out, the writ petition must be rejected on the ground of its being unreasonably belated.

6. The land had been requisitioned by the Government under sub-section (1) of section 29 of the Act. Sub-section (3) of that section provides that the State Government shall pay compensation for any property requisitioned by it under sub-section (1), and the principles according to which and the manner in which such compensation is to be determined and paid shall be, inter alia, as follows:—

(a) where the amount of compensation can be fixed by agreement, it shall be paid within three months in accordance with such agreement;

(b) where no such agreement can be reached, the amount of compensation shall be such as an arbitrator appointed in this behalf by the Chief Commissioner of Tripura may award.

These provisions are subject to a proviso which states that in the case of immoveable property, the arbitrator shall be a District Judge or an Additional District Judge. It may be safely assumed that no agreement had been reached in terms of Clause (a) between the petitioner and the Government in regard to the amount of compensation payable to the former. Therefore, the compensation had to be determined by a District Judge or an Additional District Judge in his capacity as an arbitrator. No step was taken by the petitioner to refer the matter to arbitration. Shri J. K. Roy contended for the petitioner that since it was the privilege of the Chief Commissioner to appoint an arbitrator and since the Chief Commissioner had not named any arbitrator, the petitioner had no right to seek the assistance of the civil court for getting an arbitrator appointed. I regret my inability to accept that argument as well founded. Section 29 (3) makes it clear that in the case of immoveable property the arbitrator shall be a District Judge or an Additional District Judge. Hence, the Chief Commissioner had no option in naming the arbitrator for determining the compensation payable to the petitioner because the property requisitioned was immoveable. Only a move had to be made by the petitioner, which, unluckily, he failed to initiate. If the petitioner had approached the Chief Commissioner to refer the dispute to arbitration and the latter had failed to respond, it would have been open to the petitioner to go to the civil court under the Arbitration Act, 1940, with the prayer to appoint an arbitrator. I may appropriately mention here that Section 45 of the Arbitration Act, enjoin that the provisions of the Arbitration

Act are binding on the Government, while Section 46 of the same Act enacts that the provisions of that Act (excepting certain parts of it) shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement except in so far as the Arbitration Act is inconsistent with that other enactment or with any rules made thereunder. Hence, quite obviously the arbitration contemplated by Section 29 (3) of the Act is subject to the provisions of the Arbitration Act. It was, therefore, clearly open to the petitioner to move either the Chief Commissioner or the civil court for referring the matter of compensation payable to him to the arbitration of the District Judge or an Additional District Judge. He having failed to do so, he must bear the consequences.

7. The last point urged by Shri J. K. Roy was that Section 37 of the Act stands in the way of a private person to file a suit or take other proceedings against the Government respecting the rights arising out of requisitioning of property. Here, again, Shri Roy does not appear to be on sound footing. Section 37 reads as under:—

"(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is or is deemed to have been in good faith done or intended to be done in pursuance of this Act or any order made or deemed to have been made thereunder.

(2) No suit or other legal proceeding shall lie against Government for any damage caused or likely to be caused by anything which is or is deemed to have been in good faith done or intended to be done in pursuance of this Act or any order made or deemed to have been made thereunder." Its marginal heading is, "protection of action taken under the Act." It is too obvious that the object behind Section 37 is to afford protection to the various functionaries mentioned in the Act against criminal prosecutions or suits for damages for anything done

by them in good faith to carry out the duties assigned to them under the Act. This section has nothing to do with the enforcement of the right to compensation by an individual whose property has been requisitioned. That right is clearly vouchsafed to him by subsection (3) of Section 29 of the Act, and if the right is there the remedy to enforce it through the courts of the country is necessarily implied unless it is abridged by some legislative measure, which clearly is not the case respecting the right we are concerned with. Consequently, I repel the point canvassed by Shri Roy.

8. In view of the only relief sought in the writ petition, namely, that the respondents be directed to proceed in the manner provided by Section 29 (3) of the Act for determining the compensation payable to the petitioner, I fail to see what function such a direction will serve. Section 29 (3) itself being available to the petitioner, I doubt if any direction given by this Court would make the provisions of that section more effective. It is not denied that writ Court cannot determine for want of data, the amount of additional compensation payable to the petitioner. The only purpose which such a direction could serve would be that the petitioner may get over the bar of limitation. However, the jurisdiction of writ court cannot be permitted to be abused in that manner. Hence, I feel clear that the present writ petition is altogether misconceived.

9. As a result, I dismiss the writ petition. However, I leave the parties to bear their own costs. It is for the reason that the compensation payable to the petitioner for the period during which his lands remained requisitioned was never determined in the manner envisaged by section 29 (3) of the Act and so the petitioner had some genuine grievance against the respondents. Advocates fee Rs. 50.

Petition dismissed.

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